BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

TO THE

GOVERNOR OF THE STATE OF MINNESOTA

FOR THE PERIOD ENDING
DECEMBER 31, 1938

WILLIAM S. ERVIN
Attorney General

ATTORNEYS GENERAL OF MINNESOTA

TERRITORIAL

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

STATE

Charles S. Berry.....May 24, 1858, to Jan. 2, 1860
Gordon E. Cole.....Jan. 4, 1860, to Jan. 8, 1866
William Colville.....Jan. 8, 1866, to Jan. 10, 1868
F. R. E. Cornell.....Jan. 10, 1868, to Jan. 8, 1874
George P. Wilson.....Jan. 9, 1874, to Jan. 10, 1880
Charles M. Start.....Jan. 10, 1880, to Mar. 11, 1881
W. J. Hahn.....Mar. 11, 1881, to Jan. 5, 1887
Moses E. Clapp.....Jan. 5, 1887, to Jan. 2, 1893
H. W. Childs.....Jan. 2, 1893, to Jan. 2, 1899
W. B. Douglas.....Jan. 2, 1899, to Apr. 1, 1904
W. J. Donahower.....Apr. 1, 1904, to Jan. 2, 1905
Edward T. Young.....Jan. 2, 1905, to Jan. 4, 1909
George T. Simpson.....Jan. 4, 1909, to Jan. 1, 1912
Lyndon A. Smith.....Jan. 1, 1912, to Mar. 5, 1918
Clifford L. Hilton.....Mar. 8, 1918, to Dec. 30, 1927
Albert Fuller Pratt.....Jan. 1, 1928, to Jan. 28, 1928
G. A. Youngquist.....Feb. 2, 1928, to Nov. 19, 1929
Henry N. Benson.....Nov. 20, 1929, to Jan. 3, 1933
Harry H. Peterson.....Jan. 3, 1933, to Dec. 15, 1936
William S. Ervin.....Dec. 15, 1936, to Jan. 3, 1939

ATTORNEY GENERAL'S STAFF

William S. Ervin.....Attorney General

DEPUTY ATTORNEYS GENERAL

Matthias N. Orfield

David J. Erickson

ASSISTANT ATTORNEYS GENERAL

Harry W. Oehler
Frank H. Osterlind
John A. Pearson
Roy C. Smelker
Ordner T. Bundlie
Roy C. Frank

Armond D. Brattland.....Special Assistant Attorney General
William D. Gunn.....Special Assistant Attorney General
Dwight N. Johnson.....Special Assistant Attorney General
Joseph H. Seeger.....Special Assistant Attorney General
Louis F. Soukup.....Special Assistant Attorney General
Joseph M. Donahue.....Law Assistant
Carol H. McHugh.....Law Assistant
Edgar S. Young.....Law Assistant
Irene C. Ingemann.....Department Clerk
Michael Sipkins.....Inheritance Tax Examiner

LETTER OF TRANSMITTAL OF BIENNIAL REPORT OF THE ATTORNEY GENERAL

Hon. Elmer A. Benson, Governor of Minnesota.

Dear Governor Benson:

As required by law, I submit herewith the attorney general's report for the calendar years 1937 and 1938. These two years have been very busy years for our office. The regular and extra session of the legislature in the winter, spring and summer of 1937 lasted nearly six months. These legislative sessions greatly increased the work of the office.

The details with respect to the number, character and result of all actions and proceedings in which the attorney general appeared during the past two years are set forth in the tables which are attached to and made a part of this report. This report also includes the reports of prosecutions reported by the county attorneys of the several counties for the year 1937 and the opinions of general interest given by the attorney general during the years 1937 and 1938. The reports of county attorneys for the year 1938 have not been received and therefore cannot be included in this report. Such reports will be made to this office after the close of the present calendar year and will be available when so reported.

Reference is made in the appended reports to all cases and proceedings handled in the office of the attorney general during the past two years. Particular attention is called to the following cases, which are of outstanding importance.

PROCEEDINGS BEFORE COMMISSIONS

St. Paul Telephone Rate Case

This proceeding was initiated by the Railroad and Warehouse Commission on its own motion. The taking of testimony before the commission began April 5, 1932, and considerable evidence was introduced during that year, but most of the 7,000 pages of testimony was presented subsequent to January 1, 1933, when Harry H. Peterson became attorney general. The late Frederic A. Pike, then deputy attorney general, was specially assigned to the case and participated in it actively until the time of his death, September 17, 1936. During all the time since shortly after the case was commenced, the attorney general has availed himself of the services of Eugene W. Reed, a valuation lawyer, as special counsel. Upon the death of Mr. Pike, David J. Erickson, deputy attorney general, was appointed to succeed him, and these arrangements have been continued since I became attorney general.

On March 31, 1936, the commission made its order reducing telephone rates in the St. Paul Metropolitan Area more than $500,000 per year. The telephone company appealed from said order to the District Court of Ramsey County and the case was heard before Judge Gustavus Loevinger on the record before the commission. The extensiveness of the record in this case is best stated in the words of Judge Loevinger:

"The transcript of the evidence covers 6,848 pages. There were more than 200 exhibits, some of them being voluminous reports and many of them made up of many pages of computations. The transcribed oral arguments had at the trial filled 1,090 pages. There were more than 1,733 pages of briefs, memoranda, charts, and tables presented to the Court."

On May 21, 1937, the District Court rendered and filed its decision upholding and affirming the order of the commission. This decision is one of the most important affecting the regulation of telephone rates that has ever been handed down in this state. It is important not merely as securing lower telephone rates in St. Paul and vicinity, but because of its exhaustive consideration of the principles to be employed in the appraisal of public utility properties for rate-making purposes. Other cities and communities of the state will be benefited indirectly, since it will be impracticable for the telephone companies to maintain rates in other cities which are excessive according to the standards set for the St. Paul exchange.

In this case counsel for the state have made a record which enabled a full presentation of substantially all the principles heretofore involved in such proceedings, and some questions which have not been considered heretofore. As evidence of the thorough manner in which these questions were presented, it may be noted that the first forty-five pages of Judge Loevinger's opinion are devoted to a discussion of principles to be followed in rate-making cases. The court made forty specific findings of fact and law with ample explanations of reasons to support them. These specific findings cover 107 pages of the opinion. This decision is worthy of careful study by those interested in public utility regulation.

On August 10, 1937, judgment was entered in the District Court of Ramsey County affirming said order of the commission. The telephone company appealed from that judgment to the Supreme Court of the state. The matter was heard and argued in that court on September 21 and 22, 1938. The appellant's briefs in the Supreme Court aggregated 541 pages. The state's brief contained 625 pages. The Supreme Court now has the case under advisement.

Minneapolis Telephone Rate Investigation

After the decision was handed down by the District Court in the St. Paul telephone rate case I appeared before the 1937 extra session of the legislature and made a request, in which the Railroad and Warehouse Commission joined, for appropriations to this office and to the commission to carry on an investigation for the valuation of the property of the Northwestern Bell Telephone Company in the city of Minneapolis and other cities. The legislature at said extra session appropriated $5,000 to the attorney general's special contingent fund, and $25,000 to create a special revolving fund to be immediately available to said commission to defray expenses which may be incurred by the commission in determining the value of the property, for rate-making purposes, of any telephone company operating in the state prior to the time when such expenses may be assessed against and collected from the telephone company whose rates are under investigation, as provided

by Chapter 426, Laws of 1937. As a result of these appropriations I prepared preliminary papers under which the commission has instituted an investigation to determine the value of the telephone property of the Northwestern Bell Telephone Company in the city of Minneapolis for rate-making purposes. Such investigation was commenced in November, 1937, and is still in progress.

CASES BEFORE THE SUPREME COURT OF THE UNITED STATES

First Bank Corporation v. Minnesota, 301 U. S. 324. In this case the Supreme Court of the United States affirmed a decision of the Supreme Court of Minnesota holding that the shares of stock held by the First Bank Stock Corporation in state banking institutions in other states are taxable in Minnesota.

Mahoney v. Triner Corporation, 304 U. S. 401. The Supreme Court of the United States reversed a three judge Federal District Court. The decision of the United States Supreme Court establishes that under the 21st Amendment the state has the absolute power to regulate the importation of intoxicating liquors. The decision establishes that the 21st Amendment supersedes the due process and the protection and the commerce clauses of the Federal Constitution in so far as they relate to intoxicating liquors.

PROCEEDINGS BEFORE THE STATE SUPREME COURT

National Tea Company v. State of Minnesota. Allied Stores Corporation (formerly Rahn Department Stores, Inc.) v. State of Minnesota. These two cases involve the validity of the chain store tax of 1933 (Chapter 213 of the Laws of 1933). They were tried together before the District Court of Ramsey County. This court held the tax valid as to the specific tax, which is about 12% of the total tax, and invalid as to the gross earnings tax, which is about 88% of the total tax. An appeal has been taken by the state to the Supreme Court of Minnesota. The cases are important, first, because with other chain store cases pending in various district courts, they involve the refunding of about $700,000 in chain store taxes, heretofore collected. They are important in the second place because they involve the principle of progressive gross earnings taxes on chain stores, which offers the only effective method of levying a chain store tax on chains with a small number of stores but very large sales from each.

Holmes v. Borgen, 200 Minn. 97, 273 N. W. 623. This case involved the taxation of shares of stock in a domestic corporation having 60% of its property in Minnesota. The Supreme Court reversed the District Court of St. Louis County and held that such shares are not taxable as moneys and credits.

Cherokee State Bank of St. Paul v. Wallace, — Minn. —, 279 N. W. 410. The Supreme Court affirmed the District Court of Ramsey County and held that shares of stock of state banks are subject to taxation under Chapter 304, Laws 1925, irrespective of taxation of shares of national banks.

State of Minnesota v. Oliver Mining Co.
State of Minnesota v. Proctor Water & Light Company
State of Minnesota v. Duluth and Missabe & Northern Railway Co.

State of Minnesota v. Spirit Lake Transfer Railway Company
State of Minnesota v. The Duluth & Iron Range Railroad Company

There were tried and are pending in the District Court of St. Louis County income and franchise tax suits against the above named subsidiaries of the United States Steel Corporation. These suits involved taxes for the year 1933 of about three quarters of a million dollars. Included in these suits are cases against Minnesota railroad subsidiaries of the Steel Corporation. Several important issues are involved in these cases. The District Court sustained the position of the State in deciding that the numerous subsidiaries of the United States Steel Corporation are not entitled to file a consolidated return. The Court, however, sustained the contention of these railroads that they are not subject to the income and franchise tax act. Such holding, if ultimately sustained in the Supreme Court, would lose to the state the major portion of the amount involved in these cases as well as large amounts for subsequent years and would affect other railroads. Any judgment adverse to the state on this issue should be appealed.

CASES BEFORE FEDERAL DISTRICT COURT

The Great Atlantic and Pacific Tea Company v. William S. Ervin, et al. This was a suit for an injunction to restrain the attorney general and other law enforcement officers from enforcing the provisions of the Unfair Trade Practices Act, Chapter 116 of the Laws of 1937 as amended. The suit involves the validity of said act. The matter was heard before a three-judge federal district court, which found the act invalid in part. In my opinion an appeal should be taken to the Supreme Court of the United States.

RECOMMENDATIONS FOR AMENDMENT OF LAWS

The statute provides that the attorney general shall make such recommendations for amendment of the laws as he may deem necessary or proper. I make the following recommendations:

1. I recommend that another mortgage moratorium law be enacted providing for the extension of the time of redemption for an additional two year period. In my judgment an emergency still exists which would warrant the enactment of such a law.

2. I recommend the enactment of a law increasing the rates of the gift tax law passed by the special session of the 1937 legislature.

3. I recommend that adequate sums be appropriated by the legislature so that telephone valuations can be made for fixing telephone rates in municipalities where telephone rates are too high.

4. I recommend that the statutes relating to the taxation of moneys and credits be amended and clarified to prevent the escape from taxation of corporation shares, domestic and foreign.

5. I recommend that the Unfair Trade Practices Act be amended to overcome the major objections raised by the federal district court.

Before I close I wish to express to all the members of my staff my personal appreciation for their excellent work during the past two years.

Respectfully submitted,

WILLIAM S. ERVIN,
Attorney General.

December 31, 1938.

COMPILATION

of

CASES

and

COURT PROCEEDINGS

UNITED STATES SUPREME COURT

No.	TITLE	ACTION	DISPOSITION
4610	In the Matter of the Application of the People of the State of New York by George A. Van Schaick, Superintendent of Insurance of the State of New York for an order to take possession of the property and liquidate the business of the Southern Surety Company of New York	Claims under the Workmen's Compensation Laws of New York and other states	Judgment vacated—266 N. Y. 589; 296 U. S. 544; 299 U. S. 152.
4674	Joseph Triner Corporation, a corporation v. David R. Arundel, as Liquor Control Commissioner of the State of Minnesota, Harry H. Peterson, Attorney General, Floyd B. Olson, Governor of Minnesota	Validity of Chapter 390, Laws of 1935	Reversed 304 U. S. 401.
4680	Frank McCormick, Inc. v. David R. Arundel, Liquor Control Commissioner of the State of Minnesota, et al	Validity of Chapter 390, Laws of 1935	Dismissed.
4924	Kentucky Whip & Collar Company v. Illinois Central Railroad Company	Writ of Certiorari (Prison made goods)	Affirmed 81 L. Ed. 183; 299 U. S. 334, 525; 84 F. (2d) 168.
4967	In the Matter of the Proceedings to enforce delinquent money and credit taxes for 1934—State of Minnesota v. First Bank Stock Corporation	Delinquent taxes	Affirmed 81 Law Ed. 644.
5036	State of Minnesota ex rel. International Harvester Company, a corporation v. Harry E. Boyle, et al.	Writ of Certiorari	Settled for $700.00.
5185	Marion H. Allen v. Regents of the University of Georgia	Write of Certiorari, Amicus Curiae	Reversed.

UNITED STATES DISTRICT COURT

No.	TITLE	ACTION	DISPOSITION
4011	In Wirt Wilson and Company v. Minnesota & Ontario Paper Company	Receivership—Claim for omitted gross earnings and oil inspection fees	No arrangement as to payment of claim has been made.
4375	United States of America v. Certain Lands in Winona, August G. Kruger, et al.	Condemnation of 11.05 acres	Pending.
4376	State of Minnesota v. George C. Borchardt, Jacob Graeber and R. A. Graeber	Bankruptcy	Pending.
4397	United States of America v. Certain land in Winona County, John A. Latsch	Condemnation	Pending.
4398	United States of America v. Certain Land in Wabasha County, et al.	Second condemnation 1820 acres	Pending.

UNITED STATES DISTRICT COURT—Continued

No.	TITLE	ACTION	DISPOSITION
4429	United States of America v. Certain Lands situated in Village of Litchfield, Meeker County; Standard Oil Company, et al...	Condemnation	Pending.
4438	Wirt Wilson & Company v. Minnesota Ontario Paper Company	Claim	State's claim for $3,991.56 filed.
4448	Northwest Bancorporation v. Elmer A. Benson, Commissioner of Banks of the State of Minnesota	Injunction	Dismissed without prejudice.
4457	United States of America v. Certain lands situated in Wabasha County, et al.	4th condemnation of 1960 acres	Pending.
4458	United States of America v. Certain lands situated in Wabasha County, et al.	3rd condemnation of 3140 acres	Pending.
4497	United States of America v. Certain lands in Winona County, State of Minnesota, required for the improvement of navigation of the Mississippi River	Condemnation of 56.35 acres	Pending.
4546	United States of America v. E. E. Davidsavor	Condemnation of lands	Pending.
4597	United States of America v. Certain lands situated in Aitkin, Itasca and Crow Wing Counties	Condemnation	Pending.
4634	United States of America v. Certain tracks of land in Lake City, Wabasha County, Minnesota, et al.	Condemnation of land for the Alma Dam	Pending.
4637	Edgar P. Willcuts and George A. Doney as Trustees v. George H. Ferguson, et al.	Injunction	Pending.
4638	United States of America v. Certain lands situated in Clearwater County, et al.	Condemnation of 720 acres	Pending.
4674	Joseph Triner Corporation, a corporation v. David R. Arundel, as Liquor Control Commissioner of the State of Minnesota, Harry H. Peterson, Attorney General, Floyd B. Olson, Governor of Minnesota	Validity of Chapter 390, Laws 1935..	Injunction made permanent. Appealed to Supreme Court of the United States.
4678	In the Matter of the Bankruptcy of H. Schroers	Bankruptcy	Pending.
4680	Frank McCormick, Inc. v. David R. Arundel, Liquor Control Commissioner of the State of Minnesota; Floyd B. Olson, Governor of the State of Minnesota; and Harry H. Peterson, Attorney General of the State of Minnesota	Validity of Chapter 390, Laws 1935..	Injunction made permanent. Appealed to United States Supreme Court.
4682	United States of America v. Certain land situated in Itasca County, Minnesota, R. A. McQuat, et al.	Condemnation 838.38 acres	Pending.
4685	In the Matter of Bowe-Burke Mining Company, at Duluth, Minnesota	Bankruptcy	Claim filed.
4686	United States of America v. Certain lands situated in the County of Winona, et al.	2nd condemnation 680.45 acres	Pending.

UNITED STATES DISTRICT COURT—Continued

No.	TITLE	ACTION	DISPOSITION
4700	The Prudential Insurance Company of America, a corporation, v. Erick Huseby and Carrie Huseby, wife, Towle-Jamieson Investment Company, et al.	Mortgage foseclosure	Pending.
4713	United States of America v. 272 acres of land situated in Goodhue County, State of Minnesota	Condemnation of land for navigation in Mississippi River	Pending.
4718	In the Matter of the Park Construction Company	Bankruptcy	Pending.
4745	United States of America v. Certain land situated in Beltrami County; Farmers & Merchants Bank of Leeds, N. D., et al.	Condemnation 731.65 acres	Pending.
4746	United States of America v. Certain land situated in Itasca County, Minnesota; Walter E. Hansel, et al.	Condemnation 440.72 acres	Pending.
4751	United States of America v. Certain lands in the City of Minneapolis, Hennepin County, hereinafter described and Timothy Acosta, et al.	Minneapolis housing project	Pending.
4761	United States of America v. Certain lands in Houston County, Minnesota, Frank Gillette, et al.	Condemnation 138 acres	Pending.
4832	United States of America v. Certain lands situated in the County of Winona, State of Minnesota, John Neilis, et al.	Condemnation	Pending.
4843	United States of America v. Certain land situated in Lake of the Woods County, Minnesota; Leora Himberg, et al.	Condemnation 39.29 acres	Pending.
4900	United States of America v. Certain lands situated in the County of Wabasha, State of Minnesota, required for the navigation in the Mississippi River	Condemnation	Pending.
4907	United States of America v. Certain lands in Winona County; Melanie Troost, et al.	Condemnation 1940 acres	Pending.
4913	United States of America v. Certain lands in Winona County, John Latsch, et al.	Condemnation 316 acres	Pending.
4914	United States of America v. Certain lands in Winona County.	Condemnation 1201.68 acres	Pending.
4915	United States of America v. Certain lands in Winona County.	Condemnation 21 acres	Pending.
4916	United States of America v. Certain lands in Winona County.	Condemnation 560 acres	Pending.
4923	United States of America v. Certain lands in Dakota County, John Samuelson, et al.	Condemnation	Pending.
4929	United States of America v. Certain lands in Dakota and Goodhue Counties, Minnesota; Franklin M. Crosby, Sr., et al.	Condemnation 3.23 acres	Pending.
4942	United States of America v. Certain lands in Houston, County, Minnesota, J. P. Rice, et al.	Condemnation 1449 acres	Pending.
4958	United States of America v. State of Minnesota, Julius A. Schmahl, Treasurer of the State of Minnesota and the University of Minnesota, a public corporation	Collection of taxes	Pending.
5071	The Great Atlantic and Pacific Tea Company v. William S. Ervin, et al.	Constitutionality of the Unfair Trades Practices Act	Part I held to be constitutional. Parts II and III held unconstitutional.

UNITED STATES DISTRICT COURT—Continued

No.	TITLE	ACTION	DISPOSITION
5107	In the Matter of Gogebic Steam Boiler Works, Inc.	Bankrupt	Dismissed.
5202	Harold H. Yerka, et al, v. J. D. Williams, et al.	Minimum Wage Law	Dismissed.
5203	The Western Union Telegraph Company v. Industrial Commission of Minnesota, et al.	Minimum Wage Law	Dismissed.
5204	United States of America v. H. K. Rude et al.	Taxation	Pending.
5205	United States of America v. W. J. Morrow, et al.	Taxation	Pending.
5244	United States of America v. 4450.72 acres of land, more or less, situate in County of Clearwater, State of Minnesota, et al.	Condemnation	Pending.
5251	United States of America v. 4,246.33 acres of land in Aitkin County, Minn., R. J. Bolen, et al.	Condemnation of trust fund land held by State of Minnesota	Pending.

OTHER STATE COURTS

No.	TITLE	ACTION	DISPOSITION
4213	State of Minnesota v. Southern Surety Co. of New York, dissolved	2% insurance tax on premiums	First dividend collected $188.03. Second dividend $95.56.
4536	State of Minnesota v. Consolidated Indemnity and Insurance Company	Gross Premium Tax	Pending.
4910	State of Minnesota by Harry H. Peterson, its Attorney General v. Union Indemnity Company	Claim for $3,317.58	Pending.
5176	State Board of Control v. E. R. Moore, Trustee of the property of Albert Knapp, under the Will of Margaret Knapp, deceased	Claim for maintenance of ward	Collected $446.21.

SUPREME COURT CIVIL CASES

No.	TITLE	ACTION	DISPOSITION
4125	State of Minnesota v. Tri-State Telephone Company	Telephone property valuation	Pending.
4316	State of Minnesota v. Illinois Central Railroad Company	Omitted Gross Earnings Taxes	Reversed, 274 N. W. 828—Rehearing, 275 N. W. 854.
4589	In the Matter of the Application of W. H. Bremner, receiver of the Minneapolis & St. Louis Railroad Company for permission to withdraw the Agent at the Station of Carver, Minnesota, and to substitute custodian service at said station	Abandonment	Dismissed.

SUPREME COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
4622	In the Matter of the Application of Steller Transportation Company Marshall Truck line and Joseph Verschingel for a certificate of public convenience, etc. pursuant to Laws of 1925, C. 185	Appeal from order denying certificate of public convenience	Reversed, 266 N. W. 746; 197 Minn. 234.
4815	State of Minnesota v. L. C. Sprague, et al.	Liability of Third Party for compensation of W. H. Lawler	Affirmed, 201 Minn. 416; 276 N. W. 744.
4842	State of Minnesota ex rel. Town of Stuntz v. City of Chisholm, et al.	Writ of Quo Warranto (rehearing)	Petition denied, 273 N. W. 235.
4855	State ex rel. Minnehaha Liquor Store, Inc. v. David R. Arundel	Writ of Mandamus	Judgment reversed, 273 N. W. 817.
4884	In re Estate of Herbert H. Bigelow, decedent	Determination of inheritance tax	Affirmed rehearing—former opinion withdrawn—Affirmed 271 N. W. 459; 199-239.
4889	Guy Green v. Julius A. Schmahl, State Treasurer of State of Minnesota, as Custodian of the Special Compensation Fund	Compensation claim	Reversed, 278 N. W. 157.
4892	Ingman O. Gullings et al. v. State Board of Dental Examiners of Minnesota et al.	Declaratory judgment. Testing validity of Chapter 95, Laws 1935	Affirmed, 273 N. W. 703.
4896	In the Matter of the Condemnation by the State Fire Marshal of a building owned by Phebe Ross, Hudson Sherman, et al., located upon Lot 11, Block 46, Moorhead, Minn.	Condemnation fire hazard	Affirmed, 201 Minn. 594; 277 N. W. 249.
4908	In the Matter of the Notice filed with the Railroad & Warehouse Commission, State of Minnesota, by H. McCarthy, General Superintendent of the Minnesota Transfer Company dealing with the closing of the Charles Street & East Hennepin Avenue depots effective August 1, 1936	Abandonment of depots at Charles Street and East Hennepin Avenue	Affirmed, 274 N. W. 408.
4909	E. David Peterson v. C. A. Halverson, successor to and substituted for Julius A. Schmahl, as the Treasurer of the State of Minnesota and as the Custodian of the Special Compensation Fund	Writ of Certiorari	Writ discharged and order affirmed, 273 N. W. 812.
4927	L. L. Williams v. Charles G. Mack, et al.	Revocation of optometry license	Affirmed, 278 N. W. 585.
4928	Cherokee State Bank, a corporation and Robert F. Koch v. George E. Wallace, Harry E. Boyle and George F. Gage as members of and constituting the Minnesota Tax Commission, et al.	Declaratory judgment	Affirmed, 279 N. W. 410.
4941	Julius Schmahl, State Treasurer, as Custodian of the Special Compensation Fund v. School District No. 12 of Pine County, Minnesota	Compensation claim	Affirmed, 274 N. W. 168.

SUPREME COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
4950	William B. Geery v. Minnesota Tax Commission and George E. Wallace, Harry E. Boyle and George F. Gage, as members of and constituting the Minnesota Tax Commission	Income tax	Affirmed, 278 N. W. 594. Petition for writ of Certiorari before the Supreme Court of the United States filed.
4966	Donald S. Holmes and First American National Bank of Duluth as Executors under the Last Will and Testament of Newell F. Russell, deceased v. Walter H. Borgen, as Auditor of St. Louis County	Right of state to tax stock of a Minnesota corporation which has property both within and without the state	Held that property is not taxable, 273 N. W. 623.
4967	In the Matter of the Proceedings to enforce delinquent money and credit taxes for 1934, State of Minnesota v. First Bank Stock Corporation	Delinquent taxes	Reversed, 267 N. W. 517; 197-544; 269 N. W. 37; 270 N. W. 574.
4988	State of Minnesota, ex rel. C. G. Dosland v. Mike Holm, Secretary of State; Charles Loring, Associate Justice of Supreme Court; I. M. Olsen, Associate Justice of Supreme Court; Levi M. Hall, District Judge, 4th District; J. C. Michael, District Judge, 2nd District, constituting the State Canvassing Board	Writ of Mandamus.....	Affirmed, 279 N. W. 218. Received $59.00 in payment of court costs.
4989	The State of Minnesota by William S. Ervin, its Attorney General v. A certain parcel of land in Itasca County, State of Minnesota, et al.	Condemnation of lands for forestry purposes—Thistledew project	Affirmed.
5010	In the Matter of the Application of the Trustees of Pillsbury Academy, a corporation, to determine its claim that the property described is exempt from tax levied as set forth in its Petition. Trustees of Pillsbury Academy v. The State of Minnesota	Exemption from taxation.....	Pending.
5021	The State of Minnesota v. Trustees of Pillsbury Academy.....	Exemption from taxation.....	Pending.
5036	State of Minnesota on the Relation of International Harvester Company, a corporation v. Harry E. Boyle, George F. Gage, and George E. Wallace, as members of and comprising the Minnesota Tax Commission, et al.	Writ of Certiorari.....	Judgment form approved by Justice Peterson of the Supreme Court, in the sum of $700.00.
5043	Stanley Hessian v. William S. Ervin, as Attorney General, Stafford King, as State Auditor, et al.	Constitutionality of retirement deductions	Submitted to Supreme Court on briefs.

SUPREME COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
5086	State of Minnesota, ex rel. William S. Ervin, Attorney General v. Crookston Trust Company	Writ of Quo Warranto	Reversed, 282 N. W. 138.
5091	In the Matter of the appeal of F. M. Diamond pursuant to Section 6540, Mason's Minnesota Statutes of 1927, from Minnesota Governor's Order No. 26, for 1937—Order providing for adequate control and conservation of deer in Minnesota	Appeal from Governor's Order No. 26, for opening deer season	Appeal is moot. Dismissed. Petition for re-argument denied.
5095	510 Groveland Avenue, Inc. v. Al P. Erickson, as County Auditor for Hennepin County, Minnesota, Henry Voegeli, as County Treasurer for Hennepin County, Minnesota, The Board of Education of the City of Minneapolis, a corporation, and the City of Minneapolis, a municipal corporation	Declaratory judgment	Chapter 359, Laws 1933, constitutional. Affirmed, 201 Minn. 381; 276 N. W. 287.
5123	Edwin F. Johnston v. L. B. Hartz Stores, Inc.	Recovery from contract as common carrier. C. 170, L. 1935	Reversed, 277 N. W. 414.
5168	The Board of Education of the City of Duluth v. Howard W. Anderson, et al.	Distribution of Income Tax Funds	Pending.
5187	State of Minnesota and Equity Farms, Inc. v. C. M. Hubbard, County Auditor and Cassius C. Terry, County Treasurer, Mower County, Minnesota	Amicus Curiae. Constitutionality of C. 88, Ex. Ses. L. of 1937	Affirmed, C. 88 of Ex. Ses. L. of 1937, constitutional.
5188	In the Matter of the Application of Edward H. Seidel, for Old Age Assistance filed with County of Hennepin, County Welfare Board of Hennepin County, Minn., v. State Board of Control of the State of Minnesota and Edward H. Seidel	Old Age Assistance	Pending.
5198	In the Matter of the Application of Frank Novak for Writ of Habeas Corpus by his attorney, Arthur LeSueur	Writ of Habeas Corpus	Affirmed, 281 N. W. 775.
5199	The County of Stearns, a municipal corporation, v. The Township of Fair Haven, a municipal corporation	Recovery of money paid for support of feeble-minded person (Brief Amicus Curiae)	Affirmed.
5221	In the Matter of the Application of the Calhoun Beach Holding Company for abatement of taxes upon real estate. State of Minnesota upon the relation of the City of Minneapolis, Minn., a municipal corporation	Abatement of taxes, special assessments, penalties and interest. (Writ of Certiorari)	Pending.

No.	TITLE	ACTION	DISPOSITION
654	State of Minnesota v. M. E. Bean	Selling insurance without license	Affirmed, 270 N. W. 918; 193 Minn. 113; 199 Minn. 16; 258 N. W. 18.
692	State of Minnesota v. William Robert Heffelfinger	Grand larceny	Affirmed, 274 N. W. 234; 197 Minn. 173.
698	State of Minnesota v. Frank Ellis	Abduction	Affirmed, 271 N. W. 594; 199 Minn. 306.
699	State of Minnesota v. William Nuser	Grand larceny 2nd degree	Affirmed, 271 N. W. 811; 199 Minn. 315. Petition for rehearing denied.
701	State of Minnesota v. Fred W. Reasch	Malfeasance in office	Affirmed, 201 Minn. 158; 275 N. W. 620.
702	State of Minnesota v. William Van Guilder	Illegitimacy	Affirmed, 271 N. W. 473; 199 Minn. 214.
703	State of Minnesota v. Charles E. Nelson	Sodomy	Affirmed, 271 N. W. 114; 199 Minn. 86.
704	State of Minnesota v. Orlin Henspeter	Petit larceny	Affirmed, 271 N. W. 700; 199 Minn. 359.
707	State of Minnesota v. Harry Sobelman	Contributing to the delinquency of a minor	Affirmed, 271 N. W. 484; 199 Minn. 232.
709	State of Minnesota v. Paul Poelaert	Murder 2nd degree	Affirmed, 273 N. W. 641.
710	State of Minnesota v. Albion B. Rowe	Murder	Affirmed, 280 N. W. 646. Petition for re-argument filed.
711	State of Minnesota v. Carl H. Fredlund	Murder 3rd degree	Certified question answered and cause remanded. 273 N. W. 353. Petition for re-argument denied.
712	State of Minnesota v. B. H. Hellen & Hellen's National Club	Lottery	Reversed, 273 N. W. 363.
713	State of Minnesota v. Clifford Holm	Violation of State Liquor Law	Affirmed, 275 N. W. 401; 201 Minn. 53.
714	State of Minnesota v. Schubert Theatre Players Company, a corporation, of the State of Delaware	Lottery	Affirmed, 281 N. W. 369.
715	State of Minnesota v. Domenico Lopes, Sr.	Bribery	Certified questions answered in the negative. Affirmed, 275 N. W. 374; 201 Minn. 20.
716	State of Minnesota v. Northland Amusement Company. a corporation, of Minnesota, and David Gillman	Lottery	Dismissed. Fine paid.
717	State of Minnesota v. J. L. Stern	Lottery	Reversed, 275 N. W. 626; 201 Minn. 139.
718	State of Minnesota v. Clifford Warren	Manslaughter 2nd degree	Affirmed, 276 N. W. 655; 201 Minn. 369.
719	State of Minnesota v. Arthur Kasherman	Extortion	Appeal dismissed for failure to comply with Rule VIII of the Supreme Court.
720	State of Minnesota v. Ellis Larson & Hans Peterson	Grand larceny in 2nd degree	Dismissed.

SUPREME COURT CRIMINAL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
721	State of Minnesota v. Henry H. Bowman	Coercion	Affirmed. Petition for re-argument filed—Petition denied, 279 N. W. 214.
722	State of Minnesota v. James Tsiolis	Arson	Affirmed, 277 N. W. 409.
723	State of Minnesota v. A. V. Stuart	Embezzlement of poor funds	Affirmed, 281 N. W. 299. Petition for rehearing denied.
725	State of Minnesota v. John A. Truesdale	Window breaking	Appeal dismissed.
726	State of Minnesota v. Fred Scott	Grand larceny 2nd degree	Reversed, 279 N. W. 832.
727	State of Minnesota v. Vivi Ann Mielke also known as Vivi Ann Wyntor	Violation of the Basic Science Law	Certified question answered in the affirmative, 277 N. W. 420.
728	State of Minnesota v. Northwest Poultry and Egg Co.	Unlawful discrimination (Certified question)	Reversed, 281 N. W. 753.
729	State of Minnesota v. John W. Warner & George M. Warner	Petit larceny	Affirmed, 281 N. W. 757.
730	In re State of Minnesota ex rel. Wilbur Sherman Best v. Thomas J. Gibbons, Sheriff of Ramsey County, Minnesota	Writ of Habeas Corpus	Writ discharged, 278 N. W. 578.
731	State of Minnesota v. P. J. Panetti	Sodomy	Reversed. New trial granted, 280 N. W. 181.
732	State of Minnesota v. Jesse Brown	Coercion	Affirmed, 282 N. W. 136.
733	State of Minnesota v. C. D. MacGregor	Forgery	Affirmed, 279 N. W. 372.
734	State of Minnesota v. A. H. McMasters	Violation of Chapter 235, Laws 1937.	Submitted to Supreme Court on December 7.
735	State of Minnesota v. Rose V. Elias	Murder	Pending.
737	State of Minnesota v. A. D. Pleak	Violation of C. 235, L. 1936	Pending.
738	State of Minnesota v. Nathan Saporen, alias Joe Nathan, alias Ray Davis, alias "Omaha Kid"	Carnal knowledge	Pending.
739	State of Minnesota v. Lester Gettins	Driving truck with tail gates open	Pending.
740	State of Minnesota v. Paul Winger	Rape	Certified questions answered affirmatively.
741	State of Minnesota v. Matthew Eich	Poisoning of dogs	Cause remanded for further proceedings.
742	State of Minnesota v. Clarence Sommerfield	Assault and battery	Pending.
744	State of Minnesota v. Raymond Rivers	Illegal sale of mortgaged property	Pending.
745	State of Minnesota v. C. H. Elam	Practicing barbering without a license	Appeal dismissed for failure to comply with Rule VIII of the Supreme Court.
746	State of Minnesota v. John Winkels	Inciting a riot	Pending.

DISTRICT COURT CIVIL CASES

No.	TITLE	ACTION	DISPOSITION
3181	State of Minnesota v. Gust Franson, Magnus Erickson & A. Anderson	Timber permits	Judgment cancelled.
3273	State of Minnesota v. J. F. Finley, et al.	Determination of boundary line	Judgment filed September 15, 1937.
3654	State of Minnesota v. May et al. Consumers Oil Company	Gas tax	Judgment filed. Adjudicated bankrupt.
3681	State of Minnesota v. David C. Jones, et al. (Security State Bank of Ada)	Depository bond	Satisfaction of Judgment.
3778	In re Fish Lake and Ann River	Maintenance of a water level	Settled by legislative appropriation.
3844	State of Minnesota v. Peter Evenson & John C. Beck	Timber permit	Compromise settlement of $41 accepted by State Executive Council.
3847	State of Minnesota v. Patrick W. Jordan, et al (State Bank of Beardsley)	Depository bond	Pending.
3907	State of Minnesota v. National Oil Co.	Gas tax	Judgment entered. No assets available.
3910	State of Minnesota v. C. L. Olson	Gas tax	Adjudicated bankrupt.
3919	State of Minnesota v. L. F. Woods (Woods Oil Company)	Gas tax	No estate with which to pay claim.
3946	State of Minnesota v. Racine Cooperative Telephone Co.	Telephone tax	Pending.
3984	State of Minnesota v. Litchfield Motors, Inc.	Gas tax	Adjudicated bankrupt.
3994	In re estate of Caroline Dean Haupt, First Trust Company v. State of Minnesota	Inheritance tax	Pending.
4003	State of Minnesota v. Fairmont Auto & Realty Co.	Gas tax	Receiver appointed. Collected $144.34 in settlement of all claims.
4014	State of Minnesota v. F. B. Ferguson (Lyndale Oil Co.)	Gas tax	Judgment entered. No assets available.
4025	State of Minnesota v. Red Star Oil Company	Gas tax	No assets could be attached or levied upon and dissolution proceedings are not justified.
4042	State of Minnesota v. Robert M. Neill, Guy S. Evarts, James H. Hall, et al. (Marshall State Bank)	Depository bond	Pending. Satisfaction of judgment as to Guy S. Evarts filed.
4047	State of Minnesota v. Walter Benson doing business under firm name of Fair Price Gas Company	Gas tax	Judgment entered. No assets available.
4054	State of Minnesota v. Colonial Oil Co.	Gas tax	Judgment entered.
4055	State of Minnesota v. Sullivan's Service Oil Company	Gas tax	Judgment entered.
4058	State of Minnesota v. Farmers Purchasing Association	Gas tax	Judgment filed.
4125	State of Minnesota v. Tri-State Telephone Company	Rate	Order of Railroad & Warehouse Commission affirmed. Submitted to Supreme Court.
4129	State of Minnesota v. Anderson Oil Company	Gas tax	Judgment entered. No assets available.
4134	State of Minnesota v. Edward Schriever, et al., First & Farm-		

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
	ers State Bank, State Bank of Ghent	Depository bond	Pending, satisfaction of judgment in the sum of $1,700 filed as to James H. Hall.
4145	State of Minnesota v. J. B. Burns & Company	Gas tax	Judgment entered. No assets available.
4164	State of Minnesota v. T. A. Sullivan doing business as Sullivan Service Station	Gas tax	Judgment entered. No assets available.
4174	State of Minnesota v. Union Gas and Oil Company	Gas tax	Defendant not found.
4176	State of Minnesota v. M. J. Helmer	Gas tax	Conviction secured in the Justice Court for violation of the penal provisions and upon appeal to the District Court State was reversed.
4178	State of Minnesota v. Andrew N. Arneson, et al. (Farmers State Bank of Wagdahl)	Depository bond	Pending. Judgment entered.
4179	State of Minnesota v. Andrew O. Gimmestad, et al. State Bank of Belview	Depository bond	Partial settlement as to defendants.
4194	State of Minnesota v. Local Oil Company. H. H. Spaulding	Gas tax	Collected $262.18. $19.37 still due.
4200	State of Minnesota v. Quality Oil Company	Gas tax	No property or money upon which execution can be levied.
4214	State of Minnesota v. Herman Miller and Security Savings Bank of Hartley, Iowa	Motor vehicle tax	Collected $126.96.
4243	State of Minnesota v. A. M. Thorstad	Gas tax	Judgment entered. No assets available.
4244	State of Minnesota v. Parries Oil Co	Gas tax	Judgment entered. No assets available.
4245	State of Minnesota v. Knute Nelson as Nelson Oil Company	Gas tax	Pending.
4246	State of Minnesota v. Fred Nelson as Nelson Oil Company	Gas tax	Defendants cannot be found.
4282	State of Minnesota v. Winthrop Consumers Petroleum Co.	Gas tax and inspection fee	Gas tax collected $265.99.
4289	State of Minnesota v. Red River Lumber Co., et al.	Condemnation for Itasca State Park	Land condemned. Cost of land, $5,780. Cost of buildings, $1,737. Cost of timber, $285.
4314	State of Minnesota v. Joseph F. Ballman, Sophia Ballman and Theresa Bauer	Condemnation of certain lands for dam site	Land condemned. Cost of land, $161.40.
4319	State of Minnesota v. E. W. Rudd, doing business under the firm name and style of Transfer Oil Company	Gas tax	Defendants cannot be located.
4320	State of Minnesota v. Arthur Olson under the firm name of Broadway Oil Company	Gas tax	Defendants insolvent. No assets.
4321	State of Minnesota v. William J. Burland under firm name of Burland Oil Company	Gas tax	Pending.
4322	State of Minnesota v. Home City Oil Company, Ray Elmquist		

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
	and Charles Mair	Gas tax	Judgment entered. No assets available.
4328	State of Minnesota v. Chester Wunderlich, John L. Larson, doing business as W.N.A.X. Gas & Oil Company	Gas tax	Judgment entered, no assets available.
4410	State of Minnesota v. J. A. Knabe, Jr., J. A. Trude doing business as Home Oil Company of Mountain Lake	Gas tax	Judgment entered, dismissed as to J. A. Knabe.
4411	State of Minnesota v. Even Peterson, a Peterson Oil Co.	Gas tax	Judgment entered, collected $37.55; still due, $210.19; account collectible.
4413	State of Minnesota v. Glen M. Squires	Gas tax	Judgment entered, no assets available.
4414	State of Minnesota v. Charles Weinberger	Gas tax	Judgment entered, no assets available.
4415	State of Minnesota v. Lawrence Van Hook and Walter Scharf as Van Hook & Scharf Oil Company	Gas tax	Judgment entered. No assets available.
4416	State of Minnesota v. H. G. Clendenning & R. F. Brown doing business as Dixie Oil Company	Gas tax	Collected $82.81 and $5.30 court costs.
4422	State of Minnesota v. Old Dutch Petroleum Company, Inc., a corporation	Gas tax	Fraudulent corporation. No assets available. Judgment entered.
4424	State of Minnesota v. Arnold Pajunen, R. G. Dunbar, Jr., A. K. Saari and J. A. Saari doing business as General Petroleum Company	Gas tax	Judgment entered, no assets available.
4427	State of Minnesota v. Lac qui Parle Cooperative Oil Association, a corporation	Gas tax	Collected March 24, 1936, $1,656.39; $165.64 in penalty.
4428	State of Minnesota v. William LeSage and J. C. Johnson, doing business as the Northwest Petroleum Company	Gas tax	Judgment entered executions returned unsatisfied. No assets available.
4439	County of Cass, The State of Minnesota v. Albert A. Cater and United States Fidelity and Guaranty Company, a corporation	Gas tax	Pending—Judgment entered.
4454	In the Matter of the taking and acquiring by the Minneapolis-St. Paul Sanitary District, a corporation, of a perpetual easement for a tunnel for the construction and maintenance of a main trunk public sewer, in, across, under and through certain lands in the City of St. Paul, County of Ramsey, Minn.	Condemnation	Land condemned, no State owned lands.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
4480	Gertrude Bushnell v. Thomas C. Clark and Mary Clark	Recovery of compensation claim.....	Case stricken from the calendar—no dismissal.
4482	State of Minnesota v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company	Omitted gross earnings.....	Pending.
4506	State of Minnesota by Harry H. Peterson, its Attorney General v. Various tracts of land in Clearwater County in the State of Minnesota, Charles M. Case, T. H. Welcome, et al...	Condemnation of certain lands.....	Pending.
4523	State of Minnesota v. John E. O'Connell also known as J. E. O'Connell	Judgment	
4530	State of Minnesota v. Minnesota Power and Light Company ..	Sale of stock.....	Pending.
4547	In the Matter of the application of George Howard Crosby, Jr., Charlotte V. Crosby, Northern Trust Company, a corporation, H. B. Fryberger, Harriet B. Crosby, Charles J. Crosby and Lulu I. Crosby v. Stafford King, E. V. Willard and F. A. Wildes	Declaratory judgment, Chapter 286, Laws of 1933.....	Action dismissed. Court without jurisdiction.
4567	In the Matter of the estate of Joseph Healy	Recovery of Escheat.....	Estate recovered by heirs.
4574	In the Matter of the Construction of a bridge on the Chicago, North Western Railway Company's right of way in Viola Township, Olmstead County, Minnesota	Construction of bridge.....	Pending.
4576	Grey Van Lines, Inc. v. Mike Holm, Registrar of Motor Vehicles and N. W. Elsberg, Commissioner of Highways ...	Interlocutory injunction	Restraining order allowed, to continue in force and effect until further order of the Court.
4581	State of Minnesota by Harry H. Peterson, its Attorney General v. Certain lands in Itasca County in the State of Minnesota, et al.	Condemnation	Pending.
4583	Prudential Light & Power Company, a corporation, et al. v. State of Minnesota, et al.	Injunction	Pending.
4592	In the Matter of the application of the Chicago, Rock Island and Pacific Railway Company for leave to discontinue Cazenovia, Minnesota, as an Agency Station	Abandonment	Pending.
4593	Earl Henry Baker and Thelma A. Baker v. A. J. Chesley et al.	Legitimization of child.....	Pending.
4604	David Adams v. E. G. Robie, et al.	Mortgage foreclosure	Pending.
4606	State of Minnesota v. F. A. Wise and Fanny Wise co-partners doing business as Minneapolis Gas and Fuel Company and for Radio Gas and Oil Company	Gas tax	Pending.
4607	National Tea Company v. State of Minnesota	Validity of chain store tax.....	Pending.
4608	Hahn Department Stores, Inc. v. State of Minnesota	Validity of chain store tax.....	Pending.
4619	State of Minnesota v. Itasca County	Claim of Board of Control for services rendered to Bessie Tester $1,566.50..	Pending.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
4620	State of Minnesota v. Joe Cannard	Motor vehicle registration tax for $23.35	Homestead declared free from lien for taxation of motor vehicle.
4627	State of Minnesota v. C. E. Garretson, also known as C. E. Garretson, F. B. Featherstone, Frederick Emory Cobb, G. O. Orr, Paul Hagen, The Fidelity & Casualty Company of New York, a corporation, E. M. Campbell and Tillie Husse..	Claim	C. 146, L. 1937, legalizing expenditures of State Dental Board. Dismissed.
4628	State of Minnesota v. F. B. Featherstone, Frederick Emory Cobb, G. O. Orr, Paul Hagen, W. E. Mentzer, The Fidelity and Casualty Company of N. Y., a corporation, E. M. Campbell, and Tillie Husse	Claim	C. 146, L. 1937, legalizing expenditures of State Dental Board. Dismissed.
4629	State of Minnesota v. Paul Hagen, W. E. Mentzer, W. H. Smith, W. W. Wold, Hiland D. Aldrich, The Fidelity and Casualty Company of New York, a corporation, and General Indemnity Corporation of America, a corporation, E. M. Campbell, Tillie Husse, C. E. Salisbury and Hazel Hauge ...	Claim	C. 146, L. 1937, legalizing expenditures of State Dental Board. Dismissed.
4631	State of Minnesota v. Minneapolis, St. Paul and Sault Ste Marie Railway Company, a corporation	Violation of Track Clearance Law....	Pending.
4641	State of Minnesota v. N. J. Lien, a sole trader doing business as Blackduck Telephone Company	Gross earnings tax.....	Pending.
4642	State of Minnesota v. J. P. E. Bertrand, a sole trader doing business as Cobden Telephone System	Gross earnings tax.....	Pending.
4644	State of Minnesota v. Racine Co-operative Telephone Company, a corporation	Gross earnings tax.....	Pending.
4648	State of Minnesota v. Pennock Telephone Company, a corporation	Gross earnings tax.....	Pending.
4651	State of Minnesota v. H. F. Walker, a sole trader doing business as White Earth Telephone Company	Gross earnings tax.....	Pending.
4652	State of Minnesota v. Farmers & Merchants Telephone Company and C. M. Langseth, C. H. Bassett, I. J. Barron, J. M. Metcalf, Walter Shave, Melvin Langseth and Perry Barron	Gross earnings tax.....	Pending.
4654	State of Minnesota v. Morristown Telephone Company, a corporation	Gross earnings tax.....	Pending.
4656	State of Minnesota by Harry H. Peterson, its Attorney General v. A parcel of land in Morrison County, et al.	Condemnation for the construction of a dam in Platte River.....	Pending.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
4657	State of Minnesota by Harry H. Peterson v. Various Parcels of Land in Baltrami County, et al.	Condemnation	Pending.
4667	State of Minnesota by Harry H. Peterson, Attorney General, v. Certain lands and interests therein for the restoration of Talcot Lake, et al.	Condemnation	Pending.
4671	State of Minnesota v. Harold Yench	Claim for death of Frank E. Domagalski	Claim awarded to Industrial Commission, $300.00. Funeral expenses, $150.00 to mother.
4690	In the Matter of Personal Property taxes, claimed to be owing by International Lumber Company and to have been delinquent April 1, 1935	Enforcement of taxation	Collected $150,000 for personal property taxes 1920 to 1934. $13,252.98 for personal property tax for 1935. $22,617.58 for personal property tax for 1936. $29,850.00 for personal property tax for 1937.
4693	In the Matter of the Estate of Gust Larson	Escheat	Collected $2,354.30.
4705	State of Minnesota ex rel. Harry H. Peterson, Attorney General, v. Fidelity Mutual Association, a corporation, and American Mutual Protective Association, a corporation	To vacate charter	Charter ordered vacated and organizations dissolved.
4731	State of Minnesota v. The Duluth Iron Range Ry. Co., Proctor Water & Light Co., Spirit Lake Transfer Ry. Co., Oliver Iron Mining Company, Duluth Missabe & Northern Ry. Co.	Delinquent taxes	Pending.
4744	In the Matter of the application of the First National Bank of Lakeville, Minnesota, to deposit certain moneys	To deposit certain moneys	Moneys deposited.
4754	Laurine Bailey Hone v. State Board of Control	Injunction	Dismissed.
4758	Steve Peplenjak v. L. G. Foley, et al., and State Board of Control	Injunction	Action dismissed.
4762	Thompson Lumber Co., a corporation, v. Harold Munson, N. A. McClain and Fritz Zechlin, individually, and as copartners d.b.a. Royal Fixture Co., Royal Holding Co., a corporation, Regents of the University of Minnesota, also known as University of Minnesota, a corporation	Lien foreclosure	Pending.
4764	C. Thomas Stores Sales System Inc., a corporation, v. State of Minnesota	Validity as chain stores	Pending.
4765	C. Thomas Stores Sales System, Inc., a corporation, and Mutual Wholesale Food & Supply Company, a corporation, v. George E. Wallace, Harry E. Boyle, et al.	Declaratory judgment	Pending.
4769	Northern States Power Company v. Al P. Erickson, individually and as County Auditor of Hennepin County, et al.	Injunction	Pending.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
4770	W. H. Barber Co., a corp., v. Al P. Erickson, individually and as County Auditor of Hennepin County, Henry Voegeli, individually and as County Treasurer of Hennepin County, et al.	Injunction	Pending.
4771	The Cream of Wheat Corporation, a corporation, v. Al P. Erickson, County Auditor of Hennepin County, Henry Voegeli, County Treasurer of Hennepin County, et al.	Injunction	Pending.
4775	Red Owl Stores, Inc. v. State of Minnesota	Chain store tax	Pending.
4776	Gamble-Skogmo, Inc. v. State of Minnesota	Chain store tax	Pending.
4777	J. J. Newberry Co. v. State of Minnesota	Chain store tax	Pending.
4778	Buehler Bros. Inc., a corporation, v. State of Minnesota	Chain store tax	Pending.
4779	The Schiff Company v. State of Minnesota	Chain store tax	Pending.
4780	S. S. Kresge Co. v. State of Minnesota	Chain store tax	Pending.
4781	Montgomery Ward Co. v. State of Minnesota	Chain store tax	Pending.
4782	W. T. Grant Co. v. State of Minnesota	Chain store tax	Pending.
4783	Sears, Roebuck Co. v. State of Minnesota	Chain store tax	Pending.
4785	State of Minnesota v. Vermillion River Mines, a corporation	Timber	Collected $46.48.
4786	State of Minnesota v. Vermillion River Mines, Inc.	Royalty tax	Collected $46.48.
4788	Davis & Ruben Co. v. State of Minnesota	Chain store tax	Pending.
4789	The Berland Shoe Stores, Inc. v. State of Minnesota	Chain store tax	Pending.
4790	Kindy Optical Co., a corporation v. State of Minnesota	Chain store tax	Pending.
4791	Melville Shoe Corporation v. State of Minnesota	Chain store tax	Pending.
4792	J. C. Penney Company v. State of Minnesota	Chain store tax	Pending.
4793	The Great Atlantic & Pacific Tea Company v. State of Minnesota	Chain store tax	Pending.
4794	The Scott-Burr Store, Inc. v. State of Minnesota	Chain store tax	Pending.
4795	Quality Food Stores, Inc. v. State of Minnesota	Chain store tax	Pending.
4796	F. W. Woolworth Company v. State of Minnesota	Chain store tax	Pending.
4797	Walgreen Company v. State of Minnesota	Chain store tax	Pending.
4798	Gershgol's Economy Markets, a corporation v. State of Minnesota	Chain store tax	Pending.
4799	Piggly Wiggly Northwest Inc., a corporation, v. State of Minnesota	Chain store tax	Pending.
4800	White Castle System, Inc. v. State of Minnesota	Chain store tax	Pending.
4801	Fanny Farmer Candy Shops, Inc., a corporation v. State of Minnesota	Chain store tax	Pending.
4802	L. B. Hartz Stores, Inc., a corporation, v. State of Minnesota	Chain store tax	Pending.
4803	Holland Furniture Company, a corporation, v. State of Minnesota	Chain store tax	Pending.
4804	City Market Company, a corporation v. State of Minnesota	Chain store tax	Pending.
4806	McLellan Stores Company v. State of Minnesota	Chain store tax	Pending.
4808	Salkin & Linoff, Inc., a corporation v. State of Minnesota	Chain store tax	Pending.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
4809	Maurice L. Rothschild & Co. v. State of Minnesota	Chain store tax	Pending.
4810	Western Auto Supply, a corporation v. State of Minnesota	Chain store tax	Pending.
4811	Warren Stores Inc., a corporation, v. State of Minnesota	Chain store tax	Pending.
4812	L. T. Stevenson's Inc., a corporation v. State of Minnesota	Chain store tax	Pending.
4813	State of Minnesota ex rel. Harry H. Peterson as Attorney General v. United Order of Foresters Disability and Funeral Benefit Association, a corporation	Writ of Quo Warranto	Revocation of charter and injunction granted.
4816	Walter H. Graham v. L. C. Sprague and John Junell, co-receivers of the M. & St L. Railroad Company and the Great Northern Railroad Company	Liability	Pending.
4819	State of Minnesota v. J. C. Bootey and H. O. Kragness, co-partners doing business as K. B. Oil Company	Gas tax	Pending.
4821	Blanche Peterson as Guardian of Doris Jane Peterson and Gilbert Leighton Peterson, minors v. Julius Peterson, et al.	Judgment (Division of property) Second case	Pending.
4824	John J. O'Neil and Gene Allard, as partners doing business under the firm name and style of Francel Decalcomania Company	Declaratory judgment	Dismissed.
4828	Strutwear Knitting Company, a Minnesota corporation v. Thomas E. Latimer, Floyd B. Olson, Ellard A. Walsh	Judgment	
4829	Strutwear Knitting Company, a Minnesota Corporation, v. Thomas E. Latimer, Floyd B. Olson, Ellard A. Walsh	Garnishment	
4831	Witt's Market House Inc. v. State of Minnesota	Chain store tax	Pending.
4835	State of Minnesota v. R. R. Kriesel	Income tax	Collected $502.73 and $15.20 court costs.
4836	State of Minnesota v. A. Robert Mensing, Jr.	Income tax	Judgment entered for $141.69.
4837	State of Minnesota v. Charles Joseph Hallman	Income tax	Collected $80.00.
4838	State of Minnesota v. W. B. Grobe	Income tax	Pending.
4840	J. A. Gervais v. State of Minnesota and the Department of Conservation	Compensation claim	Pending.
4844	State of Minnesota v. C. C. Kaufmann	Timber trespass	Collected $21.93.
4845	State of Minnesota v. Kildahl Company	Income tax	Pending.
4846	State of Minnesota v. Harry J. LaDue	Income tax	Pending.
4847	State of Minnesota v. Frank W. Wilson	Income tax	Judgment entered for $84.53.
4848	State of Minnesota v. Walter H. Hennessey	Income tax	Pending.
4850	State of Minnesota v. Albert Shank	Income tax	Judgment entered.
4851	State of Minnesota v. Charles E. Leonard, Jr.	Income tax	Tax collected.
4853	State of Minnesota v. Wyman McLeod	Income tax	Judgment entered for $56.17.
4854	State of Minnesota v. E. P. Moorhead	Income tax	Defendant died before action was commenced.
4860	State of Minnesota v. Kindy Optical Company, a corporation	Injunction	Dismissed.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
4861	State of Minnesota v. Cold Springs Brewing Company	Income tax	Tax collected.
4862	State of Minnesota v. Daily News Publishing Co.	Income tax	Pending.
4864	State of Minnesota v. W. S. Coleman	Income tax	Pending.
4865	State of Minnesota v. Al Johnson Construction Company	Income tax	Tax collected.
4866	State of Minnesota v. Henry J. Frundt	Income tax	Tax collected.
4869	State of Minnesota v. J. H. Fretwell	Income tax	Pending.
4876	Charles W. Jessup and Lloyd J. Jessup, co-partners d.b. under the firm name and style of Jessup Transfer and Storage Company v. C. A. Johnson, F. W. Bates and W. E. Hustleby	Restraining order	Pending.
4877	In the Matter of the Estate of J. C. Lewis, deceased	Determination of heirs	Land acquired, amount paid $729.00.
4885	State of Minnesota v. Delos Bailey and W. T. Bailey	Gas tax	Pending. Collection $7.00 on account.
4887	State of Minnesota v. Certain Land in Blue Earth County, State of Minnesota, et al.	Condemnation	Land acquired. Cost of land $351.00.
4888	State of Minnesota v. Elde Wilson	Timber trespass	Settlement compromised by the State Executive Council in the sum of $600.
4891	In the Matter of the Trust Department of the Farmers Bank of Waseca, Waseca, Minnesota	Transfer of securities	Pending.
4892	Ingemann O. Gullings, A. G. Anderson et al. v. State Board of Dental Examiners of the State of Minnesota	Declaratory judgment. Testing validity C. 95, L. 1935	Appealed to Supreme Court.
4893	State of Minnesota v. Andy Sluser, an individual doing business as Andy's Oil Company	Gas tax	Judgment entered. No assets available.
4894	City Market Company, a corporation, and David Persha v. George E. Wallace, Harry E. Boyle and George F. Gage, individually and as Minnesota Tax Commission, et al.	Chain store tax	Pending.
4895	In the Matter of the condemnation by the State Fire Marshal of two buildings owned by H. W. Davy and located upon Lot 12, Block 46, Lots 13, Block 46 at Moorhead, Minnesota	Fire hazard	Property ordered condemned.
4896	In the Matter of the condemnation by the State Fire Marshal of a building owned by Phebe Ross, Hudson Sherman et al., located upon Lot 11, Block 46, Moorhead, Minnesota	Fire hazard	Appealed to Supreme Court.
4897	State of Minnesota v. Crazy Crystal Company of Minnesota	Income tax	Judgment filed for $174.47.
4901	State of Minnesota ex rel. Knute H. Luross v. Dr. Clarence M. Jackson, Dr. J. C. McKinley, Dr. R. George Hazzard, Dr. Walter Lee, Dr. Clifford S. Pollock, comprising and constituting the Minnesota State Board of Examiners in the Basic Sciences	Writ of Mandamus	Demurrer sustained.
4903	In the Matter of the delinquency of Lillian Kreuger, a minor	Delinquency	Dismissed.
4905	State of Minnesota v. H. L. Bowen, also known as Herbert L. Bowen	Unlawful detainer	Removed from premises.
4906	State of Minnesota by Harry H. Peterson, its Attorney General, v. Various Parcels of Land in Kandiyohi County, et al.	Condemnation	Land acquired—Cost of land $77.00.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
4908	In the Matter of the Minnesota Transfer Railway Company, dealing with the closing of the Charles Street and the East Hennepin Avenue Station	Abandonment of 2 stations	Petition denied. Appealed to Supreme Court.
4927	In the Matter of the Proposed revocation of the license of Dr. L. L. Williams, optometrist, to practice dentistry	Revocation of license.	Defendant's demurrer overruled—Appealed to the Supreme Court.
4928	Cherokee State Bank of St. Paul, a corporation, and Robert F. Koch, v. George E. Wallace, Harry E. Boyle and George F. Gage, as members of and constituting the Minnesota Tax Commission; George J. Reis, as County Auditor for Ramsey County, Minnesota; Ronald V. Powers, as County Assessor for Ramsey County, Minnesota; and Elsa M. Obst as County Treasurer for Ramsey County, Minnesota	Declaratory judgment	Shares of capital stock to be assessed and taxed according to C. 305, L. 25. Appealed to the Supreme Court.
4932	W. O. Bissonett v. E. V. Willard and D. M. Stewart	Injunction	Restraining order vacated.
4933	In the Matter of the Petition of O. J. Rause and others for a judicial ditch No. 76	Establishment of judicial ditch	Pending.
4936	State of Minnesota v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.	Abandonment of station at Ottawa, Minnesota	Custodian service substituted for agency service.
4937	State of Minnesota by Harry H. Peterson, its Attorney General v. Certain Lands in Itasca County; Arthur A. Eckley, et al.	Condemnation	Land condemned. Cost of land $180.
4938	County of Blue Earth v. Edward M. Tower	Appeal from order of State Agency on order for old age pension	Pending.
4943	The State of Minnesota by Harry H. Peterson, its Attorney General v. A parcel of land in Carlton County; State of Minnesota, County of Carlton; Margaret Lord, et al.	Condemnation	Land condemned—Award $50.00.
4944	State of Minnesota by Harry H. Peterson, its Attorney General, v. A certain parcel of land in Beltrami County, Minnesota, herein described; County of Beltrami, a municipal corporation; Henry Dahlsteel; et al.	Condemnation	Land condemned—Award $25.00.
4945	In the Matter of Bettie Simning, Margaret Simning, Irene Simning and George Simning, as dependent and neglected children	Vacation of guardianship	Petition denied.
4948	State of Minnesota v. Norbert Osendorf, an individual doing business as Elrosa Oil Co.	Gasoline tax (2nd case)	Pending.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
4949	In the Matter of the Guardianship of Zelda Carlson as a delinquent child	Restoration to capacity	Restored to capacity.
4950	William B. Geery v. Minnesota Tax Commission et al.	Income tax	Demurrer overruled. Appealed to the Supreme Court.
4951	State ex rel. Perkins, Tracy Printing Co. v. Harry H. Peterson, or the Attorney General of the State of Minnesota	Writ of Mandamus	Dismissed.
4953	In the Matter of the Appeal of Northern Pacific Railway Company, a corporation, from that certain order of the Railroad and Warehouse Commission of the State of Minnesota entered on the 5th day of October, 1936	Discontinuance of station at Kimberley, Minnesota	Railroad & Warehouse Commission's order reversed.
4954	State of Minnesota v. Beltrami County	Determination of pauper's settlement.	Dismissed.
4955	In the Matter of the Feeblemindedness of Theresa Kennedy	Restoration to capacity	Pending.
4956	State of Minnesota ex rel. Paul Lisowski v. Department of Conservation, et al.	Writ of Mandamus	Relator entitled to judgment.
4959	Patrick H. Joyce and Luther M. Walter, as Trustees for the Chicago, Great Western Railway Company v. The City of St. Paul, a municipal corporation, Mark H. Gehan, as Mayor of said City	Declaratory judgment	Dismissed.
4960	D. W. Bates, Superintendent of Banking of State of Iowa as Receiver of the Security Savings Bank of Hartley, Iowa, v. Herman Miller, Margaret Miller, John Miller, Al Giesen and State of Minnesota	Lien on mortgaged property	Demurrer sustained.
4961	In the Matter of the Application of John F. Misgen for Old Age Assistance	Appeal from the decision and determination of the State Agency by the County Agency	Denied.
4962	In the Matter of the Application of Adolph Krampitz for Old Age Assistance	Appeal from the decision and determination of the State Agency by the County Agency	Allowed $15.00 per month.
4963	Aleck Goldfarb and Melvin Dansinger, co-partners as Majestic Odorless Dry Cleaners v. Frank Yetka, Commissioner of Insurance and State Fire Marshal, Ingworth Erickson, Deputy and Acting State Fire Marshal, and Martin A. Nelson, Deputy State Fire Marshal	Injunction	Injunction granted.
4968	In the Matter of the Children of Nina Heinz and the stepfather, Walter Lane	Discharge of guardian	Petition denied.
4969	State of Minnesota by William S. Ervin, its Attorney General, v. Certain Parcels of Land in Crow Wing County, et al.	Condemnation	Land condemned—Cost $150.00.
4970	In the Matter of the petition of Walter Johnson for a Writ of Habeas Corpus	Writ of Habeas Corpus	Writ of Habeas Corpus discharged.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
4971	City Market Company, a Minnesota corporation, v. State of Minnesota	Chain Store Tax Law	Pending.
4972	State of Minnesota, ex rel. Charles Langville v. L. A. Johnson, E. J. Pearlove, Phil Sundby and Paul Rasmussen as Commissioners of Administration and Finance of the State of Minnesota	Soldiers Preference Law	Dismissed. Settled out of court.
4973	State of Minnesota v. A. Kulick, an individual doing business as Peoples Oil Company and also doing business as Kulick Motor Company	Delinquent gas tax	Gas tax collected.
4974	Neisner Brothers, Inc., a corporation, v. State of Minnesota	Chain store tax	Pending. To be heard in January.
4975	State of Minnesota, by William S. Ervin, its Attorney General, v. A certain parcel of land in Roseau County, State of Minnesota herein described; County of Roseau, a municipal corporation; State of Minnesota; James Bradshaw, et al...	Condemnation of land to be used for the Clear River Ranger Station	Land condemned. Cost of land $195.00.
4976	State of Minnesota v. Northern Pacific Railroad	Track clearance at Duluth, Minnesota. Violation of Chapter 170, Laws 1935	Paid fine of $500.00.
4977	Wohl Shoe Company, a corporation, v. State of Minnesota	Chain Store Tax Law	Pending.
4978	Farm Service Stores, Inc., a corporation, v. State of Minnesota	Chain Store Tax Law	Pending.
4979	State of Minnesota v. H. T. Lawson & V. C. Whinery, co-partners doing business as Champlin Oil Company, H. T. Lawson, V. C. Whinery, Maxine R. Bonsall, John Swing and Lawrence Burke, as individuals and as co-partners doing business as Champlin Co-operative Oil Company	Delinquent gas tax	Partial assignment of judgment received.
4980	State of Minnesota v. Albert J. Kayser and Emil Kayser, co-partners, doing business as Kayser Brothers W.N.A.X. Station	Delinquent gas tax	Collected $211.57 and $15.69 court costs.
4981	State of Minnesota v. A. J. Dvoraebek, an individual doing business as Grey Eagle Oil Company	Delinquent gas tax	Delinquent gas tax collected.
4982	Union Loan & Finance Company, a corporation, v. Robert D. Beery, as Commissioner of Banks of the State of Minnesota	For release of supervision of Superintendent of Banks	Dismissed.
4983	Duluth, Winnipeg & Pacific Railroad Company v. The Railroad & Warehouse Commission of the State of Minnesota	Abandonment of station at Britt, Minnesota	Dismissed.
4984	Duluth, Winnipeg & Pacific Railroad Company v. The Railroad & Warehouse Commission of the State of Minnesota	Abandonment of station at Harney,	

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
		Minnesota	Order of December 21, 1936, of Railroad & Warehouse Commission is unlawful and unauthorized.
4985	Duluth, Winnipeg & Pacific Railroad Company v. The Railroad & Warehouse Commission of the State of Minnesota	Abandonment of station at Melrude, Minnesota	Abandonment permitted.
4988	State of Minnesota ex rel. C. G. Dosland v. Mike Holm, Secretary of State, Charles Loring, Associate Justice of the Supreme Court, I. M. Olsen, Levi M. Hall, District Judge of the 4th Judicial District, J. C. Michael, District Judge of 2nd Judicial District, constituting the State Canvassing Board	Writ of Mandamus	Petition denied. Appealed to Supreme Court.
4989	The State of Minnesota by William S. Ervin its Attorney General v. A certain parcel of land in Itasca County, State of Minnesota, herein described; State of Minnesota, County of Itasca, a municipal corporation, Lillian B. Seaberry, formerly Lillian Beatrice Robinson, et al.	Condemnation of lands to be used for forestry purposes to be known as the Thistledew Project	Condemnation proceedings dismissed. Appealed to Supreme Court.
4990	State of Minnesota, ex rel. Ray Crescenzo v. Railroad & Warehouse Commission of Minnesota, Hjalmar Petersen, Charles Munn and Harold R. Atwood	Soldiers preference	Dismissed.
4991	State of Minnesota, ex rel. William McInnis, v. Railroad & Warehouse Commission of Minnesota, Hjalmar Petersen, Charles Munn and Harold R. Atwood	Soldiers preference	Dismissed.
4993	Edison Finance Corporation v. Albert C. Johnson, L. A. Berry, and Mike Holm, Secretary of State for the State of Minnesota	Restraint of registration of motor vehicles	Restraining Order denied.
4994	State of Minnesota, ex rel. Clarence Rolfson v. Railroad & Warehouse Commission of Minnesota, Hjalmar Petersen, Charles Munn and Harold R. Atwood	Soldiers preference	Dismissed.
4995	State ex rel. G. W. Shoholm v. Paul A. Rasmussen, Phil Sundby and E. J. Pearlove, Commissioners of Administration and Finance of the State of Minnesota	Soldiers preference	Writ quashed, discharged and dismissed.
4996	Frank L. Carpenter v. Redwood County	Old age pension cash loan value of insurance policy	Not entitled to old age assistance from Redwood County. Motion for new trial made. Pending.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
4997	M. E. Jacobson v. R. A. Trovatten, as Commissioner of Agriculture, Dairy & Food of the State of Minnesota, and Paul Rasmussen, E. J. Pearlove and Phil Sundby, as Commissioners of the Department of Administration and Finance of the State of Minnesota, and Stafford King, as State Auditor of the State of Minnesota	Writ of Mandamus	Writ discharged.
5000	State of Minnesota v. George Hart and John Stark as guardian of the estate of George Hart	Claim for support and maintenance	Settlement for $600.00.
5001	Herman J. Kreft v. Muriel Maxine Stevens Kreft, A. J. Chesley, Executive Officer, and State Registrar of Minnesota, State Board of Health, and R. B. J. Schoch, City Health Officer of the City of St. Paul, Minnesota	Correction of birth certificate	Pending.
5002	State of Minnesota v. James Rausch and Frank Jonas, copartners doing business as Local Oil Company	Delinquent gas tax	Taxes paid. Collected $19.65 court costs.
5003	Autoist Mutual Insurance Company v. Frank Yetka, Insurance Commissioner of the State of Minnesota and Harold Atwood, Charles Munn and Hjalmar Petersen as the Railroad & Warehouse Commission of the State of Minnesota	Revocation of license	Dismissed.
5005	John Clark Company, a corporation, v. State of Minnesota, The County of Renville, C. A. Strom, as Auditor of Renville County, and J. L. O'Connor as Treasurer of Renville County	To set aside tax forfeiture	Demurrer filed.
5009	State of Minnesota v. A. R. Bakke and G. A. Carlson and Ed. Haule, garnishee	Garnishment	Hay taken from defendant by the Game and Fish Department and sold by said department in settlement of claim.
5010	In the Matter of the Application of the Trustees of Pillsbury Academy, a corporation, to determine its claim that the property described (Lot 12, Block 15, in the original town, now city of Owatonna, in Steele County, Minnesota) is exempt from tax levied as set forth in its petition	Property of Pillsbury Academy exempt from taxation	Property and income of Pillsbury Academy exempt from taxation. Appealed to Supreme Court.
5011	State ex rel. Laurence D. Pudney v. Louis G. Foley, Carl R. Carlgren, Anna O. Determan & Kenneth C. Haycraft	Writ of Mandamus	Pending.
5012	Minneapolis Dry Cleaners and Launderers Association, Inc., a corporation, v. Ed Goff, as County Attorney of Hennepin County, and William S. Ervin as Attorney General of the State of Minnesota	Declaratory judgment	Chapter 116, Laws 1937, applies to business of dry cleaning.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
5013	Dorr D. Austin, an individual and sole proprietor, doing business as Austin Laundry v. Frank Yetka, Commissioner of Insurance and State Fire Marshal, and I. G. Erickson, Deputy and acting State Fire Marshal, and J. T. Glascock, Deputy State Fire Marshal	Injunction	Dismissed.
5014	In the Matter of the dissolution of Minnesota Linseed Oil Company, a Minnesota Corporation	Dissolution	Pending.
5016	State of Minnesota v. John B. Irwin	Claim $75.02	Collected $20.00 on account.
5019	R. L. Hodges v. Roy A. Jargo, General Motors Acceptance Corporation, John Finch, and Arthur Anderson, co-partners, doing business as Finch Downtown Chevrolet Company, and Mike Holm, as Secretary of State of Minnesota	Refusal to issue a certificate of title or registration	Dismissed as to Secretary of State May 21, 1937.
5021	State of Minnesota v. Trustees of Pillsbury Academy (Hennepin County case)	Determination of property exempt from taxation	Property and income of Pillsbury Academy exempt from taxation. Appealed to Supreme Court.
5022	State of Minnesota, ex rel. Jacob Chessen v. William Mahoney, as Liquor Control Commissioner of the State of Minnesota and Hon. C. R. Berghult as Mayor, and C. D. Jeronimus, as Clerk of the City of Duluth, Minnesota, a municipal corporation	Writ of Mandamus	Writ quashed.
5023	State of Minnesota v. John McKusick	Timber sale permit	Executive Council approved settlement in the sum of $750, which has been paid.
5024	State of Minnesota v. Carl R. Meyers and Northern Pacific Railroad Company	Subrogation claim	Settled for $4,250.00.
5027	State of Minnesota v. Duluth, Missabe and Northern Railway Company, a corporation	1934 excise tax $7,096.75	Pending.
5028	State of Minnesota v. The Duluth and Iron Range Railroad Company, a corporation	1934 excise tax $49,053.60	Pending.
5029	State of Minnesota v. The Lake Superior Consolidated Iron Mines, a corporation	1934 excise tax $284.10	Pending.
5030	State of Minnesota v. Proctor Water and Light Company, a corporation	1934 excise tax $1,013.39	Pending.
5031	State of Minnesota v. Spirit Lake Transfer Railway Company, a corporation	1934 excise tax $2,098.78	Pending.
5032	State of Minnesota v. Oliver Iron Mining Company, a corporation	1934 excise tax $1,496.04	Pending.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
5034	The State of Minnesota ex rel. William S. Ervin, as its Attorney General v. The American Family Benevolent Association and E. B. Hayes, L. A. Wagoner, and M. J. Palmer, Trustees for the American Family Benevolent Association	Dissolution	Corporate charter dissolved.
5035	In the Matter of the Estate of Charles A. Weyerhauser	Writ of Certiorari	Pending.
5037	In the Matter of the Condemnation by the State Fire Marshal of a building owned by John Hajicek, Albert Hajicek, Mary Hajicek, and James Hajicek, heirs of the Estate of Anastacia Hajicek, deceased, and located on Lot 9, Block 12, Townsite of Hutchinson, North half McLeod County, Minn.	Fire hazard	Certain portions of property is to be removed by order of the court.
5038	M. F. Meyer v. River Lake Motor, Inc., a corporation and Mike Holm, Secretary of State of Minnesota	Validity of title of automobile for registration	Dismissed.
5039	In re: Dissolution of Equitable Mutual Insurance Company, a corporation	Dissolution	Pending.
5040	Edward J. Swanson v. Stafford King and C. A. Halverson	Injunction	Pending.
5041	State of Minnesota v. Minnesota Transfer Railway Company	Track clearance	Dismissed without prejudice.
5042	State of Minnesota v. Minnesota Transfer Railway Company, a corporation, and Superior Packing Company, a corporation	Track clearance	Dismissed—$500.00 fine paid.
5043	Stanley Hessian v. William S. Ervin, as Attorney General of the State of Minnesota, Stafford King, as Auditor of the State of Minnesota, C. A. Halverson, as Treasurer of the State of Minnesota, C. W. Shelly, as Chairman of the State Employes' Retirement Board of the State of Minnesota and George Griffith, as Chief Oil Inspector of the Oil Inspection Division of the State of Minnesota	Constitutionality of retirement deductions	Retirement act held constitutional. Question therein held to be doubtful and certified to Supreme Court for decision.
5044	State of Minnesota v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., a corporation, and General Iron and Metal Company, a corporation	Track clearance	Pending.
5046	State of Minnesota by William S. Ervin, its Attorney General, v. A certain parcel of land in Crow Wing County, State of Minnesota, herein described; Frederick M. Grinnell, Kate M. Austin; County of Crow Wing, et al.	Pequot tower site condemnation	Land condemned—Cost of land $200.00.
5047	In Re: Dissolution of Peoples Life Insurance Society	Dissolution	Corporation dissolved.
5049	State of Minnesota v. N. P. Ry. Co. and H. Y. Josephs, Louis Z. Zalk, co-partners doing business under the trade name, style and designation of Duluth, Iron & Metal Company	Track clearance	Pending.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
5050	State of Minnesota v. N. P. Ry. Co. & Benjamin Joseph, Samuel M. Karon and Harry Karon, co-partners doing business under two separate trade names, namely, Northern Scrap Iron & Metal Company, and Karon's Scrap Iron Co.	Track clearance	Pending.
5051	State of Minnesota v. Great Northern Railway Co. & Butler Brothers, a corporation	Track clearance	Dismissed—$500.00 fine collected.
5052	State of Minnesota v. Minneapolis, St. Paul & Sault Ste. Marie Ry Co., a corporation, and Soltan Brust, a sole trader doing business under the trade name, style and designation of United Iron & Metal Company	Track clearance	Pending.
5053	State of Minnesota v. Minneapolis Sault Ste. Marie Ry. Co., a corporation, and American Iron & Supply Company, Inc., a corporation	Track clearance	Pending.
5054	State of Minnesota v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., a corporation, and Harry Mark and Isreal C. Mark, co-partners doing business as Mark Iron & Metal Company	Track clearance	Pending.
5055	State of Minnesota v. Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation, and Frank J. Rosen & William Simon, co-partners doing business under the trade name, style and designation of Union Scrap Iron & Metal Company	Track clearance	Pending.
5056	In the Matter of the Condemnation by the State Fire Marshal of a building owned by William Hansen and Christine Hansen, who is also known as Kjestina Hansen, and located upon Lot 17, and the West 20 feet in width of Lot 18 of Berry's Addition to the City of Winona, Winona County, Minnesota	Fire hazard	Action dismissed. Order complied with.
5057	State of Minnesota v. Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation, and Evergreen Mines Company, a corporation	Track clearance	Received from Evergreen Mines $250; Northern Pacific Railway $250, as fine imposed.
5059	State of Minnesota v. Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation, and West End Iron and Metal Corporation, a corporation	Track clearance	Defendants entitled to judgment.
5060	State of Minnesota v. Onufry Diachok and Martin Timber Company, a corporation	Timber trespass	Claim paid in full.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
5061	In the Matter of the condemnation by the State Fire Marshal of a building owned by W. R. Longstreet, and located upon Lots 5 and 6, Block 7, Original Plat of the Village of Luverne, Rock County, Minnesota	Fire hazard	Judgment entered—Buildings ordered to be removed.
5062	State of Minnesota v. E. W. Marquette	Revocation of notarial commission	Notarial commission revocated.
5064	In re: Application of E. St. Martin for cancellation of his notarial commission	Revocation of notarial commission	Notarial commission revocated.
5065	State of Minnesota v. Landour Ecklof; C. W. Hinck, John Doe, and James E. Cashman, Fred C. Johnson; C. A. Tincher, and F. H. Joesting, as officers and directors of the Steele County Fair Association	Injunction	Temporary restraining order granted.
5067	State of Minnesota v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and Montgomery Ward and Company, Inc., a corporation	Track clearance	$500.00 fine collected—Dismissed.
5069	John M. Hughes, v. Minnesota Tax Commission of the State of Minnesota	Income tax	State to prepare Findings of Fact and Conclusions of Law in conformity with court's memorandum.
5070	State Board of Dental Examiners of the State of Minnesota v. C. H. York	Revocation of license	Injunction issued as per stipulation.
5072	In re Application of E. P. Reimers for cancellation of his notarial commission	Revocation of notarial commission	Notarial commission revocated.
5073	In the Matter of the condemnation by the State Fire Marshal of a building owned by E. W. Brand, and located upon two acres of land, etc., in Crow Wing County	Fire hazard	Judgment entered.
5075	State of Minnesota v. Chicago and North Western Railway Company, a corporation, and Hallett Construction Company, a corporation	Track clearance	Dismissed.
5076	State of Minnesota v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co.	Track clearance	$500.00 fine collected—Dismissed.
5077	State of Minnesota, ex rel. Albert E. Myers, Cyril E. Monahan, N. J. Kidwell, O. J. Rustad, Arthur P. Gilles, W. D. Bugge, Nicholas Anderson and C. H. Tipler v. David Lundeen, as Director Soldiers Welfare Division, State Board of Control; and Elmer Benson, W. H. Lamson, Stafford King, Mike Holm, C. A. Halverson, and William S. Ervin, Executive Council of the State of Minnesota	Writ of Mandamus	Writ denied, judgment entered.
5080	In re: Application of John A. Klindworth for cancellation of his notarial commission	Revocation of notarial commission	Commission revoked.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
5081	Minnesota, Power & Light Co. v. State of Minnesota; C. D. Symes; Charles McPherson; et al.	Condemnation of certain lands for the perpetual right, privilege and easement to construct, operate and maintain electric transmission lines	Award of $1,802.00 received by State and forwarded to Conservation Department.
5083	American Security Company, a corporation, of Fargo, N. D. v. Alice Olson, Peder Sakrismo, as Guardian of the Estate and person of Alice Olson, Oscar A. Olson, Sena Olson, et al.	Mortgage foreclosure delinquent tax $108.12	Pending.
5084	State of Minnesota v. Chicago, Great Western Railroad Company, a corporation, and Archer-Daniels-Midland Company, a corporation	Track clearance	Pending.
5085	State of Minnesota v. Chicago, Great Western Railroad Company, a corporation, and Marquette Elevator Co.	Track clearance	Dismissed.
5086	State of Minnesota, ex rel. William S. Ervin, Attorney General v. Crookston Trust Company	Writ of Quo Warranto	Demurrer sustained—Appealed to Supreme Court.
5087	David Swedberg v. Rosa Lena Swedberg	Determination of dependent child—ward of State Board of Control	Pending.
5088	Ralph G. Colberg v. George C. Jensen; Jack I. Kurtz, Hugo O. Schlueder, Joseph L. Kubicek, and E. W. Larson, constituting the Minnesota State Board of Optometry, and the Minnesota State Board of Optometry	Temporary injunction	Chapter 420, Laws 1929 constitutional. Order modifying previous order denied.
5089	State of Minnesota v. The Minneapolis & St. Louis Railroad Company, a corporation, and L. C. Sprague and John Junell, co-receivers of the Minneapolis & St. Louis Railroad Company, a corporation	Omitted gross earnings tax $1,040.91.	Received payment in full.
5090	State of Minnesota v. Chicago Great Western Ry. Co., a corporation, and James A. McNulty, and John C. McNulty, co-partners doing business as J. A. McNulty Co.	Track clearance	Pending.
5091	In the Matter of the Appeal of F. M. Diamond, pursuant to section 5640, Mason's Minnesota Statutes of 1927, from Governor's Order providing for adequate control and conservation of deer in Minnesota	Appeal from Governor's order No. 26 for the opening of the deer season	Proceedings remanded to Hennepin County and writ of Mandamus filed in Supreme Court.
5092	State of Minnesota v. Great Northern Ry. Co. and Butler Brothers, a corporation	Track clearance at Harrison Mine Washing Plant at Nashwauk	Pending.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
5094	State of Minnesota v. The Minneapolis and St. Louis Railroad Company, a corporation, and L. C. Sprague and John Junell, co-receivers of The Minneapolis and St. Louis Railroad Company, a corporation	Omitted gross earnings tax $634.41...	Received payment in full.
5095	510 Groveland Ave., Inc. v. Al P. Erickson, as County Auditor for Hennepin County, Minnesota, Henry Voegeli, as County Treasurer for Hennepin County, Minnesota, The Board of Education of the City of Minneapolis, a municipal corporation	Declaratory judgment	Demurrer sustained—Appealed to Supreme Court.
5096	State of Minnesota v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, and Thornton Brothers Co., a corporation	Track clearance	$500.00 fine paid—Dismissed.
5097	State of Minnesota v. Northern Pacific Railway Company, a corporation	Omitted gross earnings tax	Settled and compromised—Dismissed.
5098	State of Minnesota v. Minnesota, Dakota & Western Railway Company, a corporation	Omitted gross earnings tax	Collected $3,906.99—Dismissed.
5099	Arthur J. Schunck v. Frank Yetka, and Arthur N. Nordstrom as individuals and as Commissioner of Insurance and Deputy Commissioner of Insurance of the State of Minnesota, respectively.	Injunction	Motion of Plaintiff denied—Appealed to Supreme Court.
5100	State of Minnesota v. Charles P. Megan as Trustee of the property of the Chicago and North Western Railway Company, a debtor	Omitted gross earnings tax	Continued.
5101	State of Minnesota, ex rel. Selmer B. Sampson (also known as Samuel Sampson) v. Chas. Ommodt, as Commissioner of Agriculture of the State of Minnesota	Soldiers preference	Relator reinstated. Dismissed.
5103	State of Minnesota v. The Minneapolis & St. Louis Railroad Company, a corporation, and L. C. Sprague and John Junell, co-receivers of the Minneapolis and St. Louis Railroad Company, a corporation	Omitted gross earnings tax $67,222.13.	Rentals on cars not to be deducted from gross earnings. Appealed to Supreme Court.
5104	State of Minnesota ex rel. Coates P. Bull v. Albert Burger, Wallace V. Blomquist, Ona A. Crume, C. A. Halverson, Frank Yetka, Stafford King, Henry E. Cass, and Mrs. S. C. Notestein, members of the Board of State Employes Retirement Association of the State of Minnesota	Writ of Mandamus	Respondents entitled to judgment.

No.	TITLE	ACTION	DISPOSITION
5105	In re Application of Norris Distel, an individual doing business as Distel Oil Company, acting for himself and for other licensed distributors of petroleum products of and for the State of Minnesota v. State of Minnesota, William S. Ervin, Attorney General of the State of Minnesota, and George H. Griffith, Chief Oil Inspector of the State of Minnesota	Determination of additional gas tax	Dismissed.
5106	Paul A. Miller, as Trustee in Bankruptcy of Gogebic Steam Boiler Works, Inc., a corporation, v. State of Minnesota, Walter H. Borgen, as County Auditor of St. Louis County, Minnesota, and W. C. Sargent, as County Treasurer of St. Louis County and the County of St. Louis	Constitutionality of Chapter 278, Laws 1935—Right of redemption from tax sale	Pending.
5109	State of Minnesota v. Patrick H. Joyce and Luther M. Walter, Trustees of the property of the Chicago, Great Western Railroad Company	Violation of the Track Clearance Law	Dismissed.
5110	S. S. Kresge Company v. State of Minnesota	Refund of gross sales tax	Pending.
5111	State of Minnesota v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co.	Track clearance	Dismissed.
5113	The First and American National Bank of Duluth, et al. v. Raymond W. Higgins and Charles H. Thornton as trustees of the Trusts created by William J. Conan and Eliza Conan	Declaratory judgment	Pending.
5116	L. T. Stevenson'sInc. , a corporation, v. State of Minnesota	Chain store tax	Pending.
5117	The Duluth & Iron Range Railroad Company, a corporation, v. Harry E. Boyle, et al.	Refund of $15,077.42	Pending.
5118	Duluth, Missabe & Iron Range Railroad Co. v. Harry E. Boyle, et al.	Refund of $645.09	Pending.
5119	Lake Superior Consolidated Iron Mines, a corporation, v. Harry E. Boyle, et al.	Refund of $87.51	Pending.
5120	Oliver Iron Mining Co. v. Harry E. Boyle, et al.	Refund of $16,672.88	Pending.
5121	Proctor Water & Light Co., a corporation, v. Harry E. Boyle, et al.	Refund of $311.49	Pending.
5124	Helen Behrens, Inc., a corporation, v. State of Minnesota	Chain store tax refund $187.72	Pending.
5125	S. & S. Auto Parts Co., a corporation, v. State of Minnesota	Chain store tax refund $38.64	Pending.
5126	Silverberg Brothers Companies v. State of Minnesota	Chain store tax refund $1,267.86	Pending.
5127	Tillie Rasmussen & Wm. Rasmussen, husband and wife v. H. W. Rasmussen; The Goodrich Gamble Co.; Herbert H. Hoar; and the State of Minnesota	Partition proceedings State has judgment for $84.47	Pending.
5128	Homer D. Pearce and Paul J. Berkett doing business as Pearce and Berkett v. State of Minnesota	Refund of chain store tax	Pending.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
5129	R. P. Rosbach, C. E. Rosbach and Othmor Taschner, co-partners doing business as R. P. Rosbach v. State of Minnesota	Refund of chain store tax	Pending.
5130	In the Matter of Condemnation by the State Fire Marshal of a building owned by W. H. Davy Estate, et al., Lots 3 to 12, inclusive, Block 11, located in City of Moorhead	Fire hazard	Buildings ordered to be demolished.
5131	The Richman Brothers Company v. State of Minnesota	Refund of chain store tax	Pending.
5132	In the Matter of the condemnation by State Fire Marshal of a building owned by Georgianna Berrigan and located in Lot 10, Block 48, City of Moorhead	Fire hazard	Buildings ordered to be demolished
5133	City of Bemidji, et al. v. William S. Ervin, et al.	Declaratory judgment	Action dismissed.
5134	L. H. Raddatz, individually and doing business under the firm name and style of Raddatz I.G.A. Stores v. State of Minnesota	Refund of chain store tax	Pending.
5135	Langford Sandwich Shops, Inc., a corporation, v. State of Minnesota	Refund of chain store tax	Pending.
5136	W. H. Burd, Inc., a corporation, and Burd Cigar Company, a corporation, v. State of Minnesota	Refund of chain store tax	Pending.
5137	Oscar Wick, doing business under the name and style of Arrowhead Hotel v. State of Minnesota	Refund of chain store tax	Pending.
5138	W. G. Woodward Company, a corporation, v. State of Minn.	Refund of chain store tax	Pending.
5139	State of Minnesota, by William S. Ervin, its Attorney General v. A certain parcel of land in Cook County, State of Minnesota hereinafter described; Grand Marais Lake Site Company, et al.	Grand Portage State Forest Condemnation	Dismissed.
5140	The Trustees of the Hamline University of Minnesota; Alice E. Morley; William P. Westfall and Sophia G. Westfall, husband and wife v. Minnesota Tax Commission, et al.	Tax upon income and annuities	No abuse of the tax exemption provision of the territorial charter of the trustees. Chapter 91, Laws 1937, unconstitutional.
5142	Moses Sapero and Abe Sapero, co-partners doing business as Sapero Brothers, a co-partnership v. State of Minnesota	Refund of chain store tax	Pending.
5143	Holt Motor Company, a corporation, v. State of Minnesota	Refund of chain store tax	Pending.
5144	The State of Minnesota by William S. Ervin, its Attorney General v. Certain parcels of land in Cass County, state of Minnesota herein described; John Reid, et al.	Condemnation for Washburn Lake Camp Site	Land condemned. Cost of land, $1.00.
5145	The State of Minnesota by William S. Ervin, its Attorney General v. Certain parcels of land in Clearwater County, State of Minnesota, Newton M. Harris	Condemnation for White Earth State Forest	Land condemned—Cost of land $300.00.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
5146	State of Minnesota v. Margaret Cavanaugh and Florence M. Lepinsky, as Guardian of said Margaret Cavanaugh	Claim for maintenance	Pending.
5148	State of Minnesota by William S. Ervin, its Attorney General, v. Certain parcels of land in Crow Wing County, State of Minnesota, herein described, Iver S. Rathi, et al.	Greer Lake condemnation	Land condemned. Cost of land $5.00.
5149	G. E. Fredsell v. Minnesota State Life Insurance Company, an insurance Company and State of Minnesota upon relation of William S. Ervin its Attorney General	Receivership	Pending.
5150	State of Minnesota v. Paul Popilek	Timber trespass $204.88	Pending.
5151	State of Minnesota v. Roy Keliker and Theodore Skrivseth, also known as Ted Skrivseth	Damages $434.95	Pending.
5153	In the Matter of the Estate of John Saari, decedent, John Aspie as Administrator v. Board of Control	Claim of $2,334.00	Settled—$300.00 received from estate.
5154	State of Minnesota ex rel. Walter MacLeith v. Herman C. Wenzel, Commissioner of the Department of Conservation of the State of Minnesota	Writ of Mandamus, soldiers preference	Settled for $403.63 upon release of action.
5155	State of Minnesota, ex rel. H. B. Nickerson v. Herman J. Aufderheide as Administrator of State Relief Agency and Karl A. Lundberg as Director of Personnel, State Relief Agency	Writ of Mandamus, soldiers preference	Dismissed. No appeal.
5159	State of Minnesota v. Vernon Foley and Kenneth Hannah	Damage claim for $300.00	Pending.
5160	In the Matter of the Estate of Albin Kaukonen, decedent, A. J. Lindgren, as Administrator	Claim for $2,302.67	Settlement of $600.00 from estate.
5161	The State of Minnesota by William S. Ervin its Attorney General v. A tract of land in Ramsey County, State of Minnesota, herein described, County of Ramsey, City of St. Paul, et al.	Condemnation of land for an addition to the St. Paul fish hatchery	Land condemned.
5162	Virginia Clifford v. Minnesota Tax Commission	Refund of income tax	Pending.
5163	Booth Fisheries Corporation v. Arthur Emme, E. H. Frank and Ed Pohrte	Recovery of property seized by Game and Fish Department while fishing illegally	Judgment entered in the sum of $875.33. Plaintiff entitled to possession of confiscated property.
5164	Archie E. Meyer v. Arthur Emme, and E. H. Frank	Recovery of property seized by Game and Fish Department while fishing illegally	Pending.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
5165	In the Matter of the Suspension or Revocation of the license of Dr. R. L. Mathews to practice dentistry in the State of Minnesota	Revocation or suspension of license..	License suspended—Order of Dental Board affirmed.
5166	Russell Smith v. J. E. Miller, individually and as a sole trader doing business under the firm name and style of Miller Mercantile Co. and Northwestern National Bank & Trust Co. and State of Minnesota	Complaint in intervention.....	Dismissed.
5168	The Board of Education of the City of Duluth v. Howard W. Anderson, Louis B. Harris, Sarah T. Calvin, William E. Leppa and Mercedes L. Nelson as members of the State Board of Education of the State of Minnesota and John Gunderson Rockwell, as Commissioner of Education	Distribution of income tax fund.....	Held for the State in part and held for the Plaintiff in part—Both parties appealing to Supreme Court—Pending.
5169	Clifford v. State of Minnesota	Refund of income taxes paid.....	Pending.
5170	State of Minnesota v. Frances Nadolny and Rosalie Waldoch, as Guardian of said Frances Nadolny	Claim for maintenance.....	Collected claim in full—Dismissed.
5171	Albert C. Kavli v. Minnesota Tax Commission	Sale of forfeited tax lands.....	Pending.
5172	C. Thomas Stores Sales System, Inc., v. Harry E. Boyle, et al.	Validity of Chapter 93, Special Session Laws 1937.....	Motion denied.
5174	In the Matter of the Estate of Stiles W. Burr, deceased	Determination of inheritance taxes...	Transfer by the will of the deceased not subject to inheritance tax.
5175	In the Matter of the Application of Belle Glover, for old age assistance, filed with County Agency, County Welfare Board of Hennepin County, appellant	Old age assistance.....	State Agency decisions dated August 17, 1937, and November 15, 1937, null and void.
5177	State of Minnesota v. H. C. Weaver	Income tax $81.96, interest and penalty	Pending.
5178	State of Minnesota v. Park R. Learned	Income tax $101.46, interest and penalty	Pending.
5179	State of Minnesota v. T. T. Clark	Income tax $25.61, interest and penalty	Pending.
5180	State of Minnesota v. M. S. Stringer	Income tax $33.69, interest and penalty	Pending.
5181	State of Minnesota v. Charles W. Gordon	Income tax $251.82, interest and penalty	Pending.
5182	State of Minnesota v. Thomas E. Carpenter	Income tax $43.09, interest and penalty	Pending.
5183	State of Minnesota v. Paul C. Thomas	Income tax $82.09, interest and penalty	Pending.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
5184	State of Minnesota v. Traer Company of Minnesota, a corporation	Income tax $509.00, interest and penalty	Pending.
5188	In the Matter of the Application of Edward H. Seidel for Old Age Assistance, filed with County of Hennepin	Old age assistance	Order of Director of Old Age Assistance affirmed—Appealed to the Supreme Court.
5189	Magnus W. Brown v. Dakota County	Old age assistance	Pending.
5190	Minnesota Humane Education Society, Howard Betts, Vivian M. Sanderson, Ethelyn Cheney & Laura F. Trombley v. Minnesota State Livestock Sanitary Board, Charles E. Cotton, F. E. Harrington, George E. Leach, Frank Forestal, John P. Wall and Gilbert Seashore	Injunction (Muzzling of dogs)	Motion denied.
5191	In the Matter of the Feeblemindedness of Selma Bertha Anderson	Feebleminded	Dismissed and second case commenced on November 8, 1938, which is still pending.
5192	In Re: Estate of Ann Mealey	Mortgage foreclosure	Pending.
5193	In the Matter of the Application of Frank Novak, for Writ of Habeas Corpus, by his Attorney, Arthur LeSueur	Writ of Habeas Corpus	Writ discharged—Appealed to Supreme Court.
5194	State of Minnesota v. Garfield Avenue Dock Company, a corporation	Inspection fee claim $2,343.00	Pending.
5195	John H. Neis, Henry Branch, Anton Weber and Nick Stein v. Herman C. Wenzel as Commissioner of Conservation of the State of Minnesota	Injunction	Pending.
5196	State of Minnesota v. Lisette Laraway	Collection of inheritance taxes $3,000.00	Pending.
5197	State of Minnesota v. Matilda A. Basting	Collection of inheritance taxes $3,000.00	Pending.
5198	In the Matter of the Application of Folly Karp for Writ of Habeas Corpus by his attorney, Arthur LeSueur	Writ of Habeas Corpus	Writ discharged.
5200	J. Ernest McLaughlin, Susan McLaughlin, Harry W. Olson and Ethel Olson v. Minnesota State Livestock Sanitary Board, Charles E. Cotton, F. E. Harrington, George E. Leach, Henry H. Bank, Acting Mayor of Minneapolis, Frank Forestal, John P. Wall and Gilbert Seashore	Injunction from restraining order issued on dogs	Pending.
5201	The State of Minnesota on the relation of Minneapolis-St. Paul Sanitary District, a corporation, v. C. A. Halverson, as State Treasurer of the State of Minnesota and as Treasurer of the Minneapolis-St. Paul Sanitary District, a corporation	Writ of Mandamus	Dismissed.
5206	Virginia Clifford v. Minnesota Tax Commission	Refund of taxes paid in 1935	Pending.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
5207	George B. Clifford, Jr., v. Minnesota Tax Commission	Refund of taxes paid in 1935	Pending.
5208	State of Minnesota, ex rel. Richard G. Quehl v. Charles Munn, Hjalmar Petersen, Harold Atwood as Commissioners of the Railroad and Warehouse Commission of the State of Minnesota	Writ of Mandamus (Soldiers preference)	Reinstated—Dismissed.
5209	Olaus Rud v. the County Board of County Commissioners of Clearwater County and Herman Wenzel as Commissioner of the Department of Conservation of the State of Minnesota	Removal of dam	Pending.
5210	M. C. Madsen v. Minnesota Tax Commission	Refund of taxes paid $670.15	Pending.
5211	State Board of Dental Examiners, State of Minnesota v. Harold G. Dangremond	Injunction	Pending.
5212	State of Minnesota v. Northern Pacific Railroad Company, a corporation, and Harry Schnitzer, a sole trader doing business under the designation name and style of Schnitzer Iron & Metal Company	Track clearance	Fine of $500.00 collected—Dismissed.
5213	State of Minnesota v. M. A. Hanna Coal & Dock Company, a corporation	Inspection fee	Pending.
5214	The State of Minnesota v. The Aitkin County Farm Land Company, a corporation	Action to quiet title by State on tax delinquent lands	Motion by plaintiff for amending Findings of Fact, Conclusions of Law or a new trial—Appealed to Supreme Court.
5216	J. B. Sprafka v. State of Minnesota and County of Otter Tail, Minnesota, a municipal corporation	Constitutionality of Chapter 278, Laws 1935	Pending.
5217	J. C. Bryngelson v. State of Minnesota and County of Becker, a municipal corporation	Constitutionality of Chapter 278, Laws 1935	Pending.
5218	Louise Bryngelson v. State of Minnesota and County of Becker, a municipal corporation	Constitutionality of Chapter 278, Laws 1935	Pending.
5219	State of Minnesota v. Charles P. Megan, Trustee of the Property of the Chicago and North Western Railway Company	Abandonment of station at Smith's Mills, Waseca County	Order Commission to be vacated and set aside.
5220	State of Minnesota v. T. E. McAllister, also known as Thomas E. McAllister and Katie McAllister	Lien for income taxes	Pending.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
5221	In the Matter of the Application of the Calhoun Beach Holding Company for Abatement of Taxes upon Real Estate, State of Minnesota upon the relation of the City of Minneapolis, Minnesota, a municipal corporation	Abatement of taxes, special assessments, penalties and interest	Pending.
5222	In the Matter of the petition for dissolution of Preston Benefit Association	Dissolution of corporation	Corporation dissolved.
5223	State of Minnesota by William S. Ervin its Attorney General v. Max Goodman, H. Y. Josephs and A. I. Shapiro, individually, and as co-partners, doing business under the trade name and style of Goodman's Jewelers	Injunction restraining from practicing optometry	Pending.
5224	State of Minnesota, ex rel. A. C. Kvali v. Minnesota Tax Commission, et al.	Writ of Mandamus	Demurrer of Minnesota Tax Commission sustained.
5225	In the Matter of proceedings for the reconstruction, removal or abandonment of the dam in the Snake River below the outlet of Cross Lake in Pine County, Minn.	Removal of dam	Dam ordered removed.
5226	In the Matter of the application of the State of Minnesota by William S. Ervin its Attorney General for the possession of certain abandoned funds in the First National Bank of St. Paul, Minnesota, a banking corporation	Unclaimed accounts to be escheated to State	Pending—To be heard on January 3, 1939.
5228	State of Minnesota v. Alfred Truhn	Violation of Code of Fair Competition for the Barber Trade	Pending.
5229	In the Matter of the estate of George B. Smith	Escheat	Pending.
5231	State of Minnesota v. Inland Coal & Dock Company	Weighing fees $568.00	Pending.
5232	The Worthington Cemetery Association v. Mrs. J. T. Smallwood, et al., and Wm. S. Ervin, as Attorney General	Enforcement of a trust, Sec. 8090-3, M.M.S., 1927	Pending.
5233	In the Matter of the Dissolution of the Public Mutual Life Association	Dissolution	Association dissolved.
5236	State of Minnesota v. Spring Valley Co-op. Oil Co.	Gas tax and inspection fee $938.02	Pending.
5237	Bernard N. Litman & Rosolyn H. Litman v. Kate E. Lynch, et al.	Quiet title	Pending.
5241	American Surety Company of New York, a corporation v. William Schramm, et al.	Injunction	Pending.
5242	Gustave A. Treeman v. O. A. Decker, Roy Hansen and F. M. Coons	Damage for unlawful arrest	Pending.
5243	Vivian Johnson v. William S. Ervin, et al.	Validity of Secs. 2 and 4 of C. 316, L. 1927, as amended	Pending.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
5246	West Publishing Company, a corporation v. The Minnesota Tax Commission, et al.	Refund of income taxes paid	Pending.
5248	William W. Maghan v. The Industrial Commission of Minnesota, Board of Painting Examiners and J. Emil Kangas	Writ of Mandamus	Pending.
5249	State of Minnesota, on the relation of William J. Burns, International Detective Agency v. Elmer A. Benson, individual and as Governor of the State of Minnesota	Writ of Mandamus	Demurrer overruled—5 days' stay granted to serve a return to the writ.
5250	Geo. B. Clifford & Company, a corporation, v. The Minnesota Tax Commission and Harry E. Boyle, George Gage and George E. Wallace, as members thereof	Writ of Mandamus, refund of income $1,413.79	Pending.
5255	State of Minnesota v. Great Northern Railway Company, a corporation	Violation of Track Clearance Law (Lakeland Fruit and Produce Co.)	Pending.
5256	In the Matter of the feeblemindedness of Edith Eisman	Restoration to capacity	Submitted to Court.
5259	State of Minnesota v. Webster and Chapman, as Trustees of the property of the Mpls., St. Paul and Sault Ste. Marie Ry. Co., debtor and Twin City Tank Silo and Specialty Company	Violation of Track Clearance Law	Pending.
5260	Louis Plepler, doing business under the name and style of Victory Printing Co. v. McGowan, State Expert Printer and E. J. Pearlove, et al.	Injunction	Pending.
5261	Russell-Miller Milling Co. v. Harry E. Boyle, George F. Gage and Geo. E. Wallace, members of and constituting the Minnesota Tax Commission	Refund of income taxes	Pending.
5262	Daniel F. Bull v. The Minnesota Tax Commission, and Harry E. Boyle, George F. Gage and George E. Wallace, as members thereof	Refund of income taxes	Pending.
5263	Rosamond L. Bull v. The Minnesota Tax Commission, and Harry E. Boyle, George F. Gage and George E. Wallace, as members thereof	Refund of income taxes	Pending.
5264	Daniel F. Bull, Bess Bull Campbell, and Clara Bull Baldwin, as Executors of the Will of Elizabeth H. Merrifield, deceased, v. The Minnesota Tax Commission, et al.	Refund of income taxes	Pending.
5266	State ex rel. Eva Miller v. Margaret Bushnell and Jean Johnson	Writ of Habeas Corpus	Writ granted—Custody of child awarded to petitioner.
5267	Geo. B. Clifford & Company, a corporation, v. The Minnesota Tax Commission and Harry E. Boyle, George F. Gage and George E. Wallace, as members thereof	Refund of income taxes	Pending.
5268	Daniel F. Bull v. The Minnesota Tax Commission and Harry E. Boyle, George F. Gage and George E. Wallace, as members thereof	Refund of income taxes	Pending.

DISTRICT COURT CIVIL CASES—Continued

No.	TITLE	ACTION	DISPOSITION
5269	Rosamond L. Bull v. The Minnesota Tax Commission and Harry E. Boyle, George F. Gage and George E. Wallace, as members thereof	Writ of Mandamus	Pending.
5270	Rosamond L. Bull v. The Minnesota Tax Commission and Harry E. Boyle, George F. Gage and George E. Wallace, as members thereof	Refund of income taxes	Pending.
5271	Daniel F. Bull v. The Minnesota Tax Commission and Harry E. Boyle, George F. Gage and George E. Wallace, as members thereof	Writ of Mandamus	Pending.
5272	Daniel F. Bull, Bess Bull Campbell, and Clara Bull Baldwin, as Executors of the Will of Elizabeth H. Merrifield, deceased v. The Minnesota Tax Commission and Harry E. Boyle, George F. Gage and George E. Wallace, as members thereof	Refund of income taxes	Pending.
5273	Daniel F. Bull, Bess Bull Campbell and Clara Bull Baldwin, as Executors of the Will of Elizabeth H. Merrifield, deceased, v. The Minnesota Tax Commission and Harry E. Boyle, George F. Gage and George E. Wallace, as members thereof	Writ of Mandamus	Pending.
5274	State of Minnesota v. G. W. Webster and Joseph Chapman as Trustees of the property of the Minneapolis, St. Paul and Sault Ste. Marie Ry. Co., debtor, and George J. Johnstone, a sole trader, doing business as the Northwest Universal Equipment Company	Track clearance violation	Pending.
5276	Barlow Realty Company, a corporation, v. Industrial Commission of Minnesota, and A. E. Smith, Chief, Division of Accident Prevention of Industrial Commission of Minnesota	Injunction	Pending.

DISTRICT COURT CRIMINAL CASES

No.	TITLE	ACTION	DISPOSITION
706	State of Minnesota v. Carl E. Johnson	Forgery 2nd degree	Plead guilty and sentenced to two years.
724	State of Minnesota v. Ralph Ramge	Manslaughter 1st degree	Convicted.

MUNICIPAL COURT

No.	TITLE	ACTION	DISPOSITION
5166	Russell Smith v. J. E. Miller, individually and as a sole trader doing business under the firm name and style of Miller Mercantile Company v. Northwestern National Bank and Trust Company and State of Minnesota	Complaint in intervention	Dismissed.
4905	State of Minnesota v. H. L. Bowen, also known as Herbert L. Bowen	Unlawful detainer	Writ of Restitution served and defendant removed from premises.

PROBATE COURT

No.	TITLE	ACTION	DISPOSITION
4257	In the Matter of the Estate of Thomas Holman	Escheat	Pending.
4384	In re feeble-mindedness of Mamie Talbert, also known as Mae Talbot	Appointment of guardian	Guardian appointed.
4395	In re feeble-mindedness of Herman Fechner	Discharge of guardian (2nd case)	Pending.
4455	In the Matter of the Estate of Robert Gothard Peterson	Escheat	Pending.
4461	In the Matter of the Estate of Alanson J. Kreger	Escheat	Pending.
4505	In the Matter of the Estate of Donald B. McMullen, Jr.	Determination as to inheritance taxes	Pending.
4558	In the Matter of the Estate of Sara Da Costa Dickson, deceased	Lien for inheritance tax	Pending.
4560	In the Matter of the Estate of George McCone, deceased	Lien for inheritance tax	Pending.
4561	In the Matter of the Estate of John T. Anderson, deceased	Escheat	Judgment entered—Property recovered.
4594	In the Matter of the Estate of Isaac Weil, deceased	Lien for inheritance tax	Pending.
4595	In the Matter of the Estate of Catherine O'Brien, deceased	Re Estate of James Patrick O'Brien—Recovery of deposit with County Treasurer	Pending.
4658	In the Matter of the Estate of Benjamin Cobb, also known as Ben Cobb	Escheat	Pending.
4668	In the Matter of the Estate of Haakon Oscar Hansen	Determination of heirs	Pending.
4675	In the Matter of the Estate of Agenes O'Reilly or Agnes Salera, deceased	Claim for State Board of Control	Pending.
4681	In the Matter of the feeble-mindedness of Annette Lenander	Discharge of guardianship	Pending.
4709	In the Matter of the Estate of Benjamin Franklin Stille, also known as Benjamin F. Stille, B. F. Stille and Ben F. Stille	Escheat	Pending.
4766	In the Matter of the Estate of Charles W. Rieger, deceased	Escheat	Reassessment and redetermination for inheritance tax purposes denied.
4880	In the Matter of the feeble-mindedness of Jean Sireno	Discharge of guardianship	Pending.
4882	In the Matter of the Estate of Rebecca Grace Kizar, deceased	Inheritance tax lien	Pending.

PROBATE COURT CASES—Continued

No.	TITLE	ACTION	DISPOSITION
4883	In the Matter of the Estate of John A. Brasie, deceased.....	Inheritance tax lien.....	Pending.
4890	In the Matter of the Estate of John Edwin Rattenstoller.....	Determination of will and disposal of property	Collected $50.00 from administrator.
4898	In the Matter of the Estate of Josephine Conrad	Escheat	Pending.
4911	In the Matter of the Estate of Stephan H. Baxter.....	Inheritance tax lien.....	Pending.
4922	In the Matter of the Estate of Joseph L. Hart.....	Escheat	Escheated to State.
4949	In the Matter of the guardianship of Zelda Carlson as a delinquent child	Restoration to capacity.....	Restored.
4952	In the Matter of the feeble-mindedness of Ella Beckman.....	Restoration to capacity.....	Restored.
4955	In the Matter of the feeble-mindedness of Theresa Kennedy...	Restoration to capacity.....	Restored to capacity—Appealed to District Court.
4957	In the Matter of the feeble-mindedness of Eleanor Emholtz...	Restoration to capacity.....	Restored.
4964	In the Matter of the guardianship of Catherine Krtnick, also known as Catherine Kratnick, nee Catherine Gorian.....	Restoration to capacity.....	Denied.
4965	In the Matter of the restoration to capacity of Marion Hovde Collins	Restoration to capacity.....	Petition withdrawn for restoration.
4986	In the Matter of the Estate of Henry Pitts	Recovery of escheat of $2,376.44.....	Estate restored to heirs.
4987	In the Matter of the Estate of Patrick Boyle	Recovery of escheat of $1,450.00.....	Estate restored to heirs.
4992	In the Matter of the Estate of Solomon Wirtanen	Escheat	Pending.
4998	In the Matter of the Estate of Lena Chelgren	Lien for inheritance taxes.....	Pending.
4999	In the Matter of Anthony Andresky, also known as Tony Andrusky, Tony Androsky or Tony Andresky.....	Escheat	Pending.
5004	In the Matter of the guardianship of Gustav A. Thauwald....	Order to file Final Account of Estate	Pending.
5006	In the Matter of the feeble-mindedness of Pearl Brandt.....	Feeble-mindedness petition for commitment	Denied.
5007	In the Matter of the guardianship of Guy Miller.....	Restoration to guardian.....	Pending.
5008	In the Matter of the feeble-mindedness of Andrew Traczyk...	Restoration to capacity.....	Restored.
5015	In the Matter of the Estate of Gust Rudquist	Escheat	Pending.
5017	In the Matter of Gladys Bazinet Wilsey.....	Restoration to capacity.....	Restored to capacity.
5018	In the Matter of Loraine Swanger and Gladys Swanger as dependent and neglected children.....	Restoration to capacity.....	Restored to capacity.
5020	In re Estate of Annie Sanborn Pyle.....	Determination of inheritance tax....	Pending.
5025	In the Matter of the Estate of Robert Fifer	Escheated Estate	Estate in the amount of $150.00 escheated to State of Minnesota.
5033	In the Matter of the Estate of Thomas J. Brady.....	Lien for inheritance taxes.....	Lien satisfied.
5045	In the Matter of Sarah and David Koch.....	Discharge of guardianship.....	Petition denied.
5078	In the Matter of the Estate of John A. Teague, deceased....	Lien for inheritance taxes.....	Pending.
5079	In the Matter of the guardianship of Lauren, Arlene, Jerome and Melvin Westberg.....	Liquidation of property by the State Board of Control.....	Guardian removed and State Board of Control appointed.

PROBATE COURT CASES—Continued

No.	TITLE	ACTION	DISPOSITION
5082	In the Matter of the feeble-mindedness of Harold Hopp, Viola Hopp and Olga Hopp	Guardianship by State Board of Control	Pending.
5093	In the Matter of the Estate of Engeborg Widmey	Lien for inheritance taxes	Satisfaction of claim.
5112	In the Matter of the guardianship of Esther Sholl	Discharge of guardianship	Pending.
5115	In the Matter of the guardianship of Bertha Mortenson	Discharge of guardian	Pending.
5122	In the Matter of the Estate of Frank Latimer	Escheat Estate	Estate in the amount of $35.90 escheated to State of Minnesota.
5141	In the Matter of the Estate of Morris J. O'Brien, deceased	Lien for inheritance taxes	Land taken by State for taxes due.
5147	In the Matter of the Estate of Patrick H. Manion	Lien for inheritance taxes	Pending.
5152	In the Matter of the Estate of Ella Laucks	Lien for inheritance taxes	Pending.
5157	Estate of Lubovo A. Villano also sometimes known as Marionne Deliu, deceased	Escheat	Pending.
5173	In the Matter of the feeble-mindedness of Hilda Arneson	Restoration to capacity	Restored to capacity.
5215	Re: Estate of Clifford W. King	Escheat	Pending.
5229	In the Matter of the Estate of George B. Smith	Escheat	Pending.
5230	In the Matter of the Estate of Victor H. Anneka, deceased	Inheritance tax claim $7,036.00 and interest	Pending.
5234	In the Matter of the Estate of Henry Schmidt	Claim for maintenance $1,947.73	Pending.
5235	In the Matter of the feeble-mindedness of Luella Rouse	Restoration to capacity	Pending.
5238	In the Matter of the Estate of Louis Monson	Escheat	Pending.
5240	In the Matter of the Estate of William Freeman	Escheat	Pending.
5245	In the Matter of the Estate of Harry J. Carling, deceased	Income tax claim	Pending.
5247	In the Matter of the Estate of John W. Hayes, deceased	Lien for inheritance tax	Pending.
5262	In the Matter of the feeble-mindedness of George, Sidney, Frank and Violet Casper	Restoration to capacity	Denied.
5265	In the Matter of the feeble-mindedness of Bernice Mantel	Restoration to capacity	Pending.

JUVENILE COURT

No.	TITLE	ACTION	DISPOSITION
5058	In the Matter of Janet Nikerson	Dependent child	Denied.

STATE—MISCELLANEOUS

No.	TITLE	ACTION	DISPOSITION
5066	State Land, State owned dock at Duluth, Minnesota	Receipt of certificate of title from State Auditor	For record purposes.

RAILROAD AND WAREHOUSE COMMISSION

No.	TITLE	ACTION	DISPOSITION
4125	State of Minnesota v. Tri-State Telephone Company	Telephone property valuation	Findings of Railroad & Warehouse Commission affirmed.
4589	In the Matter of the application of W. H. Bremner, receiver of the Minneapolis & St. Louis Railroad Company for permission to withdraw the Agent at the Station of Carver, Minnesota, and to substitute custodian service at said station	Abandonment	Appealed to Supreme Court—Dismissed.
4592	In the Matter of the application of the Chicago, Rock Island and Pacific Railway Company for leave to discontinue Cazenavia, Minnesota, as an agency station	Abandonment	Denied—Appealed to District Court.
4622	In the Matter of the application of Steller Transportation Company, Marshall Truck line and Joseph Verschingel for a certificate of public convenience, etc., pursuant to Laws 1925, Chapter 185	Appeal from order denying certificate of public convenience	Reversed, 266 N. W. 746; 197 Minn. 234.
4673	In the Matter of the application of the Duluth, Missabe and Northern Railway Company for permission to discontinue the operation of certain passenger trains	Abandonment of train service	Abandonment allowed.
4696	In the Matter of the petition by the County Commissioners of Lyon County for road crossings on Chicago, North Western Railroad Company	Railroad crossings	Crossings granted. Appealed—Pending.
4908	In the Matter of the Minnesota Transfer Railway Company, dealing with the closing of the Charles Street and the East Hennepin Avenue Station	Abandonment of two stations	Denied—Appealed to District Court.
5063	In the Matter of the application of the City of St. Paul, a municipal corporation, for an Order of the Commission permitting certain exceptions in the Matter of the requirements for track clearances prescribed by C. 238, L. 1937	Track clearance	Petition denied.

INDUSTRIAL COMMISSION

No.	TITLE	ACTION	DISPOSITION
4545	In the Matter of the petition of Lillian Winans v. Northrup School of Rochester, County of Olmsted, City of Rochester and State of Minnesota	Compensation claim	Pending.
4573	Julius A. Schmahl, as State Treasurer and Custodian of the Special Compensation Fund v. S. J. Neises	Compensation claim	Pending.
4739	Alice Scheer v. State of Minnesota, Department of Gillette Hospital	Compensation claim	Pending.

INDUSTRIAL COMMISSION

No.	TITLE	ACTION	DISPOSITION
4840	J. A. Gervais v. The State of Minnesota and the Department of Conservation	Compensation claim	Pending.
4889	Guy Green v. Julius A. Schmahl, State Treasurer of the State of Minnesota, as Custodian of the Special Compensation Fund	Compensation claim	Denied—Appealed to Supreme Court.
5026	Valentine Fettig v. United Granite Co. and Ocean Accident & Guarantee Corp. and C. A. Halverson, Treasurer of the State of Minnesota	Compensation claim	Petition denied.
5048	Peter Koprovich v. C. A. Halverson, State Treasurer and Custodian of the Special Compensation Fund of the State of Minnesota	Compensation claim	Compensation awarded.
5068	Fred Haas v. R. Maturi and Company and Employers Mutual Liability Insurance Company	Workmen's Compensation claim	Compensation awarded.
5186	Irene R. Arland, widow of Raymond J. Arland, deceased, v. State of Minnesota, Department of Labor and Industry or State Executive Council	Workmen's Compensation claim	Pending.

INTERSTATE COMMERCE COMMISSION

No.	TITLE	ACTION	DISPOSITION
4222	In re Rate Structure Investigation—Grain and Grain Products within the Western District and for export	Rates, No. 17000, part 7	Pending.
4223	In re Rate Structure Investigation Western Trunk—Line Class rates	Rates, No. 17000, part 2	Pending.
4224	In re Rate Structure	Livestock rates, No. 17000, part 9	Pending.
4297	In the Matter of rates and charges of carriers by Railroads subject to the Interstate Commerce Act—1933	Rates and charges of carriers	Pending.
4599	In the Matter of the application of the Chicago, Great Western Railroad Company for certificate that public convenience and necessity permits the abandonment of portions of railroad between Harton and Utica, Minn., and require the extension of its line by operation over the track of Chicago and Northwestern Railway Company and a connection between said railroads	Abandonment of railroad line between Harton and Utica, Minnesota	Pending.
4702	Emergency freight charges in Minnesota	Emergency freight charges in Minnesota	Pending.

INTERSTATE COMMERCE COMMISSION—Continued

No.	TITLE	ACTION	DISPOSITION
4738	In the Matter of the Associated Railway Company, Chicago and Northwestern Railway Company, Chicago, Burlington & Quincy Railroad Company; Chicago, Great Western Railway Company	To acquire property of the Minneapolis, St. Paul and Sault St. Marie	Pending.
4826	In the Matter of the proposed dismemberment and partial abandonment of the Minneapolis & St. Louis Railroad Company	Abandonment	Pending.
5074	Application of Duluth, Missabe & Iron Range Ry. Co. for authority to acquire control of the Duluth & Iron Range R. R. Co. and the Interstate Transfer Ry. Co. through ownership of capital stock	Petition for merger	Acquisition approved and granted to issue $30,000,000.00 in first mortgage 3½% bonds.
5108	Ex Parte 123, fifteen per cent case, 1937	Rate case	Pending.
5158	In the Matter of the application of Duluth, Missabe and Iron Range Railway Company, The Duluth & Iron Range Railroad Company and Interstate Transfer Railway Company under Section 5 of the Interstate Commerce Act, as amended, for an order authorizing the merger of their properties into Duluth, Missabe & Iron Range Railway Co. for ownership, management and operation	Merger	Pending.
5167	In the Matter of the plan of reorganization for Chicago, Milwaukee, St. Paul & Pacific Ry. Co. presented by group of Institutional Investors—Holders of Chicago, Milwaukee, St. Paul & Pacific Railroad Company securities January 7, 1938	Reorganization	Pending.

BEFORE THE FEDERAL POWER COMMISSION

No.	TITLE	ACTION	DISPOSITION
5156	Protest of the State of Minnesota by Herman C. Wenzel, Commissioner of Conservation of the State of Minnesota, against the granting of a license to the Pigeon River Lumber Company, to construct a power dam	Protest against construction of a power dam on Pigeon River	Pending.

STATE BOARD OF DENTAL EXAMINERS

No.	TITLE	ACTION	DISPOSITION
5102	In the Matter of the suspension or revocation of the licenses of Dr. Ingman O. Gullings, Dr. A. H. Russell, Dr. Arthur G. Anderson, Dr. Donald Hill Brown, Dr. Miles E. Lawler to practice dentistry in the State of Minnesota	Revocation of licenses	Pending.
5165	In the Matter of the suspension or revocation of the license of Dr. R. L. Mathews to practice dentistry in the State of Minnesota	Revocation or suspension of license	License suspended for 10 days.

BEFORE STATE BOARD OF PHARMACY

No.	TITLE	ACTION	DISPOSITION
4740	In the Matter of the revocation of the Pharmacist's license of Bert L. Leach, doing business as the Leach Drug Store, Detroit Lakes, Minnesota	Revocation of license	Reprimand issued.
4927	In the Matter of the proposed revocation of the license of Dr. L. L. Williams, optometrist, to practice dentistry	Revocation of license	License revoked—Appealed to the District Court.

BEFORE THE SECURITIES COMMISSION

No.	TITLE	ACTION	DISPOSITION
4530	State of Minnesota v. Minnesota Power and Light Company	Sale of stock	Pending.

BEFORE STATE BOARD OF BARBER EXAMINERS

No.	TITLE	ACTION	DISPOSITION
5114	In the Matter of the petition for the revocation of the certificate of registration of Ben Schock	Revocation of license	Order revoking Certificate of Registration suspended for thirty days—Pending.
5227	In the Matter of the petition for the revocation of the certificate of registration of James Najjar	Revocation of certificate	Certificate revoked.
5239	In the Matter of the petition for the revocation of the certificate of registration of Math Dillenberg	Revocation of license	Certificate suspended for 15 days and placed on probation for one year.

STATE EXECUTIVE COUNCIL

No.	TITLE	ACTION	DISPOSITION
5257	In the Matter of the claim of the State of Minnesota against the Tankar Gas Company and K. T. Weedeman (See also files No. 4422 and No. 4320)	Gas tax and inspection fee	Settlement accepted for $873.87.
5258	In the Matter of the claim of the State of Minnesota against the Doughboy Service Oil Co. (See also files No. 4422 and No. 4320)	Gas tax and inspection fee	Settlement accepted for $125.00.
5275	In the Matter of the claim of the State of Minnesota against Peter Trader of Duluth, Minnesota for Timber Permits Nos. 8093 and 8095	Timber permits	Settlement accepted for $974.34.

HIGHWAY DIVISION

The Legal Division of the State Highway Department, under the supervision of the Attorney General, and during the time covered by this report, under the immediate supervision of Ordner T. Bundlie, Assistant Attorney General, conducts all the legal proceedings and handles all legal matters for the Commissioner of Highways and the department heads, including the Drivers License Division and the State Highway Patrol.

The Legal Division acts as advisor and conducts all litigation in connection with Highway Department work, the major portion of which is trial of appeal cases in district court in eminent domain proceedings, the handling of all condemnation proceedings, the examination of titles for land acquired for right of way, borrow pit and gravel pit purposes, and in addition thereto, written opinions are requested and furnished. Contracts are drafted and all highway contracts and bonds are submitted for approval as to form and execution. All right of way negotiations as to title, form and execution, including condemnation proceedings, are subject to the approval of the Legal Division. Claims of all nature are handled and investigated for the Department of Highways, including all workmen's compensation cases.

The following is a brief resumè of the activities of your Division for this two year period:

Highway Condemnation Proceedings

1937	102
1938	103
Total	205

These proceedings were had for the acquirement of right of way, gravel and borrow pits.

Appeals from Awards of Commissioners to District Court and Disposition of Same

Number of Appeals

1937	500
1938	401
Total	901

Cases tried in District Court in Various Counties

1937	31
1938	26
Total	57

Number of Appeal Cases Settled

1937	298
1938	227
Total	525

Number of Appeal Cases Pending

1937	135
1938	118
Total	253

Number of Cases Dismissed

1937	36
1938	30
Total	66

Final Certificates in Condemnation Proceedings

1937	166
1938	93
Total	259

Workmen's Compensation Cases

This information is included in the biennial report of the State Industrial Commission whose fiscal year is from July 1 to June 30 following. This report covering Highway Workmen's Compensation cases, therefore, covers the period from July 1, 1936 to June 30, 1938.

The number of cases handled during that period covers 1,338 accidental injuries which were reported, which were all compensable cases.

From July 1, 1936 to June 30, 1937, there were 681 cases handled.

For the period of July 1, 1937 to June 30, 1938, the Legal Division handled 657 cases.

From July 1, 1936 to June 30, 1937, a total of $72,106.41 was disbursed to injured employees, and from July 1, 1937 to June 30, 1938, a total of $63,743.49 was disbursed to injured employees.

In addition, the Department was able to collect a total of $1,203.29 from third parties or their insurers as partial reimbursement for compensation paid.

The following cases are pending before the Industrial Commission:

Joseph T. Gildea vs. Department of Highways	I.C.	408771
Sigurd M. Jordet vs. " " "	I.C.	443240
Hugh L. McConnell vs. " " "	I.C.	396681
S. Tibbetts vs. " " "	I.C.	361679

Land Acquisition, State Relief Agency Under Jurisdiction of Executive Council

The Attorney General's office under the immediate supervision of Ordner T. Bundlie, Assistant Attorney General, has been in charge of the legal work in connection with the acquisition of lands by the State of Minnesota for water and flood control, water conservation, park, lake, dam and work relief purposes as authorized by the State Executive Council, pursuant to Chapter 89, Laws of 1937.

During the years 1937 and 1938 this legal division conducted legal proceedings for the taking of lands in connection with the following projects of the State Relief Agency:

Mustinka River Dam	Grant County
Mound Lake	Rock County
Lac qui Parle River	Swift, Lac qui Parle, Chippewa and Big Stone Counties
Whetstone Diversion	Lac qui Parle and Big Stone Counties
Lake Shetek	Murray County
Cottonwood River	Brown County
Pomme de Terre	Stevens County
Lake Emily	Pope County
Beaver Valley	Houston County
Split Rock	Pipestone County
Mountain Lake	Cottonwood County
Fort Ridgely	Nicollet County
Muskoda Reservoir	Clay County
Minnesota Point	St. Louis County
Big & Little Birch Lakes & Lake Sylvia	Stearns and Todd Counties
South Fort of Two Rivers	Kittson County
Waverly Lake	Wright County
Heron Lake	Jackson County
Wood Lake	Brown and Watonwan Counties
Snake River	Pine County
Benson Park	Swift County
Old Fort Ripley	Morrison County
Frazee Dam	Becker County
Upper Ottertail	Becker County
Lake Melissa	Becker County
Willmar Chain of Lakes	Kandiyohi County
Crooked Lake	Anoka County
Lake Carlos	Douglas County
Lake Osakis	Todd County
Minnesota Lake	Faribault County

Condemnation Proceedings Instituted

1937	5
1938	7
Total	12

Condemnation Proceedings Dismissed During 1937-1938

Fee absolute	6
Flowage easements	2
Total	8

Appeals from Awards of Commissioners and Disposition of Same

1937	78
1938	27
Total	105

Appeals tried in District Court

1937	21
1938	9
Total	30

Number of Appeals Settled

1937	179
1938	49
Total	228

Number of Appeals Dismissed

1937	29
1938	2
Total	31

Number of Appeals pending at close of 1938

1938	28

Condemnations completed by Filing of Final Certificates

1937-1938	16

Miscellaneous Actions Pending

Intervention Suits	3

SUPREME COURT CASES

State v. Werder, et al., Elsie M. Appleton, Intervenor and Herman Werder, et al., Intervenors

Action to restrain purchase of property for highway purposes. Supreme Court, June 4, 1937. Held width order must be filed before purchase.

Joseph Halvorson v. N. W. Elsberg, Commissioner of Highways of State

Concerns driver's license law and financial responsibility feature. District court ordered Commissioner of Highways to issue driver's license without it being necessary for Halvorson to comply with financial responsibility law, Chapter 351, Laws of 1933. State appealed to Supreme Court February 11, 1938, which reversed district court, holding that Halvorson must first comply with Financial Responsibility Law before reissuance of license.

State by Attorney General v. John A. Lytle and McCarthy Holding Company, et al.

(2 cases). Cases tried in district court as to damages for taking of property for right of way. Owners moved for new trial which was denied. Judgment entered May 15, 1937. Property owners appealed to Supreme Court May 7, 1937. Dismissal of appeals on February 14, 1938 and lower district court judgments paid.

Bylund v. Carroll

Bylund, a highway employe, sued Carroll in district court. State has paid partial compensation to Bylund who claims he was injured by automobile driven by Carroll. Tried in Hennepin County District Court. Verdict for defendant. Bylund appealed to the Supreme Court and the State filed a brief amicus curiae as it was interested in the legal features and would be subrogated to the extent of compensation paid if recovery was made. Supreme Court sustained lower court.

UNITED STATES SUPREME COURT

United States of America v. State of Minnesota

This is an action concerning the location of Trunk Highway No. 61, Cook County, Minnesota. Opposed by Federal government. Finding for State in Federal district court appealed by United States to Circuit Court of Appeals, Eighth Circuit. Reversal in Circuit Court. State made petition for writ of certiorari to United States Supreme Court, granted October 10, 1938. State argued before U. S. Supreme Court November 10, 1938. Decision pending.

MISCELLANEOUS CASES

State of Minnesota by Attorney General v. Quality Park Investment Company, et al., respondents, Ramsey County District Court

Eminent domain proceedings for acquirement of premises occupied by Highway Department. Proceedings completed.

State by Attorney General v. Ida Lang, et al.
Eminent domain proceedings instituted at request of Commission of Administration and Finance for acquirement of additional land for Mankato State Teachers College. Condemnation completed except final certificate. Blue Earth County.

State by Attorney General v. Eber R. Randall. District Court, Steel County
Action by State for permanent injunction restraining defendant from interfering with State's erection of snow fences. Permanent injunction and judgment in favor of State.

M. J. Backman v. Tomi and State of Minnesota.
Action in Ramsey County from transfer from Grant County. Personal injury case of third party v. Highway employe. State demurred. Pending.

John A. Scholz and Helen Scholz v. State of Minnesota and N. W. Elsberg as Commissioner of Highways. Hennepin County District Court
Action for damages brought under Chapter 480, Laws of 1937 pursuant to legislative appropriation. State demurred which was overruled. Answer and reply served. Case pending.

R. P. Englund v. N. C. Como and N. W. Elsberg as Commissioner of Highways—Hennepin County District Court
Action on two contracts under declaratory judgment act concerning dispute as to ownership of moneys due from Highway Department on contracts. State answered admitting liability and requesting leave to deposit in court or hold, pending decision. Action pending.

Peter Anton Olson v. State of Minnesota and
Helene Olson v. State of Minnesota (2 cases) District Court, Isanti County
Actions brought under Claims Chapter 480, Laws of 1937, for injuries sustained on account of alleged negligence of Highway employe. State demurred which was overruled and actions tried together. Verdict for plaintiff. State made alternative motion for judgment or for new trial. New trial granted in both cases September 21, 1938. Re-trial pending.

State by Attorney General v. Merrill-Scott Corporation, District Court, St. Louis County
State obtained temporary restraining order and sued for permanent order to enjoin defendant from dredging gravel from flood bay within 1,000 feet of beach gravel deposit owned by State. Case disposed of by defendant paying for gravel taken and case settled.

G. Lindmark v. Nick Merrill and Leslie Espe, District Court, Pope County
Action on account of accident. Espe is Highway Patrolman. Case tried and verdict for defendants.

State ex rel. Oscar R. Smith v. N. W. Elsberg as Commissioner of Highways, District Court, Ramsey County
Soldier's preference case. Relator reinstated. Case settled.

J. J. and M. S. Mergens v. N. W. Elsberg as Commissioner of Highways. Arbitration case, Ramsey County, District Court

Arbitration regarding differences on contract. Prior action under declaratory judgment action as to legal construction of special terms of contract. Arbitration tried three weeks. Arbitrators made findings and judgment entered for $39,300.00 which has been paid.

Louis Swick v. State of Minnesota and Central States Construction Company, District Court, Becker County

Action for gravel allegedly taken from plaintiff's premises. Claims damage under general terms of Claims Statute, Chapter 480, Laws 1937. State demurred which was sustained June 21, 1938.

Bruce Warren, Ralph Flack and James R. McGinnis v. State of Minnesota (3 cases). Hennepin County District Court

Action brought for damage on account of alleged negligence of Highway Department, pursuant to Chapter 480, Laws of 1937. State demurred which was overruled and answer served. Case pending.

John Gardner v. State of Minnesota, District Court, Mille Lacs County

Action by former employe predicated on negligence of Department under authority of Chapter 480, Laws 1937. State demurred. Pending.

State v. Agnes Hunter, et al. and August Drees, intervenor. District Court, Wabasha County

Intervention by Drees in condemnation proceedings for award on account of damages alleged to be caused by highway construction. State appeared specially and objected to jurisdiction of the court. Pending.

Allen E. Underhill v. State of Minnesota, District Court, Pine County

Action brought for injuries on account of negligence of Highway employe. Under Chapter 480, Laws 1937. State demurred. Pending.

Adolph Ruth v. N. W. Elsberg as Commissioner of Highways, District Court, St. Louis County

Action for damages claimed caused by flooding of lands due to the construction of trunk highway. State demurred. Pending.

State ex rel. Anthony W. O'Tremba v. N. W. Elsberg and Orville E. Olson and Paul Shords

Soldier's preference case. State demurred. Order allowed amendment of petition. State answered and made return to amended petition. Pending.

George D. Peterson v. N. W. Elsberg as Commissioner of Highways, District Court, Ramsey County

Soldier's preference case. State made return and relator dismissed.

George D. Peterson v. N. W. Elsberg as Commissioner of Highways, District Court, Ramsey County

Soldier's preference case. Action for back pay and damages. Answer served. Pending.

H. A. Van Buskirk v. N. W. Elsberg as Commissioner of Highways, District Court, St. Louis County

Soldier's preference case. Stipulation for reinstatement made.

State ex rel. M. C. Hoffman v. N. W. Elsberg, District Court, Ramsey County
Soldier's preference case. Settled.

State ex rel. Harris S. Eng v. N. W. Elsberg, District Court, Ramsey County
Soldier's preference case. Answer served. Case dismissed on State's motion.

United States of America v. Certain Lands in Wabasha County. U. S. District Court, Wabasha and Winona Counties—Condemnation re: Mississippi River Channel
Awards in favor of the State. U. S. Government appealed. Cases pending settlement or trial.

Frank J. Neeve, H. T. Swanson, Amy Wartman and Margaret Kittle v. State of Minnesota and N. W. Elsberg, District Court, Winona County (4 cases)
Damage actions pursuant to Claim Act, Chapter 480, Laws of 1937. Cases settled and dismissed.

T. A. Taylor v. State of Minnesota, District Court, Rice County
Damage action under Chapter 480, Laws 1937. State demurred. Pending.

Edgar F. McCullough v. State of Minnesota, District Court, Rice County
Action under Chapter 480, Laws 1937. Damage claimed. Demurrer interposed. Case dismissed.

Frank Lockwood, G. H. Holmes v. State of Minnesota, District Court, Wiona County (2 cases)
Action under Chapter 480, Laws 1937. Case compromised and settled.

Mrs. Adron M. Pittman and Wayne Pittman v. State of Minnesota, District Court, Hennepin County
Action under Chapter 480, Laws 1937. Case is settled with court order approving.

E. A. Studer and Sons, Inc. v. State of Minnesota and N. W. Elsberg, Ramsey County District Court
Arbitration case concerning highway contract. Issue joined. Hearing before arbitrators set for January 4, 1939. Pending.

Thornton Bros. Company v. State of Minnesota and N. W. Elsberg as Commissioner of Highways, District Court, Ramsey County
Demand for arbitration served and return made and hearing pending.

State by Attorney General v. Wm. O'Neil Sons Company
Equitable action by State to restrain arbitration pending determination of legal questions involved. Case at issue and tentatively set for around February 1, 1939.

City of Alexandria v. N. W. Elsberg as Commissioner of Highways, District Court, Ramsey County
Reimbursement for highway paving brought pursuant to Chapter 308,

Section 10, Laws 1935, which was dismissed. Settlement made as authorized by Chapter 480, Sec. 15, Laws 1937.

State ex rel. Martin Wunderlich v. N. W. Elsberg, Ramsey County, District Court

Mandamus proceeding for return of money deposited at time of bid. State demurred which was overruled with order for judgment. Deposit money returned.

In the Matter of the Petition of Chas. O. Gilfillan for Special Ditch No. 106 in Redwood County, Minnesota

State Highway Department assessed damages as special benefits from a drainage ditch. State appealed from the award and the matter is pending.

Village of Hibbing v. N. W. Elsberg, District Court, St. Louis County

Action for reimbursement for pavement of Trunk Highway brought under Chapter 480, Laws 1937. Reimbursement compromised and paid.

McCree and Company and Widell Company v. N. W. Elsberg, Ramsey County District Court

Declaratory judgment action concerning return of deposit made at time of submission of bid. State demurred, which was overruled and judgment entered for return of money which was repaid.

Wilbur D. Dover v. State of Minnesota ex rel. Mike Holm, District Court, Hennepin County

Order and petition for issuance of chauffeur's license. State appeared specially objecting to the jurisdiction of court. Court granted additional time for plaintiff to petition for certiorari. No petition as yet made and matter is pending.

Regarding the highway condemnation appeals, please be advised that full information can be obtained from the files as to same. I am having prepared a complete tabulation and will be glad to submit such detailed statement to you upon the completion of same.

TAXPAYER'S SUITS

William R. Thomas v. N. W. Elsberg as Commissioner of Highways, L. L. Allen, Maintenance Engineer, Commission of Administration and Finance, Stafford King, Matt Desmond, C. A. Halvorsen, State of Minnesota and Fort Pitt Malleable Iron Company—Ramsey County District Court

Action for permanent injunction restraining payment for center line button reflectors. Motion of State for dismissal and demurrer of Fort Pitt Malleable Iron Company denied. Answer has been served. Iron Company granted indefinite time in which to answer. Reply to State's answer served. Concerns interpretation of trunk highway act as well as Reorganization act. Pending.

Otto Vanselow v. N. W. Elsberg, et al., certain officials and Jack Roth Construction Company, Ramsey County District Court (1st case)

Plaintiff as taxpayer brings action and claims contracts were let at exorbitant prices and asks for judgment in favor of State. Case at issue. Pending.

Otto Vanselow v. N. W. Elsberg and certain state officials and Jack Roth Construction Company, Ramsey County District Court (2nd case)
Concerns same questions of law as the first Otto Vanselow case. Issue joined. Pending.

M. G. Gullixson, J. M. O'Connell and Wm. R. Thomas v. N. W. Elsberg, various state officials and S. J. Reader Company
Taxpayers' suit concerning interpretation of the law concerning letting of contracts. Plaintiffs claim contracts are for construction. State maintains they are maintenance. Issue joined and case pending.

J. M. O'Connell, et al., v. N. W. Elsberg, various state officials and Okes Construction Company, Ramsey County District Court
Taxpayers' suit concerning legal right to purchase without published call for bids, black top material. State served answer. Case pending.

J. M. O'Connell et al., v. N. W. Elsberg, certain state officials and Culligan-Weinhagen Company, Ramsey County District Court
Taxpayers' suit concerning both purchase of material without published notice and letting of certain contracts. State served answer. Defense same as defense in similar cases.

Otto Vanselow v. N. W. Elsberg, certain state officials and S. J. Reader Company, Ramsey County District Court, (2nd case)
Taxpayers' suit concerning letting of contracts without published advertisement. State served answer. Issue joined by reply and note of issue. Pending.

Otto Vanselow v. N. W. Elsberg, certain state officials and Whitmas & Borg, Ramsey County District Court
Taxpayers' suit concerning letting of contracts without published notice of call for bids. Answer served and issue joined by reply and note of issue. Action pending.

John P. Good v. N. W. Elsberg, various state officials, about 20 contractors and their sureties, Ramsey County District Court
Taxpayers' suit based upon allegations of conspiracy between state officials and contractors and sureties from 1934 to 1938. Extension of time granted to state officials to January 15, 1939.

TABLE NO. 1
PROSECUTIONS REPORTED BY COUNTY ATTORNEYS FOR 1937, SHOWING COUNTIES SEPARATELY

COUNTY AND COUNTY ATTORNEY	IN DISTRICT COURT				IN MUNICIPAL AND JUSTICE COURTS				Cases Pending
	Pleaded Guilty	Found Guilty	Acquittals	Dismissals	Pleaded Guilty	Found Guilty	Acquittals	Dismissals	
Aitkin—John T. Galarneault	19	4	4	13	4	.....	.....	.....	2
Anoka—Leeds H. Cutter	6	.....	.....	2	112	1	.....	4	2
Becker—Henry N. Jenson	25	3	4	.....	83	7	6	4	.....
Beltrami—Clarence R. Smith	14	3	3	1	62	12	.....	7	13
Benton—J. Arthur Benson	9	2	.....	9	92	14	3	10	12
Big Stone—C. J. Benson	6	1	1	.....	28	7	.....	12	1
Blue Earth—C. A. Johnson	.....	.....	.....	.....	.....	.....	.....	.....	.....
Brown—T. O. Streissguth	14	.....	1	8	61	1	.....	2	.....
Carlton—Rudolph Rautio	10	2	.....	2	257	32	3	27	30
Carver—J. J. Fahey	13	.....	.....	.....	80	4	1	2	5
Cass—Edward L. Rogers	16	4	2	6	32	21	1	14	5
Chippewa—C. A. Rolloff	5	.....	.....	2	108	7	.....	7	8
Chisago—Carl W. Gustafson	6	1	.....	.....	161	8	.....	1	11
Clay—James A. Garrity	34	.....	.....	.....	250	.....	.....	.....	.....
Clearwater—O. E. Lewis	7	.....	.....	.....	160	2	.....	2	.....
Cook—J. Henry Eliasen	4	.....	.....	.....	71	4	2	3	2
Cottonwood—M. F. Juhnke	11	.....	1	1	35	3	1	.....	1
Crow Wing—Franklin E. Ebner	24	.....	.....	9	649	36	8	11	.....
Dakota—Harold E. Stassen	30	1	.....	3	1,378	51	19	67	15
Dodge—Kenneth A. Myster	4	.....	.....	.....	103	7	2	2	.....
Douglas—Kenneth H. Dell	15	.....	.....	2	157	3	3	3	1
Faribault—H. C. Lindgren	11	.....	2	1	112	11	2	16	36
Fillmore—Clarence T. Perkins	12	.....	.....	2	67	3	.....	.....	1
Freeborn—Elmer R. Peterson	29	2	.....	.....	187	36	5	17	.....
Goodhue—Milton I. Holst	29	1	2	8	173	1	.....	9	18
Grant—R. J. Stromme	.....	1	.....	2	29	.....	.....	.....	.....
Hennepin—Ed. J. Goff	453	44	15	54	.....	.....	.....	.....	52
Houston—L. Rorkohl	13	2	.....	2	154	5	.....	4	3
Hubbard—Charles L. Clark	6	12	.....	1	90	7	.....	8	4
Isanti—Harold L. Westin	7	3	.....	2	113	3	1	6	1
Itasca—John J. Benton	16	3	3	8	365	29	2	34	26
Jackson—Warren P. Adams	6	1	.....	5	71	11	.....	8	2
Kanabec—Geo. L. Angstman	5	.....	.....	4	74	1	1	4	6
Kandiyohi—Roy A. Hendrickson	11	2	.....	.....	460	10	3	42	13
Kittson—Lyman A. Brink	13	.....	.....	4	39	.....	2	1	13
Koochiching—J. J. Hadler	20	4	1	1	106	7	1	15	6
Lac qui Parle—R. M. Saltness	8	1	.....	.....	35	1	1	9	14
Lake—Emmett Jones	6	1	1	.....	69	1	.....	22	5
Lake of the Woods—W. B. Sherwood	2	3	.....	1	59	10	.....	.....	6
Le Sueur—George T. Havel	20	.....	.....	6	205	3	.....	2	.....
Lincoln—B. M. Heinzen	4	.....	.....	.....	56	.....	.....	3	.....

Lyon—C. J. Donnelly	20	.....	1	1	91	.....	1	.....	.....
McLeod—J. P. O'Hara	16	.....	.....	.....	120	5	2	8	36
Mahnomen—L. A. Wilson	20	1	.....	6	40	1	.....	.....	3
Marshall—A. A. Trost	25	.....	.....	.....	76	.....	.....	3	1
Martin—C. L. Erickson	22	2	.....	1	126	1	.....	1	3
Meeker—Sam G. Gandrud	10	1	.....	.....	127	5	.....	.....	.....
Mille Lacs—C. C. Mitchell	8	.....	.....	.....	173	16	4	3	.....
Morrison—Austin L. Grimes	28	.....	1	2	146	13	8	29	69
Mower—A. C. Richardson	38	1	3	3	163	4	1	6	10
Murray—H. G. Whitney	12	.....	.....	2	65	2	1	2	7
Nicollet—A. L. McConville	10	1	.....	.....	136	6	.....	7	2
Nobles—Arnold W. Brecht	24	.....	.....	4	57	3	.....	5	.....
Norman—Lloyd J. Hetland	9	.....	.....	3	58	3	.....	.....	14
Olmsted—Hayes Dansingberg	44	4	.....	4	399	10	3	11	9
Ottertail—W. P. Berghuis	53	4	1	10	198	2	9	44	18
Pennington—H. O. Berve	18	.....	.....	2	31	1	.....	6	5
Pine—Albert Johnson	4	1	1	3	215	4	.....	4	5
Pipestone—J. H. Manion	16	2	.....	4	175	1	1	30	18
Polk—F. H. Stadsvold	43	3	2	.....	118	1	2	21	86
Pope—Wm. Merrill	4	.....	.....	1	65	1	.....	8	1
Ramsey—M. F. Kinkead	248	13	1	26	913	46	1	3	1
Red Lake—Fred L. Farley	6	.....	.....	4	44	.....	1	1	11
Redwood—George A. Barnes	21	.....	1	4	132	3	1	12	13
Renville—Russell L. Frazee	21	.....	.....	4	138	.....	.....	18	8
Rice—Thos. H. Quinn	12	3	4	7	355	15	4	40	38
Rock—Frank F. Michael	8	.....	.....	1	115	2	.....	.....	1
Roseau—R. J. Knutson	15	3	1	5	53	2	1	.....	3
St. Louis—Thomas J. Naylor	195	12	6	16	390	15	2	20	91
Scott—H. A. Irwin	8	.....	.....	3	66	4	1	7	17
Sherburne—George Tyler	7	.....	.....	1	86	.....	.....	3	1
Sibley—Chas. W. Quandt	14	.....	1	6	51	1	1	6	.....
Stearns—Harry E. Burns	66	2	1	52	169	.....	13	82	108
Steele—A. B. Anderson	29	2	1	1	225	7	1	1	2
Stevens—Clayton A. Gay	6	2	.....	.....	99	8	1	4	.....
Swift—Lester A. Johnson	6	.....	1	.....	34	.....	.....	6	29
Todd—J. Norman Peterson	45	3	1	2	250	5	1	21	41
Traverse—Earl E. Huber	6	2	1	2	55	.....	.....	4	.....
Wabasha—Wm. G. Lindmeier	7	1	1	2	96	2	.....	1	1
Wadena—Hugh G. Parker	10	.....	.....	1	67	4	.....	1	1
Waseca—John H. McLoone	21	.....	.....	.....	146	.....	3	.....	.....
Washington—P. M. Lindbloom	10	2	.....	1	155	9	2	20	.....
Watonwan—E. M. Perrier	18	1	1	6	228	4	5	3	15
Wilkin—E. H. Elwin	2	.....	.....	1	42	5	.....	.....	1
Winona—E. D. Libera	20	2	3	3	748	20	10	32	8
Wright—Thos. P. Welch	13	5	.....	3	60	52	1	17	.....
Yellow Medicine—Paul D. Stratton	5	.....	2	.....	34	1	.....	11	12
Total	2,186	174	75	356	13,677	643	148	879	1,005

TABLE NO. 2

TABULATED STATEMENT SHOWING CRIMINAL CASES IN ENTIRE STATE AS REPORTED BY COUNTY ATTORNEYS FOR 1937

NATURE OF ACCUSATION	IN JUSTICE, MUNICIPAL AND DISTRICT COURTS			
	Pleaded Guilty	Found Guilty	Acquittals	Dismissals
I. Crimes Against the Person				
Murder in the first degree	3	2	1	2
Murder in the second degree	1	1	1	.....
Murder in the third degree	4	1	.....	1
Manslaughter in the first degree	5	3	1	1
Manslaughter in the second degree	7	4	5	4
Death by criminal negligence	8	1	4	2
Assault in the first degree	8	4	2	5
Assault in the second degree	65	11	10	16
Assault in the third degree	523	98	27	125
Robbery in the first degree	45	1	.....	7
Robbery in the second degree	14	1	.....	1
Robbery in the third degree	14	.....	.....	.....
Disorderly conduct	187	13	4	3
Slander	2	1	1	4
Coercion	1	.....	.....	.....
II. Crimes Against Morality, Etc.				
Rape	7	4	.....	4
Carnal knowledge—				
Female under 10 years	3	.....	.....	2
Female 10 to 13 years	6	1	.....	1
Female 14 to 17 years	62	4	3	23
Indecent assault	53	10	2	10
Adultery	10	1	.....	1
Indecent liberties	.....	.....	2	1
Indecent conduct	11	2	.....	2
Abortion	3	.....	1	.....
Paternity, illegitimate child (ch. 17)	213	33	14	59
Abandonment, wife or child	90	6	3	32
Non-support, wife or child	173	31	5	33
Bigamy	5	1	.....	.....
Incest	10	.....	.....	5
Fornication	6	1	.....	2
Sodomy	4	2	1	.....
Keeping house of ill fame	4	.....	.....	.....
Habitual offenders	1	.....	.....	.....
Public dance law, violations	7	.....	.....	.....
Gambling and lottery laws, violations	116	6	1	11
Maintaining nuisance	21	2	.....	2
Narcotics	2	.....	.....	.....
Abduction	.....	1	.....	1
Seduction	.....	.....	.....	3
Contributing to delinquency	14	1	.....	1
Cruelty to children	1	.....	.....	.....
Selling articles to prevent conception	1	.....	.....	.....
Concealment of birth of child	1	.....	.....	.....
Selling obscene pictures	2	.....	.....	.....
III. Crimes Against Property				
Arson in the first degree	.....	2	.....	.....
Arson in the second degree	5	1	.....	3
Arson in the third degree	13	1	1	1
Burglary in the first degree	3	3	.....	.....
Burglary in the second degree	5	.....	1	5
Burglary in the third degree	185	12	1	16
Unlawful entry	32	1	.....	5
Forgery in the first degree	7	1	.....	8
Forgery in the second degree	115	2	.....	14
Forgery in the third degree	30	.....	.....	7
Grand Larceny in the first degree	97	2	1	27
Grand larceny in the second degree	444	26	12	124
Petit larceny	612	58	20	94
Giving checks without funds	269	11	1	97
Receiving stolen property	26	2	1	4
Mortgaged chattels, sale, removal, etc	24	2	1	17
Malicious mischief	72	11	3	25
Extortion	2	1	1	1

TABLE NO. 2—Continued

TABULATED STATEMENT SHOWING CRIMINAL CASES IN ENTIRE STATE AS REPORTED BY COUNTY ATTORNEYS FOR 1937

NATURE OF ACCUSATION	IN JUSTICE, MUNICIPAL AND DISTRICT COURTS			
	Pleaded Guilty	Found Guilty	Acquittals	Dismissals
III. Crimes Against Property—Cont.				
Blue sky law, violations	8	3	.....	2
Unlawful acts of public officials	5	1	.....	2
Swindling	3	.....	.....	.....
Possession of burglar tools	1	.....	.....	1
False advertising	1	.....	.....	.....
Trespass	13	.....	.....	.....
IV. Crimes Against Sovereignty, Public Justice				
Perjury	5	.....	2	9
Resisting or interfering with officer	35	9	2	5
Carrying concealed weapons	17	2	.....	2
Language provocative of assault	64	16	2	14
Criminal contempt	1	.....	.....	.....
Assisting escape of prisoner, escape	14	1	.....	.....
Accessory to felony	1	.....	.....	.....
V. Miscellaneous Crimes				
Cruelty to animals	3	1	2	1
Vagrancy	178	5	.....	9
Violations of laws relative to:				
Compulsory education	20	4	.....	5
Forestry	61	4	.....	8
Wild animals (game and fish)	998	83	9	27
Health	10	1	.....	3
Food	42	1	1	4
Motor vehicles (traffic)	5,214	129	20	81
Motor vehicles (intoxicated drivers)	622	54	12	28
Motor vehicles (unauthorized driving, etc.)	286	13	3	17
Drunkenness	2,429	80	10	32
Intoxicating liquors	577	17	8	47
Barbers	22	5	.....	.....
Basic sciences	3	1	.....	.....
Druggists	6	.....	.....	.....
Peddlers	15	1	.....	.....
Dentists	2	.....	.....	.....
Animals (tame)	5	.....	2	3
Taxes	3	.....	.....	.....
Hotels and Inns	23	.....	.....	7
Recognizance to keep the peace	6	1	.....	1
Impersonating an officer	1	.....	.....	.....
Miscellaneous	279	13	9	42
Total	14,627	828	213	1,162

SELECTED OPINIONS

1

ARCHITECTS AND ENGINEERS—Board—Determination of—Qualifications of applicant.

Mr. William W. Tyrie, Board of Registration for Architects and Engineers. You ask our opinion on the following question:

> "Whether the Board is forced to issue a certificate of registration to an applicant who holds a like unexpired certificate of registration in a state in which the requirements for registration are equal to those fixed by the Board for this state, or whether the fourth paragraph of Section 9 does not further modify paragraph No. 2 and the Board may subject the applicant to such examination as may be deemed necessary even though he be registered in another state by examination?"

We wish to advise you that in pursuance with the provisions of Section 9 of Chapter 523, Laws 1921, as amended by Chapter 404, Laws 1933 your board must issue a certificate of registration to any person who holds an unexpired certificate of registration issued by the proper authority in the District of Columbia or in any state or territory of the United States or in any province of Canada in which state, territory or country the requirements for registration are equal to those fixed by your board and in which state, territory or country similar privileges are extended to the holders of certificates of registration issued by your board. Your board has the authority to determine whether or not these statutory requirements have been complied with when an applicant submits his application to it for a certificate of registration. If your board is not satisfied with the evidence presented to it, it may require further evidence to be presented or it may subject the applicant to such examination as the board deems necessary to establish the qualifications of said applicant. In other words, if the board is satisfied that the qualifications of the applicant are sufficient, a certificate of registration must be issued. If the board is not satisfied as to the qualifications of the applicant, it may request further evidence of said fitness or may require an examination. The responsibility for determining this question rests entirely upon your board, and if its discretion is exercised in a reasonable and proper manner, its determination is final.

ROY C. FRANK,
Assistant Attorney General.

September 20, 1937. 10a-3

2

ARCHITECTS AND ENGINEERS—Parochial school not a public work.

Mr. Paul Doty, Chairman Board of Registration for Architects, Engineers and Land Surveyors.

You state that the Emanuel Lutheran Church Building Committee of Hamburg, Minnesota, contemplates the erection of a school building in con-

nection with the church. The committee does not contemplate hiring an architect and the work is to proceed under plans and specifications, and supervision of a contractor.

You call our attention to Laws of 1921, Chapter 523, as amended by Laws of 1933, Chapter 404, and ask whether or not such a school building has such a public interest that the services of a registered architect are necessary in the preparation of the plans and specifications.

We answer your question in the negative.

Section 1 of Chapter 404 permits the preparation of plans and specifications for a building of the character stated by an established contractor or builder in negotiating for employment. The provisions of Section 1 are qualified by Section 2 in the case of public works and improvements. Section 2 reads, in so far as is material to this opinion:

> "No person, except an architect, engineer or land surveyor registered as provided for in this act, shall be employed in responsible charge of the preparation of plans or specifications for any public work or public improvement in this state or in responsible charge or supervision of architectural, engineering or land surveying for any public work or public improvement in this state."

The term "public work or public improvement" refers to works and improvements done by or on behalf of the state or a political subdivision thereof, and does not refer to works and improvements to which the general public has access, for example, churches, libraries, theatres and other buildings privately owned. The school under consideration is not a public school to be constructed by a school district, but rather is a private school owned and operated by a private organization. Consequently, in so far as such school is concerned, Section 2 does not restrict the provisions of Section 1 of Chapter 404.

ROY C. FRANK,
Assistant Attorney General.

April 5, 1938. 10a

3

BANKS AND BANKING—Directors—Charter provisions—By-laws—Terms and tenure of office.

Mr. Robert Berry, Commissioner of Banks.

Pursuant to Section 7458, Mason's Minnesota Statutes of 1927, vacancies in the Board of Directors of a banking corporation may be filled by the remaining directors; provided the certificate of incorporation or the by-laws so provide, but not more than one-third of the members of the board may be so filled in any one year.

You state that the articles of incorporation of the bank in question provides that:

> "The government of this corporation and the management of its affairs shall be vested in a board of not less than three nor more than nine directors * * *."

You state that your department has recommended the use of this form of clause relating to the number of directors in recent years because it has proved very convenient for state banks and that you have always insisted that the number of directors elected at the annual meeting must be the number to serve for that year, except when changed by the stockholders at a special meeting called for that purpose.

The clause you set forth and refer to is an ordinary clause which has been in common use by corporations, including banking corporations, for many years. It is not novel or unusual. The statute in this state fixes the minimum number of directors at not less than three who are required by law to be elected by and from the stockholders or members by ballot. Where a variable clause appears in the certificate of incorporation or charter, relating to the number of directors a definite number within the range permitted by the certificate of incorporation should be fixed by the by-laws which are also contemplated by the statute. Section 7453 provides the manner of adopting and amending by-laws. The first by-laws are usually adopted by the first board of directors which remain effective until and except as amended by the stockholders or members at any regular or special meeting called therefor. By-laws thus adopted would control the number of directors required and would be effective until modified or repealed by the members. The statutory limitations must, of course, be observed.

In the instant case you have not informed us relative to the provisions of the by-laws, if any, in this respect and it is therefor difficult to answer your question categorically. If the by-laws provide for the election of nine directors and as you state nine were chosen by the stockholders but only seven accepted and qualified, it is our opinion that the vacancies which thus exist should be expeditiously filled by the remaining members of the board from among the stockholders or members. This system of control is both proper and lawful. If no by-law exists it would be within your discretion to suggest and even insist that suitable action be taken to adopt a suitable by-law fixing a definite number of directors. Section 7647 contemplates approval of the original by-laws or amendments by the superintendent of banks, as the successor to certain duties therein enumerated formerly granted to the public examiner, as provided for by Mason's Minnesota Statutes of 1927, Sections 5323, 5324, 5325 and Section 53-28 of the reorganization act.

It is possible that the by-laws are silent on this question, in which event we suggest they be amended. It may also be possible that the matter has been covered by a resolution of the stockholders, which although not of the same import nor as formal as a by-law would be entitled to recognition and should be considered by the directors as well as the Commissioner of Banks, in determining the question. It should, if it exists, be honored until action

in the matter can be taken by the stockholders and until they have adopted a suitable by-law in regard to the premises.

Two former opinions of this office of August 14, 1914 and May 10, 1918 which imply and state that vacancies in the membership of a board of directors of a bank may not be filled by the remaining directors are no longer law because the act has been specifically amended to grant them such power and because those opinions obviously overlooked certain general powers granted to banking corporations as well as other corporations. We call your attention to that certain provision of Section 7443 Mason's Statutes of 1927 (same clause appearing in R. L. 1905, Section 3849) as follows:

> "It (the certificate of incorporation) may also contain any other lawful provision defining and regulating the powers or business of the corporation, its officers, directors, trustees, members and stockholders."

We also call attention to Subdivision 4 of the same section relating to the managing board and requiring the certificate of incorporation to state:

> "In what board its management shall be vested, the date of the annual meeting at which it shall be elected and the names and addresses of those composing the board until the first election, a majority of whom, in the case of savings banks and building and loan associations shall always be residents of this state."

We call attention to Subdivisions 5 and 6 of Section 7447 Mason's Minnesota Statutes of 1927 which provides:

> "Every corporation formed under the provisions of this chapter shall have power"

and further provides:

> "5. To elect or appoint, in such manner as it may determine, all necessary or proper officers, agents, boards, and committees, to fix their compensation, and define their duties."

> "6. To make and amend, consistently with law, **by-laws**, providing for the **management** of its property **and the regulation and government of its affairs.**"

We also call attention to the provisions of Section 7460 relating to tenure of office for directors of corporations and the manner of fixing the same,

> "By so providing in its certification of incorporation, any corporation may classify its directors or trustees in respect to the time for which they shall severally hold office, the several classes to be elected for different terms; provided, that no class shall be elected for a term less than one or more than five years, and that the term of office of at least one class shall expire each year."

In the absence of any express provision relative to eligibility and tenure for the office of director in a bank the question of eligibility and tenure will

be determined by the general laws applicable to the eligibility of directors in corporations generally.

7. Am. Jur. Section 204.

It is our opinion that the proper manner of determining the number of directors and their tenure in office, within the provisions of the applicable statutes and the certificate of incorporation is to fix the number and term of the directors definitely either by amending the charter clause, or by adopting and filing a suitable by-law or amendment. The latter method is the most flexible and economical, as by-laws do not have to be published and recorded. As stated before, it is the duty of the directors to cause vacancies in their membership to be filled with reasonable expedition and promptness and within a reasonable period of time after the vacancy occurs, having due regard for the exercise of proper discretion and judgment in making selections of qualified successors.

FRANK H. OSTERLIND,
Assistant Attorney General.

June 2, 1937. 29a-13

4

BANKS AND BANKING—Directors—Fidelity bonds.

Hon. Robert D. Beery, Commissioner of Banks.

You state in substance it is proposed that Minnesota credit unions incorporated under Laws 1925, Chapter 206 of this state who are members of a Credit Union National Association having its principal place of business in Madison, Wisconsin, will enter into agreements or contracts whereby the credit union corporations of this state will delegate to the national association the power to act for them as agent and trustee for the purpose of contracting, effecting, procuring or covering by indemnity contract the fidelity of those officers and employes required by the directors to be bonded. This purpose will be effected by the national association contracting with an indemnity carrier corporation to insure the fidelity of the individual officers and employes by means of an indemnity contract or schedule type of bond similar to the specimen copy you enclosed. Pursuant to the terms of the contract of indemnity the right of action, in the event of loss or contested claim, is vested in the trustee and not in the member credit union. The Credit Union National Association will collect the losses if any occur for the use and benefit of the member corporation. The indemnity contract or schedule bond will be deposited with the national association as trustee in Wisconsin. The trustee corporation and the surety carrier corporation may or may not be such as are amenable to the laws of this state or subject to process in its courts, and the surety corporation may or may not be a licensed carrier in Minnesota. You state that it has been the established custom of your office in the past to require all officers and employes of credit unions to execute individual bonds of indemnity in favor of their employer credit

union and for your examiners to investigate these bonds at the time they make examinations of the affairs of the credit unions doing business in Minnesota as required by the laws of this state. You request us to advise you whether this form of bond should be accepted and if accepted whether the Commissioner of Banks should hold the master bond.

It would seem that the answer to your questions may depend upon a determination of certain fundamental principles which are apparently involved in a consideration of this subject relative to the existence of authority to make a contract of the nature stated and the right, if any, of the governing board to delegate its powers in this respect.

Mason's Minnesota Statutes of 1927, Section 7774-8 (Laws 1925, Chapter 206, Section 8) provides that credit unions shall elect a board of directors of not less than five members and Section 7774-9 specifically provides that "It shall be the duty of the Directors to have general management of the affairs of the credit union," and provides amongst a group of specific enumerated powers, particularly:

> "(c) To fix the amount of the surety bond which shall be required of all officers and employes handling money."

It is clear that the directors are charged by law with the duty of managing the affairs of the credit union and particularly with the duty to fix the amount of the surety bond which shall be required of all officers and employes handling money, which power we believe includes the duty of authorizing the purchase and procurement of such bonds. Directors, particularly of banking corporations, cannot enter into a contract that will bargain away the independent judgment which they are bound to exercise in the interest of the corporation, the stockholders and the depositors. The cases relating to delegation of power by directors are not entirely in harmony when attempts are made to apply them to particular statements of fact. We are favorably impressed with the conclusion reached in a federal case where a duty was imposed by statute upon the president and directors of a railroad company to locate the line of the railroad. The court held that this duty could not be delegated to a committee of their own number.

> Weidenfeld v. Sugar Run R. R. Company, 48 Fed. 615, 14 (a) C. J. 95, Sec. 1863.

In the matter which you present it is clear that the legislature has unequivocally delegated and vested the powers of general management of the affairs of credit unions in the directors and particularly the power to fix the amount of surety bonds of the officers and employes handling money. We believe that where such powers have been specifically delegated by the legislature to the board of directors the maxim,

> "Delegated power or authority cannot be delegated," (Delegata potestas non potest delegari)

should be applied, and that in the instant case it would not be proper for the directors to delegate to another corporation the duty to procure fidelity insurance covering their own officers and employes from a third or carrier corporation, both of which are foreign corporations. It is the responsibility

and duty of the directors to authorize such contract and we are of the opinion that the risks underwritten in the event of default should be payable to the insured credit union directly, instead of indirectly to a trustee corporation, as contemplated by this plan. We do not lay down the rule against delegation of power in a narrow sense. The directors may delegate to one of their number, or to a particular officer, or employe, the power to perform the purely ministerial act of procuring the bonds for officers and employes or of actually carrying out the executive orders of the board in respect to the subject. It is the executive duty or power which may not be delegated. The corporation should retain its right of action. We find no statute authorizing the directors to contract in the manner stated. We direct no criticism against the participating corporations merely because they are foreign corporations although, as heretofore intimated, it is conceivable that a toleration of the contemplated practice could result in undesirable complications both for the directors, should there be contested claims, and for the banking commissioner in the event of insolvency of a particular credit union.

This office has heretofore held that the schedule type of fidelity contract of indemnity, providing it affords the same degree of coverage and protection as required by law and as contained in the usual individual form of bond, is not in and of itself objectionable and we have permitted their use for various state departments.

Without commenting in detail on the various sections of the specimen bond which you enclosed, it is our opinion that you should decline to accept this bond for the reasons stated. We are also of the opinion that a schedule type of indemnity contract could be accepted if written with loss payable to the credit union where the risk is carried by a company duly authorized to write fidelity bonds or contracts in Minnesota. We find no provision in the credit union act, Laws 1925, Chapter 206, or in the act relative to bonds or contracts of indemnity of officers and employes of banks, Laws 1925, Chapter 351, which would authorize or require master indemnity contracts or bonds to be deposited with you. This act contemplates the issuance of this type of contract. It would further seem that by reason of the legislative classification of credit unions as a species of banking corporation subject to the jurisdiction and periodical examination by the Superintendent of Banks of the state, that the provisions of Chapter 351, Laws 1925, relative to the requisites and conditions pertaining to bonds or contracts of indemnity for officers and employes of state banks, would be controlling for credit unions. This is especially true in view of the failure of the legislature to fully cover the subject of bonds and contracts of indemnity for officers and employes in the credit union act, Laws 1925, Chapter 206.

In conclusion it is our opinion that you are justified in continuing your established practice and custom of requiring that such bonds or contracts of indemnity be required to conform substantially to the requirements of the provisions of Laws 1925, Chapter 351.

FRANK H. OSTERLIND,
Assistant Attorney General.

March 24, 1937. 92a-28

5

BANKS AND BANKING—National Housing Act loans.

Hon. Robert D. Beery, Commissioner of Banks.

You ask if the provisions of Chapter 49, Laws 1935, authorizes the financial institutions therein named to make to one person, "National Housing Act" loans, and as there described, and which exceed the restrictions contained in Section 7677 of Mason's Minnesota Statutes, 1927, of "25 per cent of such capital and surplus."

In my opinion your question should be, and it is, answered in the negative. Section 2, Chapter 49, Laws 1935, provides:

> "No law in this state prescribing the nature, amount or form of security or requiring security upon which loans or advances of credit may be made, or prescribing or limiting interest rates upon loans or advances of credit, or prescribing or limiting the period for which loans or advances of credit may be made shall be deemed to apply to loans, advances of credit or purchases made pursuant to the foregoing paragraphs (a) and (b)."

The there prescribing or limiting terms relate to security, interest rates and periods, and not to the "amount" of any such loan.

HARRY W. OEHLER,
Assistant Attorney General.

March 18, 1937. 533i

6

BANKS AND BANKING—Trust companies acting as.

Hon. Robert D. Beery, Commissioner of Banks.

You ask if the law precludes a trust company organized under the laws of this state, and having a capital of not less than $50,000, from assuming the additional powers of a state banking corporation without complying with the provisions of said sections relative to the application of a trust company to assume the powers of a state bank.

It is my opinion that your question should be, and it is, answered in the affirmative.

The statutory provisions above referred to point the way in which a state trust company may assume the powers of a state bank. The foregoing statutory provisions are those of Chapter 90, Laws 1929.

Section 3997, Mason's Minnesota Statutes, 1927, prescribes the method for the organizing and licensing to do business of a state bank. Said Section 3997 was held constitutional against various objections in State v. State

Securities Commission, 145 Minn. 221. Against the background of Sections 7733-1 to 7733-5, and hereinbefore referred to, I do not believe that any inference may be drawn from Section 7726, Mason's Minnesota Statutes, 1927, that a trust company may conduct a banking business, as defined in Section 7636, Mason's Minnesota Statutes, 1927, simply by complying with the reserve provisions of Section 7680, Mason's Minnesota Statutes of 1927. The legislative history of the statute involved surely precludes any such inference.

HARRY W. OEHLER,
Assistant Attorney General.

January 23, 1937. 29a-30

7

BIDS—Advertising for—Unfinished portion of school building.

Hon. John G. Rockwell, Commissioner of Education.

You ask:

> "Our School Board has contracted with a contractor to construct a school building. Certain items, bid on by the contractor, were left out because of lack of funds to complete the project as originally designed by the architect. After that several additions have been made to the contract and now, since the contract has been completed and the building accepted, the School Board finds that one of the items left out under the original bid should be completed.
>
> "The contractor, at the time of bidding on the job in competition with other bidders, specified that the amount would be $2,163.00 and in spite of the fact that prices have gone up materially he is still holding open the offer of completing this item at that price.
>
> "The School Board wants to know if they can proceed in completing the job under the original bid of $2,163.00, or if they will be compelled to readvertise. This seems like an unnecessary delay and possibly a greater expenditure of money.
>
> "In other words, may we proceed to complete that portion of the building, having money available at the present time, without re-advertising for bids?"

Under the facts stated we advise you that it is doubtful whether it would be legal for the Board of Education of Proctor to proceed with the construction of the $2,163.00 item without re-advertising. The original contract appears to have been completed, and a new contract cannot be made without re-advertising.

MATTHIAS N. ORFIELD,
Deputy Attorney General.

September 2, 1937. 707a-12

8

BIDS—Error in—Withdrawal.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You state:

> "Some weeks ago the board of education advertised for bids for the construction of an addition to the present school building, the project to be financed in part by P. W. A. grant. The low bidder was awarded the contract, but within a few days thereafter he claimed that he had made a mistake in his estimates in that he had unintentionally omitted the item of structural steel amounting to more than $15,000. All of the bids were considerably higher than the board of education had estimated, and, as a matter of fact, the board had not made provision for sufficient funds to warrant their entering into a contract for the building even at the figures of the low bidder. Such bidder, after discovering his mistake, offered to enter into a contract at a figure $15,000 greater than his first bid, but this was not sanctioned by the P. W. A. office. The bidder requests the return to him of his certified check for $4,000, which accompanied his bid, claiming an honest mistake in his estimates." Our opinion is requested on the following question:
>
> "Has the school board the right to return the certified check to the bidder?"

We advise you that if it is shown to the satisfaction of the school board that the error in the bid was the result of an honest mistake without gross negligence on the part of the bidder, and if the bidder will reimburse the school district for any expense it might incur in the re-advertising for bids, caused by the bidder's mistake, the board may refund the deposit check to the bidder. See St. Nicholas Church v. Kropp, 135 Minn. 115, 160 N. W. 500, and Federal Contracting Co. v. City of St. Paul, 177 Minn. 329, 225 N. W. 149. In the latter case the court said:

> "The authorities hold in varying situations that when the bidder makes a mistake in his bid, and though the mistake is unilateral, a court of equity may give him relief if the other party to the contract has not changed his position to his disadvantage. This is the result of St. Nicholas Church v. Kropp, 135 Minn. 115, 160 N. W. 500, L. R. A. 1917D, 741, where the mistake was discovered after the bid was made and before a formal contract was executed and before a change of position."

In the Federal Contracting Co. case the court held that the city need not return the deposit since the breach was the failure to furnish a bond with no suggestion of a mistake for three years after the acceptance of the bid. The Kropp case appears to be exactly in point with the matter presented for our consideration and we feel that the rule there announced should govern. The bidder should, however, as heretofore stated, pay all of the expenses incurred by the school district as the result of the error.

ROY C. FRANK,
Assistant Attorney General.

May 4, 1937. 622j-6

9

BIDS—Error—Withdrawal.

Mr. J. T. Ellison, Chief Engineer.

You ask for an opinion or recommendation on the claim of S. J. Reader Company, a corporation, in connection with the above subject.

I have read your memorandum of March 30, 1938 as to the facts and have noted that you feel that there has been a palpable error in the compilation of contractor's proposal bid, occurring in Item 12 thereof, in which the unit price for drain tile was put at $1.50 per lineal foot and which contractor claims should have been $4.50 per lineal foot and that he so intended. In your memorandum you state that a price of from $4.00 to $4.50 would be a reasonable bid for the item in question and further state that shortly after the receipt of bids, the contractor made a prompt claim that an error was made during the transcription of this item from a sheet of paper on which he had computed his unit price to the proposal and that the mistake was made by one of his associates or employees. It further appears, as I understand it, that the Department was not misled and recognized an inadvertent error. Reader was the low bidder on the job, but due to the error refused to sign the contract and the money was declared forfeited to the State under Paragraph 3.06 of the specifications. The proposal was filed on April 23, 1934 and contractor has since such time made request for return of this money, and the question arises whether or not this deposit which contractor claims to be $625.56 should now be returned or paid to contractor, S. J. Reader Company.

This claim is somewhat similar to a case which was brought in the fall of 1934 under a mandamus proceedings instituted by Megarry Brothers vs. N. W. Elsberg, which concerned likewise the return of a deposit submitted with the contractor's proposal. In the Megarry case, the contractor in one of the items, made a mistake in putting in under the item which should have been granite aggregate a figure computed upon gravel aggregate, which would make a material difference. Megarry Brothers were the low bidder and refused to execute the contract, claiming an honest mistake and error had been made, and the Department was not deceived thereby. A full disclosure of the facts was set up in the petition for writ of mandamus and as there was no dispute as to the facts, the State demurred to the petition. This was argued orally by the writer, as well as extensively briefed by both sides, and the Court after hearing the arguments and studying the briefs, held that upon equitable principles the State should return the deposit money which had been declared forfeited under Paragraph 3.08 of the general specifications.

In the present case as in the Megarry case, an inadvertent mistake was made by the contractor which the Department very easily ascertained, nor was there any attempt made, as far as I can ascertain, to mislead the Department or submit a double bid. Inasmuch as the two cases are so similar, and feeling that the Court in view of the Megarry decision would hold the same way, I am inclined to recommend to the Department that it refund the

amount submitted by the S. J. Reader Company with their proposal on this particular project. It is suggested that the amount be checked to ascertain the correct amount. Contractor claims $625.56 and if this is the correct amount, same should be returned without interest. Particularly in view of the similarity between these two cases and the legal principles involved, and in view of the fact that the Megarry case was extensively briefed and argued, I am of the opinion that the Department could legally return to the S. J. Reader Company the amount on deposit.

ORDNER T. BUNDLIE,
Assistant Attorney General.

April 26, 1938. 229d-4

10

BIDS—Cities and villages—Fire hose as village improvement.

Mr. Edmund T. Montgomery, Village Attorney.

You state that you have come to the conclusion that Section 1199, Mason's Statutes of 1927, which originated in the Revised Laws of 1905, and which relates to advertising for bids before entering into contracts involving $100.00 or more, does not apply to a village organized under Chapter 145, Laws of 1885, pursuant to which the village of St. Louis Park is operating.

You inquire "whether the purchase of fire hose by the Village of St. Louis Park is a contract for a village improvement, such as requires an advertisement for bids under Section 51, Chapter 145, Laws of 1885."

Section 1199, Mason's Minnesota Statutes of 1927, to which you direct attention, appears as Section 731, Revised Laws of 1905, and is a part of Chapter 9 thereof. It appears from Section 698, Chapter 9, Revised Laws of 1905, that this act does not apply to any village that existed at the time of the enactment of Chapter 9, unless such village, pursuant to Section 699, Revised Laws of 1905, adopted the provisions of this act. Inasmuch, therefore, as said Section 1199 is a part of Chapter 9, Revised Laws of 1905, and the village of St. Louis Park is operating under Chapter 145, Laws of 1885, and has not elected to come under said Revised Laws of 1905, we believe that you are quite right in your conclusion that said Section 1199 does not apply to your village.

As indicated in your letter, the only provision of the 1885 law which relates to the awarding of contracts pursuant to a call for bids, so far as we can discover, is Section 51, which reads as follows:

> "All contracts for village improvements, except expenditures of road and poll tax, shall be let to the lowest responsible bidder, after public notice of time and place of receiving bids therefor."

We are of the opinion that the purchase of the "fire hose," mentioned in your letter, by the village, does not come within the term "village im-

provements" within the meaning of said Section 51, so as to require advertisement for bids. See Trentum v. Shaw, 49 N. J. 638, also McLean v. North St. Paul, 73 Minn. 146. It would seem, therefore, that the village may purchase the "fire hose" without a call for bids.

DAVID J. ERICKSON,
Deputy Attorney General.

January 30, 1937. 707a-15

11

BIDS—Cities and villages—Reconsideration of action at former meeting.

Mr. L. P. Blomholm, City Attorney.

You state that pursuant to the provisions of the city charter the city advertised for bids for the purchase of some "snow removal equipment"; that the bids were opened and the contract awarded at a meeting of the city council held on November 15, 1937; that pursuant to the provisions of Sections 10 and 11 of Chapter 7 of the charter an ordinance was prepared authorizing the approval of the contract and the payment of money for the purchase price of the equipment; and that at the meeting of the city council held on November 22, 1937, at which time said ordinance was given its first reading, "it failed of passage, there being six members of a total membership of seven at the meeting, and the result was a tie vote."

You inquire whether the city council may reconsider its action taken at the meeting of November 22, 1937, and adopt an ordinance authorizing "the purchase and payment of the snow removal equipment, pursuant to the bids heretofore received and approved by the council," without again readvertising for bids.

No question is raised in your communication relative to the legality of the proceedings on the part of the city council leading up to the acceptance of the bid in question. It is assumed, therefore, that the council proceeded pursuant to the terms of your city charter in connection with the advertisement for bids and all the proceedings leading up to the acceptance of the bid in question. The council having accepted the offer of the lowest or most responsible bidder and not having rejected all of the bids, we are of the opinion that it may at a subsequent meeting reconsider its former action taken on November 22 and adopt an ordinance pursuant to the charter, authorizing the making of the contract for the "purchase and payment of the snow removal equipment" without re-advertising for bids.

The rule is well established that unless restrained by charter or statute applicable, the legislative body of a municipal corporation possesses the right to vote and reconsider its vote upon measures before it, at its own pleasure, and to do and undo, consider and reconsider, as often as it may think proper, until by final vote or act, accepted as such by the body, a con-

clusion is reached. McQuillin on Municipal Corporations, Second Edition, Volume 2, Section 642.

In the time available we have been unable to find any provision in your charter prohibiting the city council from reconsidering the action taken at its meeting of November 22, 1937, which resulted in a tie vote. The only limitation which we have been able to find relative thereto is the language in Section 9 of Chapter 7 to the effect that "no vote of the City Council shall be reconsidered or rescinded at a subsequent meeting unless at such a meeting there are present as large a number of its members as were present when said vote was taken." This language clearly authorizes the council to reconsider its vote upon measures before it, until by final vote or act, accepted as such, a conclusion has been reached, so long as there are present at such subsequent meeting as large a number of its members as were present when the former vote was taken.

DAVID J. ERICKSON,
Deputy Attorney General.

December 1, 1937. 707a-4

12

BOATS—License—Operation on lakes.

Mr. C. C. Mitchell, County Attorney.

You state and inquire:

> "Under the provisions of Chapter 31 of Mason's Minnesota Statutes, and such rules and regulations as are authorized therein, the District Boiler Inspector examines and inspects all boats propelled by gasoline or steam on Lake Mille Lacs. For this inspection he receives a fee of $3.00.
>
> "The question now arises whether the owners of the boats inspected as above would also be required to procure a license for said boats from the Commission set up under Chapter 80 of Extra Session Laws of 1937."

Yes, if the boats are within the provision of Section 4 of said Chapter 80, Extra Session Laws of 1937.

You also inquire:

> " * * * whether the County Boards of Commissioners of the counties which border on such a lake as designated in Chapter 80 can set up a Commission by joint action only."

We answer this inquiry in the affirmative. This is provided for in Section 1 of said Chapter 80.

You further inquire:

> " * * * does the Commission determine which county treasury shall

carry a 'Boat Inspection Fund' as provided in Section 7 of said Chapter 80, or does the county treasury of each county carry such a Fund?"

In our opinion the Commission determines which county treasury shall carry the "Boat Inspection Fund" provided for in Section 7 of said Chapter 80. See Section 2.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

February 9, 1938. 34g-2

13

CHILDREN—Abandonment—Illegitimate.

Mr. Thos. H. Quinn, County Attorney.

You present the following facts for our consideration:

> "We can prove that a certain man is the father of an illegitimate child born to a woman resident of this county. He paid the lying in expenses and he also paid for the board of the child at a boarding home in Minneapolis for a period of months. He also was present at a baptism in a Church there at Minneapolis and the Church records show that he is the father of the child."

and ask:

> "Would he be the parent within the meaning of Section 10135?"

We answer your question in the negative.

Previous to 1931, Mason's Minnesota Statutes of 1927, Section 10135 provided that:

> "Every parent or other person having legal responsibility for the care or support of a child . . . who deserts and fails to care for and support such child with intent wholly to abandon him; . . . is guilty of a felony . . ."

This statute was interpreted to mean, in the case of State v. Sweet, 179 Minn. 32, 228 N. W. 337, that where the father didn't have custody of the child, he could not abandon it within the meaning of the statute. That case involved the prosecution of a divorced man whose child was placed by the court in the care and custody of the mother. The court said:

> "Although the information was under G. S. 1923 (2 Mason, 1927) Section 10135, it stated facts showing a violation of the section following, and in our opinion he could be convicted only under that section since the evidence was undisputed that during the time involved the custody of the child was exclusively in the mother, from whom he was divorced. **Hence within the meaning of Section 10135 he could not desert or wholly abandon one whom he had no right to have the care and keeping of.**"

In illegitimacy cases the mother is entitled to the care and custody of the child. 1 Dunnell's Minnesota Digest, Section 825, and cases cited in note 66. While there are no Minnesota decisions relating to the precise question in so far as the abandonment of illegitimate children are concerned, there can be no question but the rule stated in the Sweet case is applicable and that the father of an illegitimate child not having custody of the child cannot be guilty of abandoning it.

In 1931, Section 10135 was amended (Laws of 1931, Chapter 94) and now reads, in part:

> "Every parent, **including the duly adjudged father of an illegitimate child and a father who in an action for divorce or separate maintenance has been judicially deprived of the actual custody of his child** * * *."

It will be noted that the amendment is specifically designed to overcome the effect of the Sweet decision. However, it did not go far enough to reach a situation like the one presented by you. The amendment merely includes **the duly adjudged father of an illegitimate child** and does not include the father of an illegitimate child who is not adjudged to be such. Consequently our negative answer to your question.

ROY C. FRANK,
Assistant Attorney General.

May 6, 1937. 840a-1

14

CHILDREN—Abandonment—Insufficient payments by father.

State Board of Control, State Office Building.

You state:

> "A mother of three children who are in need of assistance, is divorced from her husband who also lives in the same community as the mother and her children, but not in the same house. By the decree of divorce the mother has the custody of the children and the father was ordered to pay alimony for the support of the same.
>
> "1. If the father does not comply with the court order or pay for the support of the children, and they are in need of assistance, are they eligible for aid to dependent children under Chapter 438 unless court action has been taken for abandonment and a warrant issued as provided in Section 1 (d).
>
> "2. If the father pays in full the amount of alimony ordered by the court, but which amount does not provide an adequate budget for the support of said children, would the children be eligible for aid to dependent children in an amount to cover the deficiency between the

amount paid by the father under the order of the court and the budget needed for their support?"

We answer your first inquiry in the negative and the second inquiry in the affirmative, assuming, of course, that each of the three children involved is found by the county agency, or the state agency, to be a dependent child within the definition of the term "dependent child" as defined in Subdivision (c) of Section 1, Chapter 438, Laws 1937.

Concerning the second inquiry we direct your attention to Section 5 of said Chapter 438.

You further state and ask:

"A child has resided with her grandmother in County A for two years. As her father who resides in County B is a disabled veteran and the mother is in a sanatorium caring for tubercular persons, the child appears to be a dependent child as defined in Section 1, Subdivision (c). In what county should an application for aid to dependent children be made for the benefit of said child?"

The facts you submit indicate that the child has resided in County A for two years and, therefore, it is our opinion that County A is the proper county in which the application for aid for this child must be filed. Section 4 of Chapter 438 specifically provides that:

" * * * The County responsible for the payment of assistance under this Act shall be the county in which said child has resided for the year preceding the application for assistance; * * *."

LOUIS F. SOUKUP,
Special Assistant Attorney General.

July 29, 1937. 840a-6

15

CHILDREN—Dependent—Aid to—Availability of funds.

State Board of Control, Aid to Dependent Children Division.

You state:

"The legislature in 1937 appropriated $800,000.00 per annum for each of the years ending June 30, 1938 and June 30, 1939 as the financial participation of the State of Minnesota in planning for aid to dependent children under the provisions of Laws 1937, Chapter 438.

"Title IV of the Federal Social Security Act provides for the payment of an amount equal to one-third of the total of sums expended by the state and counties for aid to dependent children eligible under the Social Security Act, and in carrying out the plan for such aid approved by the Federal Social Security Board. Since the amount of assistance

given by the Federal Government is about one-third of the total above described, and since the state is limited by its appropriation of $800,000.00 per annum made by the legislature, it appears that there is a limit to the amounts by which the counties may be reimbursed."

You direct our attention to Laws 1937, Chapter 438, which reads as follows:

"(a) The County Agency shall keep such records, accounts and statistics in relation to aid to dependent children as the State Agency shall prescribe.

"(b) Each grant of aid to dependent children shall be paid to the recipient by the County Agency in the first instance.

"(c) The County shall be paid from state and Federal funds available therefor an amount equal to two-thirds of the county's total expenditures for aid to dependent children as defined by the Federal Social Security Act.

"(d) The County shall be paid from state funds in an amount equal to two-thirds of the county's total expenditures for aid to dependent children not included in the provisions of the Federal Social Security Act and which are eligible for assistance under the provisions of this Act.

"(e) Not exceeding two-thirds of the balance of any Federal funds made available annually to the State Agency for carrying out the purposes of this act, after the payment to the County of two-thirds of the County's total expenditures for aid to dependent children, as provided in subsection (c) of this section, shall be used to repay the counties' necessary administrative expenses pro rata in the proportion the total number of recipients in each county bears to the total number of recipients in the state for the period for which such funds were received and are available, and the balance of any such sum shall be available to the State Agency to defray the necessary expenses of the State Agency."

You inquire:

1. "If, according to Laws 1937, Chapter 438, Section 13 (b), a county pays each grant of aid in the first instance and if the total sum of such grants of aid is in excess of the sum on which the county can be reimbursed from available state and federal funds in accordance with the provisions of Section 13 (c) and (d), are such payments by the county legal and in accordance with the provisions of Chapter 438, Laws 1937? (As a hypothetical instance: if state and federal funds are available to reimburse, as provided by Section 13 (c) and (d), two-thirds of only a certain sum per month, may the county legally pay out additional amounts for which it could not because of limited state funds receive reimbursement?)"

2. "If the answer to the above is in the affirmative, and if a county, as cited in the hypothetical instance of the above paragraph,

should expend sums for aid to dependent children in excess of that amount for which state funds are available for reimbursement, may the amount certified to the federal government for the purpose of federal reimbursement be on the basis of the total sum expended by the county for those children as are eligible under Title IV of the Federal Social Security Act, it appearing in this situation, that the state could not pay as provided in Section 13 (c) and (d), its full portion of the total expenditures of the County?"

We answer your inquiries 1 and 2 together, thus:

It is our opinion that each grant of aid to dependent children made and paid by the county in conformity with the provisions of Laws 1937, Chapter 438, is legal irrespective of the availability of any state and federal funds to reimburse the counties in accordance with Section 13 above quoted and as provided for in Section 14. However, in our opinion your department cannot arbitrarily limit the amount which a county is entitled to be paid as reimbursement from the state while there are sufficient state and federal funds available to comply with the provisions of said Sections 13 and 14. This is obvious from the provisions of said Section 13 and from the provisions of Section 14 which provides that "Payments shall be made by the state to the counties of two-thirds of the estimated costs of aid for dependent children in each county of the state from state and federal funds available for that purpose * * *."

If, at any time, because of insufficient state and federal funds, your department cannot comply with the provisions of Section 13 and pays to a county as reimbursement less than the amount specified, particularly in Section 13, subdivision (c), your department should certify to the federal government for the purpose of federal reimbursement on the basis of the total sum expended by the county and on the basis of the total sum expended by the state for the children as are eligible for aid under Title IV of the federal social security act. See Section 403 (b), Title IV of the federal social security act relating to grants to states for aid to dependent children.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

November 18, 1937. 840a-6

16

CHILDREN—Dependent—Aid to inmate of public or private charitable institution.

State Board of Control, Aid to Dependent Children Division.

You state:

"There are many children in the State of Minnesota who are now inmates of public or private charitable institutions because they have been deprived of parental support."

You inquire:

"May a relative, eligible to make application under the Laws of 1937, Chapter 438, apply for assistance for aid to a child, who is an inmate of such an institution, in the county in which the child has a legal settlement?"

We answer your inquiry in the affirmative. See Sections 6 and 17 of Chapter 438, Laws 1937.

You also inquire:

"Does the term 'aunt' listed in Section 1 (e) of said Act include the wife of a brother of either parent of the child, or, in other words, is an aunt by marriage eligible to make application for aid to a dependent child?"

It is our opinion that an "aunt" is eligible to make application for aid to a dependent child under Chapter 438, Section 1 (c) thereof, and that the word "aunt" as used in the definition of the term "dependent child" in said Section 1 (c) includes the wife of a brother of either parent of the child.

You further inquire:

"Does the term 'grandmother,' as used in the Act, Section 1 (c), include a stepgrandmother of said child?"
We answer your inquiry in the negative.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

December 21, 1937. 840a-6

17

CHILDREN—Ownership of money as a bar dependent—Aid to.

Aid to Dependent Children Division, State Board of Control.

You ask:

(1) "Is the $400.00, owned by the two children in common, a bar to an allowance under Laws 1937, Chapter 438, Section 4 (c) (1)?"
(2) "If the $400.00 is held to be a bar will the children be eligible for aid if $100.00 or more of the $400.00 is spent for support of said children?"

(3) "May a child, otherwise dependent and eligible under Chapter 438, own personal property of a value of $300.00 or less and be eligible for Aid to Dependent Children?"

(4) "Where a sum of money of over $300.00 has been bequeathed to a child to be held in trust until his majority and because of this such

funds are not available for the support of the child at the present time, is the child, being dependent otherwise, eligible for Aid to Dependent Children?"

Relative to inquiries numbered one and two, it is our opinion that the $400.00 left in trust for the children to the mother by the deceased husband does not constitute ownership of property by the mother within the provisions of Laws 1937, Chapter 438, Section 4 (c), Subdivision (1) thereof, and, therefore, the $400.00 left in trust for the children to the mother as aforesaid is not a bar to an allowance under said Laws 1937, Chapter 438, Section 4 (c), Subdivision (1) thereof.

Relative to your inquiry numbered three, it is our opinion that a child, otherwise dependent and eligible for aid under the provisions of Laws 1937, Chapter 438, may own personal property of the value of $300.00 or less and be eligible for aid under said Chapter 438, at the discretion of the county agency in accordance with all the facts in each particular case, and in accordance with the provisions of Section 5 of said Laws 1937, Chapter 438.

We answer your inquiry numbered four in the affirmative assuming, of course, that the child referred to therein is a dependent child as defined in Section 1 (c) of said Laws 1937, Chapter 438, and is not living with a surviving mother or a surviving father who owns any property within the provisions of Section 4 (c), Subdivisions (1) and (2), which is a bar to an allowance.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

October 25, 1937. 840a-6

18

CHILDREN—Dependent aid to—Settlement—Removal by county.

State Board of Control, State Office Building.

You submit as follows:

"A number of cases have arisen, in the administration of Laws 1937, Chapter 438, in granting Aid to Dependent Children, where a family is residing in County B when it has legal settlement for poor relief purposes in County A. The children are dependent and application is made for Aid to Dependent Children under the statute. The county hesitates to consider the application or delays making a grant until the family is returned to County A where it has legal settlement. In other cases where the grant has been made by County B and the parents have legal settlement for poor relief purposes in County A, counties have been reluctant and unwilling to recognize the need for State Agency approval before children may be moved to the county where their parents may have settlement for purposes of poor relief.

"Laws 1937, Chapter 438, Section 11, provides as follows:

'Any child qualified for and receiving assistance pursuant to the provisions in this act in any County in this State, who moves or is taken to another County in this State, **with the approval of the State Agency,** shall be entitled to continue to receive assistance from the County from which he has moved or has been taken until he shall have resided for one year in the county to which he has moved.'

"A case has arisen of a family who has resided in Mille Lacs County for three or more years but who has legal settlement for poor relief purposes in Sherburne County, as it has received relief during that period from Sherburne County. The father is physically incapacitated, being very ill, and the mother has applied for and is receiving aid for her dependent children. Application was made for this aid in May but was not granted until August because of a feeling on the part of the Mille Lacs County Welfare Board that the family should be returned to Sherburne County. However, it has been necessary for Mille Lacs County to grant poor relief to the family because of an emergency situation, and Mille Lacs County has thus far failed to make collection from the proper Sherburne County Township Board. Now Mille Lacs County insists upon returning the family to Sherburne County.

"It appears to us at this time that it may be better for the children to remain in the present home in Mille Lacs County, and we are not ready to approve the removal of the children to Sherburne County under the provisions of Section 11, Chapter 438, Laws 1937.

"The Supreme Court decision, found in Volume 188, Page 125, Minnesota Reports, enunciates the principle that the 'Mothers' Pension Law, being newer, prevails over poor laws where the same conflict.' "

For the purpose of our opinion we have numbered your inquiries one, two and three with answers immediately following each inquiry.

Your first inquiry:

1. "Does the principle stated above hold also for the Aid to Dependent Children Law, since it is the newer law?"

We answer your first inquiry in the affirmative.

Your second inquiry:

2. "Since there has arisen a conflict with some of the counties who claim their right to return families to the county where they may still have settlement for poor relief purposes, though the children's right to Aid to Dependent Children is clearly established in the county where the family now resides, is the State Agency correct in holding to the opinion that the Aid to Dependent Children Law of 1937, Chapter 438, Section 11, being newer, prevails whenever it conflicts with the poor law, particularly where the question of moving families is involved?"

We answer your second inquiry in the negative for the reason that in our opinion the provisions of Section 11 of the Aid to Dependent Children Act, Laws 1937, Chapter 438, referred to and quoted in your letter, are not in conflict with the provisions of the poor laws pursuant to which counties claim the right to return families to the county where they may still have a settlement for poor relief purposes though the children's right to aid to dependent children is clearly established in the county where the family now resides.

However, the children's right to aid to dependent children when clearly established in the county where the family subject to removal now resides should be recognized without hesitation or delay by the county exercising the right of removal of the family under the poor laws. In our opinion it is contrary to the intent of the aid to dependent children act for any such county to hesitate to consider applications for aid and to delay granting of aid to such children until the family is returned to the place of their legal settlement for poor relief purposes.

Your third inquiry:

3. "May the county where the family is living remove the parents, to the county of their legal settlement for poor relief purposes, and leave the children stranded in the county where they now reside, if the Board of Control refuses to approve the removal of the children under the provisions of Laws 1937, Chapter 438, Section 11?"

We answer your third inquiry in the negative. In our opinion such act on the part of the county and the refusal of approval on the part of the state agency would be contrary to the intent of the provisions of Section 11 and contrary to the purposes of the Aid to Dependent Children Act as set forth in Section 17 of the act, which reads as follows:

"This act shall be liberally construed with a view to accomplishing its purpose, which is hereby declared to be to enable the state and its several counties to cooperate with responsible mothers or relatives in rearing future citizens, when such cooperation is necessary on account of relatively permanent conditions, in order to keep the family together in the same household, reasonably safeguard the health of the mother and secure to the children during their tender years her personal care and training."

It is obvious from the provisions of the above section that Section 11 must be construed liberally and in conjunction with Section 17 with a view of accomplishing the purposes of the Aid to Dependent Children Act as declared to be in Section 17. Therefore, construing the two statutes in the light of the inquiry, it is our opinion that said statutes should be construed as requiring the county to request approval of the state agency for the removal of children qualified and receiving aid under the act in all cases of removal of the parents by the counties under the poor laws to their place of legal settlement for poor relief purposes, and as requiring the state agency to give its approval in all such cases in order that the purposes of the act set forth in Section 17 may be carried out by the county and state,

and in order to secure to the children continuance of payment of aid under the act from the county from which they have been taken as provided for in Section 11.

With reference to the specific case of Mille Lacs County and Sherburne County referred to in your letter, it is our opinion that the state agency should approve the removal of the children to Sherburne County, which said county you indicate to be the place of legal settlement of the family for poor relief purposes.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

September 15, 1938. 840a-6

19

CHILDREN—Dependent—Aid to—"Sister" does not include "Sister-in-law."
Mr. Downer Mullen, Secretary, State Board of Control.

You state:

> "Laws of 1937, Chapter 438, Section 1 (c) provides that a dependent child as defined in the section may receive aid
>
> > 'who is living with his mother, stepmother, grandmother, sister, step-sister or aunt in a place of residence maintained by one or more of such relatives as her or their own home.'"

You then inquire:

> "Does the term 'sister' include the wife of a brother of said child?"

We answer your question in the negative.

Section 1 (c) specifically enumerates the relatives with whom the dependent child must live before said child is entitled to aid. Such enumeration is exclusive and cannot be extended to apply to relatives not therein named. Said section names "sister" and "step-sister". If the term "sister" is broad enough to cover "sister-in-law" it would be broad enough to cover "step-sister" and the term "step-sister" need not have been enumerated. Since it was specifically set forth, it is clear that the legislature intended that a dependent child must live with either a blood sister or a step-sister, or any of the other relatives specifically named, before aid can be given to such child, and that living with a sister-in-law does not meet the statutory requirements.

ROY C. FRANK,
Assistant Attorney General.

August 16, 1938. 840a-6

20

CHILDREN—Dependent—Aid to—Stepchildren—Eligibility.

State Board of Control, State Office Building.

You state that in adminstering Laws 1937, Chapter 438, providing aid to dependent children, the following case is before the Board of Control, to-wit:

> "A father dies leaving a wife and children; the mother re-marries and the second husband who becomes the stepfather of the children refuses to support such children. Except for the support which the stepfather might give, if able, the children are otherwise eligible for Aid to Dependent Children."

You inquire:

> (1) "If the stepfather to the child (or children) is able to support such child, but refuses to do so, is the child eligible for Aid to Dependent Children?
>
> (2) "If it appears that the stepfather is not able, without great effort and sacrifice, to support such child (or children) is the child eligible for Aid to Dependent Children?"

Assuming that there are no facts from which the presumption arises that the stepfather has voluntarily assumed the relation of father to the child (or children) in question in your inquiries and that he has undertaken to maintain and support them, or that there is no prenuptial agreement with the mother establishing liability on the part of the stepfather to maintain or support the said child (or children), or that the stepfather has not legally adopted the said child (or children), we answer both of your inquiries in the affirmative.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

December 15, 1937. 840a-6

21

CHILDREN—Dependent—Aid to—Who may qualify for.

State Board of Control, State Office Building.

You state that:

> "An applicant for aid to dependent children was denied such aid by a county agency recently because the grandparents of the child were deemed able to provide for the child."

You direct our attention to Section 1 (c) of Laws 1937, Chapter 438, the aid to dependent children act, which defines the term "dependent child" in so far as herein pertinent as follows:

"'Dependent child' as used in this Act means a child under the age of 18 years * * * who is deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of the parents, and whose relatives, liable under the law for his support, are not able to provide, without public assistance, adequate care and support of such child, and who is living with his mother, stepmother, grandmother, sister, stepsister, or aunt, in a place of residence maintained by one or more of such relatives as her or their own home."

You inquire:

"Is the statement 'whose relatives, liable under the law for his support, are not able to provide, without public assistance, adequate care and support for such child' one of the elements of eligibility in the definition of a dependent child, and does the fact that there are relatives able to support, render the child ineligible even though they refuse to contribute, and all other conditions pertinent to the matter of the allowance has been established?"

In our opinion, while the statement or phrase "whose relatives, liable under the law for his support, are not able to provide without public assistance, adequate care and support for such child," is one of the elements of eligibility in the definition of the term "dependent child", the fact that there are relatives able to support the child and refuse to do so does not render the child ineligible for aid under Chapter 438, if all the other conditions of Chapter 438 pertinent to the allowance of aid to the child have been established.

All of the elements of eligibility included in the definition of the term "dependent child" in Section 1 (c) of Laws 1937, Chapter 438, as a matter of fact **all of the provisions of Laws 1937, Chapter 438, must be construed in the light of the intention of the legislature expressed in Section 17 thereof, which reads as follows:**

"This act shall be liberally construed with a view to accomplishing its purpose, which is hereby declared to be to enable the state and its several counties to cooperate with responsible mothers or relatives in rearing future citizens, when such cooperation is necessary on account of relatively permanent conditions, in order to keep the family together in the same household, reasonably safeguard the health of the mother and secure to the children during their tender years her personal care and training."

The provisions of Section 17, above quoted, indicate that Chapter 438, from the standpoint of the inquiry you submit, must be construed as being intended to enable dependent children to live with and be cared for by their mother, a responsible mother, in her own home, or to live with and be cared for by responsible relatives, if there is no responsible mother, to-wit: stepmother, or sister, or stepsister, or aunt, if such latter relatives are within the requirements of Section 4 (d) of said Chapter 438, rather than

to have the home broken up and the child taken care of in other ways and under our poor laws.

In view thereof and assuming that all other conditions precedent to the matter of allowance of aid under Chapter 438 have been established in the case referred to in the first paragraph of your letter, it is our opinion that if the applicant for aid for the dependent child therein referred to is a responsible mother, or any one of the responsible relatives enumerated and referred to in the preceding paragraph, the statute, Chapter 438, requires a finding by the county agency, or on appeal to the state agency by the state agency, that the child is a "dependent child" within the meaning and intent of said Chapter 438, the fact that there are grandparents of sufficient financial ability to support such child and refuse to do so, is not intended to negative such finding. **It is to be particularly noted that the provisions of Section 17 are intended by the legislature to be mandatory on both the county and state agencies in the administration of aid under the provisions of said Chapter 438.**

It is true that by reason of the provisions of Section 19, of said Chapter 438, which provide "Nothing herein shall be deemed inconsistent with any right of action against a relative of a poor person conferred by law", that under Section 3157, Mason's Minnesota Statutes of 1927, of the poor relief laws, a grandfather having sufficient financial ability can be called upon for the support of a pauper. **This like other forms of poor relief might result in the breaking up of a home, as the grandfather might agree to support the child in his own home, but refuse to support the child in the home of the responsible mother and to support such mother, or the grandfather might agree to support the child in his own home but refuse to support the child in the home of the responsible relatives entitled to make application for aid under the provisions of Chapter 438, all of which would be contrary to the legislative intent expressed in Section 17, of Chapter 438.**

In our opinion Chapter 438, is intended to be construed as authorizing and contemplating the granting of aid in all such cases in the first instance, and in the second instance as authorizing the county agencies or the state agency to maintain a legal action pursuant to the poor relief statutes, against the grandfather who is financially able to provide support for the child, but who refuses or fails to do so, to recover the amount of aid furnished to the child under said Chapter 438.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

April 12, 1938. 840a-6

22

CHILDREN—Delinquent—Committment—Age of.

Mr. J. J. Hadler, County Attorney.

You state that there is a delinquent girl in your county just over the age of 18 years and that the Juvenile Court of your county is desirous of

committing such girl to the Home School at Sauk Center. You refer to a new statute which presumably has raised the age limit from 18 years to 21 years for the purpose of such commitments. You ask our opinion thereon.

We advise you that the Juvenile Court of your county does not have the authority to commit a delinquent girl over the age of 18 years to the Home School for Girls at Sauk Center. Mason's Minnesota Statutes, 1936 Supplement, Section 8637, provides that the delinquency act shall apply to children under the age of 18 years. Also see State ex rel. Ernest B. Johnson vs. Wiecking, which opinion was filed July 30, 1937. The statute that you have in mind is Section 24 of Chapter 435, Laws of 1937, which section provides that the word "minor" as used in the Probate Code means a person under the age of 21 years. This particular statutory provision is not applicable to the delinquency statutes.

We assume that the delinquent girl referred to in your letter was not committed to the guardianship of the State Board of Control or any other agency previous to the time that she reached the age of 18 years.

ROY C. FRANK,
Assistant Attorney General.

August 9, 1937. 840a-5

23

CHILDREN—Delinquent—Release of—When.

Mr. Downer Mullen, State Board of Control.

It appears that on July 17, 1934, the juvenile court of Wright County committed Alice Eads to the Home School for Girls as a delinquent child. The findings of the court show that the girl was born January 25, 1917, and is now 20 years and 3 months old. She now demands to be released from the institution claiming, through her attorney, that since she is over 18 years of age she is no longer a minor and that the state cannot hold her any longer.

Our opinion is requested as to whether she must be released because she is over 18 years of age.

We advise you that the fact that she is over 18 years of age does not make her release mandatory. She may be held in the custody of the school until she is 21 years of age. Mason's Minnesota Statutes of 1927, Section 8706, defining a minor to mean, in reference to a female, one under the age of 18 years, has no application in this case.

Mason's Minnesota Statutes of 1927 (1936 Supplement), Section 8637, provides that:

> "When jurisdiction shall have been obtained by the court in the case of any child, such child shall continue for the purposes of this Act

under the jurisdiction of the court until he becomes twenty-one years of age, unless discharged prior thereto by the court."

In this connection see State ex rel. White vs. Patterson, 188 Minn. 402, 249 N. W. 187. In that case, Violet White had been committed to the Home School for Girls as a delinquent child by the juvenile court of Stearns county. The record shows that she was born on July 1, 1914, was committed on September 27, 1929, and obtained a writ of habeas corpus on September 3, 1932, at which time she was 18 years and 2 months old. The writ was quashed. The supreme court held that under the provisions of Section 8637 she could not be released since she was under the age therein provided, which was 19. Since then Section 8637 has been amended to set the age of release at 21. Laws of 1933, Chapter 184. The court discussed Section 8706, relating to minors, and said:

" * * * in the case of dependent, neglected, or delinquent children, no constitutional inhibition or any good reason denies the legislature the right to continue them under guardianship for a longer period than other children. The relator was therefore not entitled to release upon arriving at 18 years of age."

Your enclosures are herewith returned.

ROY C. FRANK,
Assistant Attorney General.

April 24, 1937. 840a-5

24

CHILDREN—Employment of—Places where malt liquors are sold.

Mr. Lyman A. Brink, County Attorney.

You ask our opinion on the following question:

"May a boy or girl under the age of eighteen years of age serve non-intoxicating malt liquors in a restaurant?"

We answer your question in the negative. Chapter 109, Laws of 1935, prohibits the employment of any person under the age of eighteen years in places where non-intoxicating malt liquors are sold.

ROY C. FRANK,
Assistant Attorney General.

July 26, 1937. 217f-3

25

CHILDREN—Female under 21 is minor—Cannot convey real estate except in specific instances.

Mr. L. A. Wilson, County Attorney.

In your letter you state:

> "Sec. 24, Chapter 435 of the Laws of Minnesota for 1937 defines a minor as 'a person under the age of twenty-one years.' One R. L. B., a female over the age of eighteen years but under the age of twenty-one years, is entitled to a monthly compensation payment of $16.50 per month from the United States Veterans Administration as the child of a deceased World War Veteran."

You then inquire:

> "In view of the above definition of 'minor' is it required that a guardian be appointed for said R. L. B. and that such guardian collect such compensation payments?"

We answer this question in the affirmative.

You further advise us that a certain minor between the ages of 18 and 21 desires to convey an interest in real estate of which she is the owner, and ask:

> "Insofar as said real estate is concerned is she competent to sell and convey the same or is she a minor and must sale be made through guardianship?"

We advise you that the sale cannot be made by the minor but must be made by a guardian.

You also state:

> "Heretofore, that is, prior to the passage of said Chapter 435, females eighteen years of age were deemed to be of age and competent to convey their real estate."

and ask:

> "Has the law now been changed so as to render all persons, including females, under twenty-one years of age minors and as such incompetent to convey real estate? What is the situation with respect to married females under the age of twenty-one years?"

In so far as it is pertinent to your inquiry, Mason's Minnesota Statutes, 1936 Supplement, Section 8992-142 (Laws of 1935, Chapter 72, Section 142) provides:

> "A guardianship of a minor shall terminate upon his death or upon his attainment of legal age. The marriage of a female ward under guardianship as a minor only and not under a juvenile court guardianship shall terminate the guardianship of her person but not of her estate, provided that such guardianship shall not affect her capacity

to join with her husband in instruments involving his interest in real estate."

The only general definition of a minor in this state has been contained in the probate code. By virtue of such code a female reached her majority at the age of 18 years rather than at the age of 21 years as provided for by common law. Mason's Minnesota Statutes of 1927, Section 8706, 31 C. J. 986, Section 3. Section 8706 was one of the sections repealed by the probate code of 1935 (Laws of 1935, Chapter 72). The new code provides that the age of majority shall be 21 years for both males and females.

Assuming that we were to construe the probate code to apply only to probate procedure, we would have to apply the common law rule, and we would reach the same result, that is, that a minor whether male or female, is a person under the age of 21 years.

It is our opinion that the definition of a minor as set forth by said Chapter 72 is applicable generally, unless in specific instances a different age is fixed, and that the effect of said Chapter is that all persons under the age of 21 years are incompetent to convey real estate other than that permitted by the above quoted section (142).

ROY C. FRANK,
Assistant Attorney General.

November 4, 1937. 498c

26

CITIES AND VILLAGES—Bands and musical entertainment—Tax levy.

Mr. Glen C. Sawyer, Village Attorney.

You state that the village council contemplates the levying of a tax of not exceeding one mill against the taxable property in the village for the purpose of providing musical entertainment for the public in public buildings or on public grounds pursuant to and within the limitations provided for in Section 1192 of Mason's Minnesota Statutes of 1927.

You inquire whether the proposition of levying such tax, pursuant to said Section 1192, must be submitted to a vote of the electors for approval.

We are of the opinion that said Section 1192 is still in force and effect, and that the same was not repealed by implication or otherwise by the enactment of Chapter 79, Laws of 1927 and amendments thereto. In this connection see State vs. Keyes, 188 Minn. 79, in which the supreme court held that said Chapter 79, Laws 1927 did not repeal Section 1737 of Mason's Minnesota Statutes of 1927 by implication. This office, since the decision in the Keyes case has heretofore held that said Chapter 79 did not repeal said Section 1192. It is, therefore, our opinion that your village council may levy a tax not exceeding one mill against the taxable property in your vil-

lage for the purpose of providing musical entertainment to the public, in public buildings or on public grounds, without submitting the proposition of so doing to a vote of the electors, within the limitations provided for in said Section 1192.

DAVID J. ERICKSON,
Deputy Attorney General.

July 29, 1937. 519h

27

CITIES AND VILLAGES—Bonds—Issuance of—Election authorizing—Delay in issuing.

Mr. Garfield H. Rustad, Village Attorney.

You state that in the fall of 1935 the village council of the village of Dilworth "contemplated the construction of a sewage disposal plant in said village"; that this was a WPA project and necessitated the issuance of bonds on the part of the village in the sum of $15,000; that a special election was had whereby the proposition of issuing bonds in the sum of $15,000 for such purpose was submitted to and approved by the voters of the village, "but thereafter the village council took no steps to issue said bonds for this project"; that "the matter has now come up again before the council for consideration and in the meantime the personnel of the council, by election, has been changed so that the same council does not exist that were in office when the election was had"; and that the "setup with the WPA has been completed."

You inquire:

> " * * * whether or not the election in the fall of 1935 authorizing the village council to issue these bonds will carry over to the present time in that it is the same project involved or are you of the opinion that a new election should be had resubmitting the proposition to the voters."

We assume that the proposition to issue the sewage disposal bonds was submitted in conformity with the applicable statutory provisions relating to the issuance of such bonds by your village. We also assume that the bonds in question will be issued in conformity with the terms and conditions of the submission of the proposition to the voters and that it was necessary to submit such proposition to the electors of the village for approval. We believe, therefore, that after the proposition of issuing the bonds for such purpose had been submitted to the voters for approval and the electors of the village had approved the same, that it was the duty of the village council to take such action and steps as might be necessary to carry out the mandate of the electors of the village. In other words, we believe that you are quite right in your conclusion that where the bonds were authorized by the voters to pay the cost of constructing said sewage disposal plant and

where this project "had not been abandoned but was still being considered by the council" that the present council may now proceed to issue said bonds in conformity with the applicable statutory provisions. Under the circumstances outlined in your letter, we do not believe that the time which has elapsed since the authorization by the electors to issue said bonds would prohibit the council from issuing the same at this time. The election has been held and nothing remains but for the village council and the properly constituted village officers to carry out the mandate of the electors. There could be no finality to elections were it possible to resubmit propositions already adopted. The applicable rule is stated in McQuillin on Municipal Corporations, (2nd ed.), Volume 5, Section 2362, as follows:

> "If the vote is in favor of the proposition submitted as incurring an indebtedness, it is final and conclusive. * * * If the municipality has power to refuse to submit the question to a vote of the people, but it nevertheless does submit the question, it cannot refuse to issue the bonds after a favorable vote."

In the case of Stokes v. Montgomery, 203 Ala. 307, 82 A. 663, it was held that in the absence of a statute requiring the bonds to be issued within a specified period of time after the election, the time of issuance rests within the sound discretion of the city officials.

In Chickaming Tp. v. Carpenter, 106 U. S. 663, 1 S. Ct. 620, 27 L. ed. 307, it was held that even where a statute provides that the bonds shall be issued within a certain number of days after an election authorizing the issue, valid bonds may be issued after the time specified.

In Carlson v. Helena, 39 Mont. 82, 102 P. 39, 17 Ann. Cas. 1233, it was held that the statutory authority conferred to issue bonds does not lapse upon the completion of the assessment roll for the year in which the election was held.

In the case of Nall v. Elizabethtown, 200 Ky. 321, 254 S. W. 893, it was held that the issuance of bonds for constructing a filtration plant and improving a city's waterworks system four years after they were voted did not constitute such unreasonable delay as to affect the validity of the bonds, where the same necessity for improving the waterworks system existed, and the delay was due to the desire of the city to make the improvements at lower prices than those prevailing, as well as to its inability to market the bonds to advantage.

As indicated, therefore, we are of the opinion that the issuance of the bonds by your village to pay the cost of constructing a sewage disposal plant approximately two years after the issuance of said bonds was authorized by the electors does not constitute such an unreasonable delay as to affect the validity of the issuance of the bonds at this time where the project in question has not been abandoned but is still being considered by the governing authorities of the village and where the same necessity for constructing the sewage disposal plant in the village exists.

DAVID J. ERICKSON,
Deputy Attorney General.

September 20, 1937. 44a

28

CITIES AND VILLAGES—Buildings—Community hall—Warrants—Issuance of.

Mr. Arthur R. Lieberman, Village Attorney.
Dear Sir:

You state that about a year ago the "voters of the Village of Carlton approved a bond issue in the sum of $15,000 for the purpose of acquiring the site and erecting a community building;" that "this work is now proceeding under the direction of the W.P.A.;" that "the council has just been informed that the cost to the Village will exceed the sum of $15,000;" and that "it is estimated that this additional expense will amount to between $3,000 and $5,000."

You inquire,

> "whether the members of the Village Council are permitted to expend whatever sums are necessary over the amount of the original bond issue provided that these sums are paid from the general fund of the Village of Carlton after a proper resolution authorizing the expenditure of these sums has been approved by the council."

It is impossible to answer your inquiry definitely upon the basis of the information submitted. You do not inform us under what statutory provisions your village is operating; nor under what statute the building in question is being constructed and the bonds issued.

Our information is that your village is operating under Chapter 139, Laws of 1875. Under Section 1 of said Chapter 139 villages operating thereunder were endowed with all the rights, powers and duties incident to municipal corporations at common law. There can, therefore, be no doubt of the right of the village to construct, hold and maintain a building reasonably necessary for general governmental purposes. Under the same section of said Chapter 139 the village council has authority "to take, hold, purchase, * * such real estate and personal property or mixed estate as the purposes of the corporation may require." This office in construing similar statutory provisions relating to villages has heretofore held that the village council as the governing body of the village has authority to acquire a site and erect needful public buildings thereon, without authorization of the voters, if the village has funds on hand, or will have funds on hand when the taxes already levied have been collected, sufficient and available for that purpose.

However, there seems to be a limitation in Section 20 of said Chapter 139, under which your village is operating, which prohibits the council from appropriating a "greater sum of money than five hundred dollars * * * for any one purpose by the council, unless it is expressly authorized by a vote of the legal voters of said village at an annual or special meeting." We assume, however, that said Section 20 has already been complied with since an election has been held whereby the village council was authorized to issue bonds in the sum of $15,000 for the purpose of paying the cost of ac-

quiring the site and erecting said building. In other words, the electors at said election authorized the governing body to construct said building without any limitation as to the cost of the same. If this is true and the village has funds on hand sufficient to pay the additional expense incident to the cost of constructing said building or if it will have such funds when taxes already levied have been collected, the council may authorize the issuance of village warrants or orders in anticipation of the collection of such taxes to pay said additional cost.

DAVID J. ERICKSON,
Deputy Attorney General.

April 20, 1937. 469c-4

29

CITIES AND VILLAGES—Buildings—Memorial hall combined with city hall.

Mr. Albert G. Loomis, Village Attorney.

Dear Sir:

You state that several years ago the American Legion Post of Comfrey built a "brick memorial hall;" that this hall consists of a large assembly room and stage, which has been used as the Post's headquarters, and has been rented for dances and other public gatherings of the Legion Post; that the Legion Post financed the erection of this building by the sale of bonds, which are in the nature of a mortgage against the property; that the Post has had considerable difficulty in meeting its obligations and has approached the village council to convey the property to the village "if the village will pay the outstanding indebtedness;" that the building would "probably cost the village six or seven thousand dollars;" that this building, if purchased by the village, would probably be used as a "memorial building, city hall and council rooms;" and that it is likely that the village council would also use a part of the building "as a public rest room."

You inquire:

> "Under that statute (Sections 1933-10 to 1933-14, Mason's Minnesota Statutes of 1927) would the village of Comfrey have the power to purchase the Legion building and use it as a memorial hall, by submitting the question to the voters in compliance with the statutes?"

We are of the opinion that this may be done by complying with the statutory provisions relating thereto. Under the general laws the village has power to construct a village hall containing a council room or rooms. Under said Section 1933-10, et seq., the village has the power to construct a memorial building for specific purposes.

Chapter 294, Laws of 1921, requires cities and villages of the fourth class to provide and maintain public rest rooms. In our opinion the village

may combine these purposes in one building. Under said Section 1933-10, the village is authorized to provide for the "erection, equipment and maintenance of a building * * * in recognition of the services performed by soldiers, sailors, marines and war veterans of the United States." If the village may erect, equip and maintain such a building, we see no legal reason why it cannot purchase one already constructed. There are authorities to the effect that power to erect a building includes power to acquire a building already erected. Moreover, we understand that your village is incorporated and operating under Chapter 145, Laws of 1885. Subdivision 3 of Section 21 of said chapter authorizes the council "to receive, purchase and hold for the use of said village any estate, real and personal, and to sell, convey, lease or otherwise dispose of the same, * * *." We have always considered that this vested ample authority in the village council to accept a conveyance of real estate.

Your first question, however, involves something more than the mere acceptance of a grant of said Legion Post building, since you state that the Post has approached the village council to convey the property to the village if the village will pay the outstanding indebtedness. This involves the assumption of an obligation or, in other words, the creation of a debt against the village. There is no express statutory authority for this, nor do we believe that this is an implied power arising out of said Section 1933-10, et seq. Section 1933-10½ authorizes the village, for the purpose of meeting the cost of such a building, to levy, within the limits provided by law, an amount sufficient to cover the cost of such building. Sections 1933-11 and 1933-12 authorize the issuance of bonds to pay the cost of such a building. It will also be noted that Section 1933-12 provides that for the purpose of meeting the indebtedness created by such bond issue a village may levy, within the limits provided by law, a sum sufficient to discharge such bonded indebtedness and interest thereon.

The village may, if it has money available for that purpose, buy said building for a cash consideration sufficient to pay off the mortgage and take it clear. We have heretofore held that a village may not mortgage property held for a governmental purpose, and, as indicated, it is very doubtful if it may do so indirectly by purchasing such property subject to a mortgage which it assumes and agrees to pay. So far as we can find, our Court has not directly passed on this question, but the general rule judicially established in other jurisdictions seems to be that a city or village may purchase property subject to a mortgage only when it may legally mortgage its own property. If the grant can be made without any assumption agreement we believe that it would be valid.

You also inquire "if it (the village) would have the right to rent a part of the building, from time to time, for public dances or other gatherings in order to obtain some income from the property."

As indicated Subdivision 3 of Section 21 of said Chapter 145 authorizes the village council "to sell, convey, lease or otherwise dispose of" any property belonging to the village. It is true that the statute does not expressly authorize the leasing of surplus space in the village hall or any other municipal building, but we believe that this power is necessarily implied

from the broad power of conveying and leasing granted in said Section 21. Generally speaking, a municipality has power to temporarily lease public property providing that it does not interfere with the public use of the property for which it is maintained. See Dillon on Municipal Corporations, Volume 3, page 1594, 5th Ed., and McQuillin on Municipal Corporations, Volume 3, Section 1247, page 762. See also Anderson v. Montevideo, 137 Minn. 179, 162 N. W. 1073.

Under the rules of law above referred to, we know of no legal objection to the village renting its village hall or public building or a portion thereof, when not needed for public purposes, for entertainments, public dances or other gatherings, providing such renting does not interfere with the public use of the property for which it is maintained. However, we question the power of the village council to enter into a long term lease which would virtually tie the hands of succeeding governing bodies of the village.

DAVID J. ERICKSON,
Deputy Attorney General.

March 2, 1937. 476b-8

30

CITIES AND VILLAGES—Building site memorial—Designation of—Issuing bonds therefor.

Mr. Chester G. Rosengren, City Attorney.

You state that the City of Fergus Falls contemplates building a memorial auditorium pursuant to Chapter 325, Laws of 1923 (Mason's Minnesota Statutes of 1927, Section 1933-10 et seq.); that the city council desires to incorporate a provision in the proposed ordinance "the substance of which is that three available sites will be designated and a maximum aggregate cost set forth for the purchase of one of them;" and that in submitting the ordinance for approval or rejection to the voters the council desires to submit the question as to which site is to be purchased.

You inquire:

> "Whether or not, * * * three sites can be designated in the notice instead of one?"

The statute, Section 1933-10, to which you direct attention and so far as pertinent provides:

> "The governing body of such city or village, after such approval, is authorized to acquire a site within such city or village upon which such monument or parks or building may be erected, **provided that before such election the site shall be designated and the cost thereof specified in such election notice.**"

We believe that you are quite right in your conclusion that the underscored portion of the above quoted section of the statute requires that only

one site may be designated in the resolution and in such election notice. The statute seems to contemplate the approval of the electors of a certain specified site together with the cost of the same.

You state that the city charter provides "that no property of a value of more than $3,000 shall be purchased without submitting the same to the vote of the electors and after the approval by 60% of the electors."

You further state and inquire:

> "Since the charter is not in harmony with the statute and in view of the introductory clause of the statute I have advised the City that the statute would govern instead of the charter. Will you please confirm this opinion?"

The statute, Chapter 325, Laws of 1923, is a general enabling act applying to all cities and villages coming with the provisions and that elect to exercise the powers granted therein. Our Supreme Court has uniformly held such an act to be constitutional as to all municipalities within the class to which such an act applies or which shall elect to come within its provisions.

If your city elects to take advantage of the provisions of said act in erecting such a memorial for soldiers, sailors, marines and war veterans, we are of the opinion that the procedure prescribed therein is controlling rather than the provisions of your home rule charter.

DAVID J. ERICKSON,
Deputy Attorney General.

September 25, 1937. 59b-9

31

CITIES AND VILLAGES—Cash basis law—Bonds—Tax levy for.

Mr. James V. Abate, Village Attorney.

You state that the Village of Keewatin is operating under Chapter 342, Laws of 1931, one of the so-called cash basis laws, and that a water, light, power and building commission has been established under Section 1852, Mason's Minnesota Statutes of 1927.

You further state that said village is planning to improve its heat distribution system by repairing and extending its heat mains, said improvement to be carried out as a WPA project; and that it will be necessary that the village issue "its corporate bonds" in such sum as may be necessary to furnish the village's contribution for such improvement.

You inquire:

> (1) "Does the said cash basis law or any other law prevent the village from making a special levy in order to raise funds for the payment of such bonds and the interest thereon over and above the amount that can be levied for general corporate purposes?

(2) "Assuming that your answer to the foregoing question is in the negative, can the village issue its bonds for the purpose aforesaid and levy for both the principal and the interest thereon over and above any existing limits on the total municipal tax levies?

(3) "Must the village council, after having secured the necessary funds from the sale of its bonds, turn over the money realized therefrom to its water, light, power and building commission and have it make the said improvements, or may the village retain the same money and make them itself?"

Section 2 of said Chapter 342 provides, in part, as follows:

"Whenever from and after January 1, 1932 the expenses and obligations incurred chargeable to any particular fund of such village, in any calendar year, are sufficient to absorb 85 per cent of the entire amount of the tax levy, payable in that year, * * * no officer, board, or official body of such village shall have the power and no power shall exist to create any additional indebtedness (save as the remaining 15 per cent of said tax levy is collected) which shall be a charge against that particular fund, or shall be **in any manner a valid claim against such village, * * * and no power shall exist to create any indebtedness which shall be a charge against the village, in excess of the tax levy payable in that year** for the use of the particular department, board or official body, less the amount required to be paid each year therefrom on bonds herein authorized and interest accruing thereon."

The bonds therein provided for are bonds which are authorized to be issued "for the purpose only of paying and discharging" indebtedness incurred prior to January 1, 1932.

It seems apparent that the legislature, in placing certain municipalities on a cash basis, intended that the only moneys such a village may spend in any calendar year for general corporate purposes are moneys which have been levied for in the preceding year. This office has held that the mill limitation provided for by the laws under which a village is operating must cover expenditures for all corporate purposes, and that in making public improvements a village operating under a so-called cash basis law is not authorized to make a special levy therefor above the general millage levy authorized by law, except in cases where specific power is given to levy a special tax.

We find no provisions in said Chapter 342 providing for an additional tax levy for general municipal purposes, and we do not believe the village of Keewatin is authorized to make a special levy in order to raise funds for the payment of the corporate bonds issued for the purpose of improving its heat distribution system.

In view of our answer to your first question, it is unnecessary to answer your last two inquiries.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

April 7, 1938. 44a-8

32

CITIES AND VILLAGES — Charter — Amendments — Ballots—Failure to vote—Blank ballots.

Mr. J. E. Montague, City Attorney.

You state that your regular city election will be held February 8, 1938, at which time various city officers will be elected and that petitions have been submitted to the Charter Commission "one set of petitions making two proposed amendments to the City Charter, the other set of petitions proposing two different amendments relating to the same subject matter."

You further state that said "Charter Commission determined that the requisite number of voters had signed the sets of petitions and presented them to the Mayor, and the city council thereupon determined to submit these four proposed amendments to our city charter on the same date as the general election, namely, on February 8, 1938".

You also direct our attention to such proposed amendments as they appear in the notice of such special election, a copy of which you enclosed with your letter. It appears therefrom that under proposal No. 1 the existing ward boundaries will be retained, but the present provisions of your charter providing for redivision by the council would be eliminated, while under proposal No. 3 new ward boundaries would be fixed. Proposal No. 2 provides for the erection of additional community buildings and hospitals without limitation as to cost, and the acquiring of land and the issuance of bonds therefor, by a majority vote of the council, while proposal No. 4 provides for the erection of additions to hospitals and additional community buildings at a cost not to exceed $100,000, upon a two-thirds vote of the council.

You inquire:

1. "Under the decision of our court in Godward v. Minneapolis, 250 N. W. 719, I assume I am unquestionably correct in referring to this as a special election?"

We believe that you are correct in concluding that such election should be considered a "special election". We note that in the notice of such election the council has designated the same as a special election to be held for the purpose of submitting such proposed amendments to such charter, and it does not seem to us that the fact that such special election is to be held on the same day as the regular city election alters the situation.

In this connection your attention is directed to the following language used by the court in the above referred to case:

> "The city council in submitting the proposed amendment did not designate the election upon the amendment as a special election, but we have no difficulty on that account in construing that election in so far as it related to the acceptance and adoption of the amendment as being a special election."

2. "Under the same decision, am I correct in assuming that only those who in some manner mark a preference for one or more of the amendments on the charter amendment ballot may be held to have voted in the special election?"

The above question is answered in the affirmative. In Godward v. City of Minneapolis, supra, the Court said:

"Certainly a voter cannot be said to have voted when he casts only a blank ballot on every proposition submitted to him. We follow the Hopkins Case in holding that the blank ballots should be excluded from the computation of the total votes cast at the special election."

3. "If so, am I correct in stating that so long as the voter expresses some preference for one or more of the proposed amendments on this ballot, his failure to vote on the remaining proposed amendments shall be considered as a vote against such amendment?"

We are of the opinion that when a voter votes for one or more of said amendments, he should be considered as having voted at such special election. It follows that since such amendments must "be accepted by three-fifths of the qualified voters of such city or village voting at the next election and not otherwise", a failure to vote on any proposed amendment should be considered as a vote against the same.

4. "Am I also correct in stating that blank ballots on which the voter indicates neither acceptance nor rejection of any of the amendments are not to be counted in determining the number of votes cast at the special election?"

We believe that you are correct in concluding that blank ballots, on which the voter indicates neither acceptance nor rejection of any of the amendments, are not to be counted in determining the number of votes cast at such election.

In the Godward case, supra, the Court said:

"We cannot regard as a vote a blank ballot expressing no intention one way or another upon the question presented. Possibly it is a ballot cast, but certainly it is not a vote any more than the ballot of a voter who enters a booth with the intention of voting at a general election and then concludes he does not desire to vote and returns his ballot to the election officers."

5. "What would be the situation if three-fifths of the voters casting ballots at the special election should vote affirmatively on both propositions? In your opinion, would the spirit of the rule laid down in State ex rel Andrews v. Beach, 191 N. W. 1012 apply? As I understand that decision, neither the courts nor the council have any supervisory or veto powers over the judgment of the board of freeholders in submitting amendments, and I take it that it would follow that there is no control over voters petitioning for amendments nor over the vote cast by the people on amendments petitioned for. In such case, would

our charter become inoperative because of inconsistent provisions and remain so until again amended? The same situation would arise if three-fifths of the voters would vote in the affirmative on propositions 2 and 4."

We agree with your opinion that under the decision of the Court in State ex rel Andrews vs. Beach, 155 Minn. 33, 191 N. W. 1012, neither the governing body of a municipality nor the courts have any supervisory or veto power over the form of such proposed amendments, and that it is mandatory on the part of the council to submit such amendments in the form proposed. The Court in the above case said:

"It is not within the province of the governing body of a city or of a court to pass judgment on the quality of the work done by a board of freeholders. Such boards may and sometimes do write charter provisions or amendments which are of doubtful meaning, or amendments which do not dovetail into charter provisions left untouched. In a word, although the work of the board may have been badly done, that is no reason why the electors should not be given an opportunity to approve or disapprove of it. * * * Neither the city council nor the court have any supervisory or veto powers. The statute is mandatory and declares that, upon the delivery of a draft of a charter, the council or other governing body of the city, shall cause the proposed charter to be submitted, etc."

The question of the effect of the adoption by the voters of two inconsistent and conflicting amendments to your charter will not arise until after the voters have voted on such proposed amendments, and then only in the event that such conflicting amendments are adopted. We do not believe, therefore, that we should pass upon the question at this time. If the voters at such election should adopt inconsistent and conflicting amendments to said charter, we shall be glad, upon request, to go into the question of the effect of their adoption.

DWIGHT N. JOHNSON
Special Assistant Attorney General.

February 4, 1938. 59a-11

33

CITIES AND VILLAGES—Charter—Amendment—Ballots—Form of.

Mr. Karl L. Rudow, City Attorney.

You inquire:

"(a) In submitting a number of amendments of the charter to the electors is it necessary that they be submitted on separate ballots or may they be grouped and submitted on one or more ballots?"

The provisions of Section 1286, Mason's Minnesota Statutes of 1927,

relating to the form of ballot to be used in amending a home rule charter provides as follows:

> "The form of ballot and mode of voting shall be similar to those used upon the adoption of such charter, the general nature of each amendment being briefly indicated."

Section 1284, Mason's Minnesota Statutes of 1927, describing the manner of submitting a home rule charter to the voters for adoption provides:

> "The ballot shall bear the printed words 'shall the proposed new charter be adopted? Yes..... No.....,' with a square after each of the last two words in which the voter may place an X to express his choice. And if any part of such charter be submitted in the alternative, the ballot shall be so printed as to permit the voter to indicate his preference in any instance by inserting an X in like manner."

In our opinion the language contained in the above referred to sections of the statutes which provide that "if any part of such charter be submitted in the alternative **the ballot** shall be so printed as to permit the voter to indicate his preference in any instance by inserting an X in like manner" seems to imply that such alternative proposition may be submitted on a single ballot. If two propositions in the alternative may be submitted on one ballot, it would seem to follow that two or more separate amendments may be submitted on a single ballot.

We do not believe that said statutory provisions can be construed otherwise in view of the language used by the court in Hopkins v. City of Duluth, 81 Minn. 189.

In the above case the court, in passing on the validity of a ballot used at the election in question said:

> "At the election in question four distinct subjects of choice were submitted to the voters of that city upon a **single ballot**, viz.: Three candidates for mayor, two for aldermen, a proposition for issuing water and light bonds for the city, and the proposition for the ratification of the charter, which is the subject of this contention. The names of the mayoralty and aldermanic candidates, as well as the two propositions referred to, were properly placed on the ballot, * *."

You also inquire:

> "(b) If amendments may be submitted on other than separate ballots is it permissible to provide a space at the top of the ballot where the voter may designate his vote on all amendments contained on the particular ballot by a single mark, making provision also for the voter to vote his preference on each question separately, if he so desires?"

Although the statutes relating to the form of ballot to be used at such an election do not expressly prohibit providing a space on the ballot "where the voter may designate his vote on all amendments contained on the ballot by a single mark", we believe the statutes contemplate that the voter should

vote either for or against each amendment separately. If a space were provided on the ballot where a voter might vote for or against all of said amendments "by a single mark" it would be impossible to determine a voter's intention if a voter should cast a separate vote on one or more of said amendments in conflict with his vote on all of the amendments voted on as one proposition.

DWIGHT N. JOHNSON
Special Assistant Attorney General.

October 4, 1938. 59a-11

34

CITIES AND VILLAGES—Charter—New or revised—Publication of.

Mr. Irving L. Eckholdt, City Attorney.

Therein you state that the City of Rochester operates under a home rule charter; and that the charter commission is about to submit to the common council a "new charter, not amendments."

You state that you find no provision in the law "requring any publication of a new charter before election and this leaves me uncertain to the procedure to be followed."

We assume that you intend to inquire whether such a new or revised charter can be submitted in the manner of an original charter without publication, or whether it is necessary to publish it as in the case of amendments.

The controlling statutory provision is found in Chapter 236, Laws of 1909 (Sections 1297 to 1299, Mason's Minnesota Statutes of 1927).

Section 1 of the above act provides:

"Any city in this state which now has, or may hereafter adopt, a so-called 'home rule' charter by and under the provisions of section 36, article 4 of the constitution, and of any statutes enacted in pursuance thereof, is hereby authorized and empowered to frame, submit and **adopt a new charter in the same manner and mode as is by law provided for the original adoption of such so-called 'home rule' charter."**

Section 2 provides as follows:

"Any city named in section one hereof is hereby authorized and empowered to amend its present so-called 'home rule' charter in the nature of a revision and submit and adopt such revision **as is by law provided for the original adoption of such so-called 'home rule' charter."**

Section 3 provides as follows:

"It shall not be necessary or obligatory for the board of freeholders framing such new charter, or making such revision hereunder,

to return the same to the chief magistrate of such city within six months."

In the absence of the above quoted statute it might be doubtful as to whether or not a city having once adopted a home rule charter could adopt a new or revised charter except by the procedure provided for amending a home rule charter. However, the constitutional provision, Section 36 of Article 4, is not so clear that it should be said that the 1909 law referred to is unconstitutional. Our court has many times said that it will not hold a statute unconstitutional unless its unconstitutionality appears beyond a reasonable doubt.

We have heretofore held the 1909 law constitutional and that a city may adopt a proposed new or revised charter in the same manner that an original charter is adopted and, therefore, that it is not necessary to publish such new or revised charter in any newspaper.

It is, therefore, discretionary with the council as to whether or not such new or revised charter should be published, provided that the cost of publication must be within the five hundred dollar limit specified by the statute.

DAVID J. ERICKSON,
Deputy Attorney General.

July 30, 1937. 59a-11

35

CITIES AND VILLAGES—Charter—Amendments—Special election—Publication.

Mr. Frank M. Talus, City Attorney.

You state that the city of Chisholm was incorporated as a city of the fourth class under Section 1828-17, et seq., Mason's Minnesota Statutes of 1927; and that thereafter a home rule charter was duly adopted, effective as of November 6, 1934.

You submit several inquiries relative to the calling of a special election for the purpose of adopting amendments to the home rule charter of the city of Chisholm. We will restate and answer these inquiries in the order set forth in your letter.

1. "Can a special election be called under the Chisholm Home Rule Charter upon amendments to the charter to reduce the size of the council and increase their salaries prior to the primary election scheduled to be held Nov. 23, 1937?"

Amendments to a home rule charter must be submitted pursuant to Article 4, Section 36 of the State Constitution and Sections 1284 and 1286 of Mason's Minnesota Statutes of 1927 and not pursuant to the terms of your home rule charter. Article 4, Section 36 of the Constitution provides

that a home rule charter may be amended by a proposal by the board of freeholders published for thirty days and "accepted by three-fifths of the qualified voters of such city or village voting at the next election and not otherwise."

Section 1286 of Mason's Minnesota Statutes of 1927 provides that:

> "Amendments shall be submitted as in the case of the original charter, * * *."

And Section 1284 provides with reference to the original charter as follows:

> "Upon delivery of such draft, the council or other governing body of the city or village shall cause the proposed charter to be submitted at the next general election thereafter occurring in said city or village within six months after the delivery of such draft, and if there is no general city or village election occurring in said city or village within six months after the delivery of such draft, then the council or other governing body of said city or village shall cause the proposed charter to be submitted at a special election to be held within ninety days after the delivery of such draft as aforesaid. **Provided, that said council or other governing body may call a special election for that purpose only at any time.** If said election is held at the same time with the general election, the voting places and election officers shall be the same for both elections."

Our Supreme Court has definitely decided that a proposed charter or amendments thereto may be submitted at a special election. State v. Kiewel, 86 Minn. 136; State v. Barlow, 129 Minn. 181. See also Godward v. City of Minneapolis, 190 Minn. 51.

In other words, it has been held that the statute providing for the submission of a charter or amendments thereto at a special election was not in conflict with the constitutional provisions cited above.

In State ex rel. Lowe v. Barlow, supra, the Supreme Court said:

> "There is no question but that a charter may be submitted at a special election,"

citing State v. Kiewel, supra. You are, therefore, advised that a special election may be called pursuant to the above constitutional and statutory provisions for the purpose of submitting amendments to your home rule charter prior to the city primary election to be held on November 23, 1937, provided the requirements of the above referred to constitutional provisions are satisfied by the publication of the charter amendments "begun in three newspapers conforming to the statutory standard on a particular day and continued in every issue of such newspapers from the date of first publication until the time of holding the election, provided that the charter amendment be published for a period of at least thirty days" prior to said primary election to be held on November 23, 1937. See Wolfe v. City of Moorhead, 98 Minn. 113.

2. "How can these questions be so framed as to become effective for the primary election to be held on said date and the General Election to be held on Dec. 7, 1937?"

Article 4, Section 36, with reference to charter amendments, provides, in part, as follows:

"Such charter so deposited may be amended by proposal therefor made by a board of fifteen commissioners aforesaid, published for at least thirty days in three newspapers of general circulation in such city or village, and accepted by three-fifths of the qualified voters of such city or village voting at the next election and not otherwise; * * *."

It will be noted that the above quoted language of said Section 36 does not specify the time of the taking effect of a charter amendment subsequent to the ratification by the voters as is the case of the adoption of an original charter. The statute, Section 1286, provides, so far as pertinent, as follows:

"If three-fifths of those lawfully voting at such election shall declare in favor of any amendment so proposed, the same shall be certified, deposited and recorded, and shall take effect, as in the case of the original charter, provided that, if it be proposed that any amendment shall take effect at a specified time, it shall take effect as proposed."

It would appear, therefore, that, under the above quoted language of said Section 1286, the proposed amendment may specify the time it shall take effect. This could be done by inserting a provision in the amendment to the effect that "this amendment shall take effect and be in force from and after the—day of November, 1937." The effective date of the amendment should be fixed after the expiration of the publication period. In other words, we do not believe that the effective date of the charter amendment can be fixed at any time prior to the holding of the election at which such charter amendment is ratified; that is, the effective date of the amendment must be fixed at a time subsequent to the holding of the election at which such amendment is ratified and the election can not be held until after the charter amendment has been published for a period of at least thirty days.

3. "When will the amendments to the charter if adopted become effective? Can the amendments become effective forthwith upon adoption under Section 1286?"

The proposed amendments to the charter if ratified by three-fifths of those voting at such election will take effect at the end of the thirty days from the date of the election as in the case of an original charter, unless the amendment specifies that it shall take effect at a certain time. We have already discussed as to when such amendments may become effective under the proviso contained in Section 1286.

4. "Is it possible to postpone either the primary election of Nov. 23rd or the General Election of Dec. 7th so as to permit the adoption of the amendments to the charter and then elect the city officials at the postponed election?"

5. "Does Section 1287 apply to the City of Chisholm?"

Questions four and five may be conventiently considered together. The

only statute of which we are aware which authorizes the postponement of a city election in a city of the fourth class covered by a home rule charter when a special election has been called to vote on any proposed amendment to such city charter is said Section 1287. It will be noted from the language of said Section 1287 that it applies only when a **special election** has been called to vote on a proposed amendment to such a city charter "which amendment if adopted will not take effect prior to the date fixed for the city election in said city charter, and which amendment provides for holding said city election at a later date than is provided in its charter." Manifestly, if your special election at which the proposed amendments are to be submitted is to be held prior to your primary and city election you cannot take advantage of said Section 1287. This section of the statute seems to contemplate a situation where the proposed amendment to the city charter provides for the holding or changing of the city election to a later date than is provided for in the charter. It does not appear from your letter that the proposed amendments to your charter contemplate the holding of your regular city election at a later date than provided in the charter. However, although the question is not free from doubt, in the event that the proposed amendments to the charter provide for the holding of your city election at a later date than is provided in the charter and your special election has or will be called to vote on said proposed amendments and the same if adopted will not take effect prior to the date fixed for your city election in the charter, then we are of the opinion that the city primary and election may be postponed within the limitation provided for in said Section 1287, "so as to permit the adoption of the amendments to the charter and then elect the city officials at the postponed election."

6. "Is it necessary to publish the amendments in three newspapers when there are only two newspapers published in the city?"

This question is answered in the affirmative. You will note that Article 4, Section 36 of the Constitution requires proposed amendments to be published for "at least thirty days in three newspapers of general circulation in such city or village." The effect of the statute, Section 1286, is merely to limit the number of newspapers in which the proposed amendments shall be published to three, but such a statute cannot affect the constitutional requirement that the amendments be published in three newspapers. In other words, the constitutional amendment is controlling in so far as Section 1286 is inconsistent therewith. Where you have only two newspapers in your city the third newspaper need not necessarily be published in the city of Chisholm but the proposed amendments must be "published in three newspapers of general circulation in such city."

The case of Wolfe v. City of Moorhead, supra, held that the constitutional requirement was satisfied by the publication of a proposed charter amendment begun in three newspapers conforming to the statutory standard and continued in every issue of such newspapers from the date of the first publication until the time of holding the election, provided that the charter amendment be published for a period of at least thirty days. In this case the proposed amendment was published in twenty-seven issues of a daily newspaper during a period of thirty-one days and in five issues of two

weekly newspapers. The supreme court held that the publication in the daily newspaper was clearly correct since the amendment was published in every daily issue of the paper during a period of thirty days, citing Sewall v. City of St. Paul, 20 Minn. 459 (511), and Carpenter v. City of St. Paul, 23 Minn. 232.

We have heretofore held that publication of proposed charter amendments once each week for a period of thirty days in a weekly newspaper is sufficient, but that if a daily newspaper is used it must be published in each issue of such paper for the requisite thirty day period.

DAVID J. ERICKSON,
Deputy Attorney General.

October 18, 1937. 58c

36

CITIES AND VILLAGES—Civil Service—Police—Removal of police officers and employees.

Mr. Orville C. Peterson, League of Minnesota Municipalities.

You direct our attention to the case of Saholt vs. City of Rochester, 185 Minn. 510, wherein it was held that a police civil service commission established under the provisions of Chapter 299, Laws of 1929, had the power to summarily remove any employe of the police department of the city during the first six months after the establishment of said commission, including employes who were employed in said department at the time of the creation of said commission.

You also call our attention to the fact that after the decision in the Saholt case, supra, said Chapter 299, Laws of 1929, was amended by Chapter 197, Laws of 1933, which act contains the following provision:

> "Any police officer regularly employed at the time of the creation of the civil service commission shall automatically come under the jurisdiction of the civil service commission."

You request our opinion as to whether the above quoted provision found in said Chapter 197, Laws of 1933, should be construed as taking from said commission during the first six months after its establishment the right to summarily remove members of the police department who are in the employ of said department at the time of the creation of said commission.

As you have pointed out in your letter, the supreme court in the Saholt case construed Chapter 299, Laws of 1929, as authorizing the police civil service commission to remove without a hearing any employe of the police department during the first six months after the establishment of said commission, and that the power to so remove such employes extended to officers and employes of the police department who were employed in the depart-

ment at the time of the creation of said commission. In other words, the court held in effect that the members of the police department who were employed therein at the time of the establishment of the commission had no greater rights than persons who became members of said police department after the establishment of said commission.

When said Chapter 299, Laws of 1929, was amended by the enactment of said Chapter 197, Laws of 1933, we believe that the legislature in providing that "any police officer regularly employed at the time of the creation of the civil service commission shall automatically come under the jurisdiction of the civil service commission" must have intended that upon the establishment of said commission the incumbent members of the police department should have a different status than persons who became members of the police department after the creation of such a police civil service commission. Any other construction of the above quoted provision of Chapter 197, Laws of 1933 would make said provision meaningless, and we are of the opinion that by the enactment of Chapter 197, Laws of 1933, the legislature intended to take from the commission the power to summarily remove employes of the police department who are so employed at the time of the establishment of said commission, and who have been so employed for six months or longer.

In McDougall vs. Baich, 194 Minn. 551, mandamus proceedings were instituted to compel the police civil service commission of the village of Chisholm to reinstate the plaintiff as a policeman of the village. Although the right of the plaintiff to be reinstated was denied on the ground that plaintiff was an employe of the park board, and not a member of the police department of said village, in our opinion the court used language implying that had plaintiff been a member of the police department of the village instead of an employe of the park board, he would have been entitled to reinstatement under the provisions of said Chapter 197, Laws of 1933. Therein the court said:

> "Before the present action was brought, Chapter 299, Laws 1929, was amended by Chapter 197, Laws 1933, adding Section 17 providing:
>
> 'any police officer regularly employed at the time of the creation of the civil service commission shall automatically come under the jurisdiction of the civil service commission.'
>
> It is plain that plaintiff can claim nothing by virtue of this amendment for he was not a regularly employed police officer at the time the commission was created."

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

May 16, 1938. 785e-2

37

CITIES AND VILLAGES—Civil service—Discharge of employe.

Mr. Charles L. DeRue, City Attorney.

You enclose a copy of an ordinance passed by the council of the City of Marshall in 1933 establishing a police civil service commission in said city. You further state that the City of Marshall has three regular policemen and a part time policeman who is employed whenever any of the regular policemen are on vacation or off duty or when more than the three regular policemen are needed; that about a year ago said civil service commission held an examination and as a result of said examination one K., having passed the same, was put on the "eligible list;" that at different periods of time said K. has acted as policeman; that "last summer he acted from July 1 to November 15 as regular policeman," at which time "the city got along with three policemen and K. being the fourth one was laid off."

You further state that a change was made this spring in the personnel of the commission and that the commission called for "applications for examination;" that as a result of such examination one H. was given the highest rating, the same being higher than the rating of K. who was already on the "eligible list;" that prior to said examination the city council had made provision for a "fourth policeman" and requested the commission to furnish some person eligible to be appointed to the position and that the commission thereupon certified K., who was appointed as such "fourth policeman."

You state that the commission now desires "to take K. off and substitute H. in his place," while the mayor and city council "prefer to keep K., who has been giving good and efficient service."

You inquire:

> "Is K. entitled to the position since he has been on the police force off and on for several years last past and since he was on the police force when the examination was taken, and since he has taken the examination and passed it successfully? Must the Police Commission discharge him and disregard his standing as first on the eligible list, or must it disregard K. and appoint H., who is next on the eligible list but with higher rating? Have the acting Mayor and City Council anything to say relative to the appointment of such policeman or is their employment, discharge and control entirely within the jurisdiction of the Police Commission, which claims it can employ, discharge and supervise the Police Department as it sees fit?"

Although you do not so state, we assume that said police civil service commission was established pursuant to the authority conferred by Chapter 299, Laws of 1929, as amended.

Section 5 of said Chapter 299 provides, in part, as follows:

> "The commission shall have absolute control and supervision over the employment, promotion, discharge and suspension of all officers and

employes of the police department of such city or village and these powers shall extend to and include all members of the police department. * * *"

Section 7 provides, in part:

"No officer or employe **after six months continuous employment** shall be removed or discharged except for cause upon written charges and after an opportunity to be heard in his own defense as in this chapter hereinafter provided. * * *"

From the facts as stated in your letter it does not appear that K. has had "six months continuous employment" after the council created the position of "fourth policeman," nor does it appear that he has had six months continuous employment as a policeman during any other period of time.

Assuming this to be true, we are of the opinion that until K. has had six months continuous employment in the police department of said city he may be discharged at any time by the commission without cause. In other words, regardless of the efficiency and good conduct of said employe of the police department, we believe that until he has had **six months continuous employment** the commission is vested with exclusive jurisdiction to determine whether he shall remain as an employe of the police department or whether he shall be discharged.

If the commission exercises their right to discharge said employe of the police department, a vacancy will exist which should be filled as provided under Section 6 of said Chapter 299, as amended.

Subdivision (d) thereof provides for "the creation and maintenance of lists of eligible candidates after successful examination **in order of their standing in the examination and without reference to the time of examination.**"

Subdivision (f) requires **"the certification of the name standing highest** on the approved list to fill any vacancy."

We are of the opinion that if the commission discharges K. before he has been employed continuously for six months as an employe of the police department, the commission is required to certify the name standing highest on the list of persons eligible for the position regardless of the fact that another person with less than six months continuous employment, and with a lower rating, may be employed at that time as an employe of said police department.

In arriving at the conclusions herein stated we have not been unmindful of the provisions of Section 7 of the enclosed ordinance.

Section 1 of said Chapter 299 provides that there may be created in every village or city, except a city of the first class, "a police civil service commission **with powers and duties as hereinafter provided.**" This office has held that when a city adopts the provisions of said Chapter 299, Laws of 1929, as amended, the powers and duties of the commission as prescribed

in said act control over any inconsistent provisions contained in a city ordinance.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

July 6, 1938. 785d

38

CITIES AND VILLAGES—Contracts—Bids—Meaning of term "supplies or equipment."

Mr. Walter T. Ryan, City Attorney.

You direct our attention to Chapter 416, Laws of 1937, and inquire whether the provisions of said act apply to contracts let by the City of South St. Paul for the construction or repair of "sidewalks, small foundations for buildings to be erected, and the installation of sewers or water mains," or whether said act applies only to the purchase of "road or fuel oil, a truck or police car, or other articles of a similar nature."

Section 13 of Chapter XI of the charter of the City of South St. Paul provides, in part, as follows:

> "All contracts for work to be done by said city or for the purchase of materials or property of any kind, for the public use of said city, not otherwise provided for in this act, in which the value of such property materials, shall exceed the sum of two hundred ($200.00) dollars, shall be let to the lowest responsible bidder, reserving to the council the right to reject all unreasonable bids. In such case the council shall require a notice of not less than six days of the time and place of letting such contract, by one publication in the official paper of said city, * * *."

Section 28 of Chapter X of said charter provides, in part:

> "Whenever the city council by a vote of at least two-thirds of the members of said council shall have determined upon making any proposed improvement involving the doing of any work or the furnishing of any material, according to the provisions of this chapter, not otherwise provided for herein, the said council shall direct the city recorder to advertise for proposals for doing such work or furnishing such materials, or both; * * *. Bids for doing any work or making any improvements as provided herein, shall name a gross sum for whole work or improvement, or some specified division or section thereof, * * *. Upon the opening of such bids, or any time thereafter, the council shall award the doing of the work or any part thereof to the lowest reliable and responsible bidder or bidders, * * *."

Under the above quoted provisions of said charter, all work to be done by the city, or contracts for the purchase of material or property of any kind exceeding $200 in value and all contracts for the making of any public improvements, authorized under said Chapter X, involving the doing of any

work or the furnishing of any material, are required to be let to the lowest responsible bidder, after public notice as therein provided.

Said charter provisions undoubtedly require that contracts for the construction or repair of sidewalks, sewers, water mains and similar improvements, as well as contracts for the purchase of commodities or specified items of property shall be let only after advertisement for bids.

However, we assume your inquiry is limited to the question of whether or not in advertising for bids under said charter provisions, said Chapter 416 requires the submission of more than one bid before a contract can be let for public improvements such as the construction and repair of sidewalks, sewers, water mains and like improvements.

Section 1 of said Chapter 416, provides as follows:

> "Whenever any county, township, city, borough, village or school district in this state calls for bids for the purchase of any supplies or equipment, no bid submitted shall be accepted unless competitive bids have also been submitted."

Section 2 provides:

> "Specifications for supplies and equipment shall not be so prepared as to exclude all but one type or kind but shall include competitive supplies and equipment."

We do not believe that it was the intention of the legislature, in enacting said Chapter 416, to require as a prerequisite to the letting of contracts after advertisement for bids, that more than one bid must be submitted in cases where the contract for public improvements include, as a part of the whole contract, work and labor as well as the supplies and materials which go into the making of said improvements. In other words, if the city advertises for bids for an improvement which includes the furnishing by the contractor of the work and labor as well as the materials for such improvement, we do not believe that the city is prohibited by said Chapter 416 from awarding a contract for the making of such improvement because of the fact that only one bid is submitted. In some of the small municipalities in the state situations might occur where only a local contractor would submit a bid for the making of such an improvement. If said Chapter 416 were to be construed as prohibiting the awarding of such a contract unless more than one bid had been submitted it might be impossible, in such cases, for the municipality to make a needed improvement. Such a situation is not likely to occur, however, in connection with the purchase of particular items of property usually available from a number of different business firms in the community.

On the other hand, if the city, in making a public improvement, such as the construction of sidewalks, sewers or water mains, should hire the work done itself and purchase the different items of material necessary, we believe that the provisions of said Chapter 416, requiring the submission of more than one bid as a prerequisite to letting a contract for the "purchase

of any supplies or equipment" should be construed as applying to contracts for the purchase of such particular items of material.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

July 9, 1938. 707b-2

39

CITIES AND VILLAGES—Contracts—Officers—Interest in.

Mr. George L. Angstman, County Attorney.

You state that A is an officer and stockholder in the Kanabec State Bank of Mora "but has nothing to do with the operation of said bank;" "that said bank writes all kinds of insurance and the income from the insurance becomes profits of said bank;" that "A is also a member of the Light and Water Commission of the Village of Mora, and the Light and Water Commission insured the buildings of the Light and Water Department through the Kanabec State Bank and paid premiums therefor to the bank."

You inquire: EE

> "Is A sufficiently interested in this contract of insurance so as to come under Section 10305, Mason's Statutes of 1927, and subject to prosecution for gross misdemeanor, or would you consider his interest too remote to be deemed a criminal?"

This office has heretofore held that it is unlawful for a corporation to be interested in contracts with the Water, Light, Power and Building Commission of the village when one or more of its stockholders are members of the Commission, and that this comes within the prohibition of the statute which forbids the officers of a municipality from being interested in contracts with such municipality. The prohibitory statute is Section 10305, to which you direct attention.

As to whether or not A may be "subject to prosecution for a gross misdemeanor" is a matter for your determination after investigating all the surrounding facts and circumstances.

DAVID J. ERICKSON,
Deputy Attorney General.

April 7, 1937. 90a-2

40

CITIES AND VILLAGES—Contracts—Officers—Interest in.

Mr. Glen C. Sawyer, Village Attorney.

You state that a question has arisen in your Village as to the right of members of the Water, Light, Power and Building Commission to enter into

contracts with the Village; that the members of said commission are appointed by the City Council; that two of said members are rival local hardware dealers; that the Village contemplates the construction of a new sewer system as a W. P. A. project; and that these two hardware men who are also members of said Utilities Commission "intend to bid on furnishing material to go into this sewer project which is being sponsored by the village."

You inquire whether these hardware men may submit bids on furnishing materials to be used in said sewer project?

Although you do not so state, our information is that the Village of Lanesboro is incorporated and operating under the 1905 Village code.

Assuming this to be true, we presume that if said merchants, who are also members of said Utilities Commission, are prohibited from entering into contracts of such a nature, such prohibition would be either under Mason's Minnesota Statutes of 1927, Section 1199, as amended, or under Section 10305.

Section 1199, so far as here pertinent, provides:

> "No member of a village council shall be directly or indirectly interested in any contract made by such council, and every violation thereof shall be a misdemeanor. * * *"

It will be noted from the above quoted language of said Section 1199, that the prohibition relates to a "member of a village council." Utilities Commissioners are not members of the village council and do not, therefore, come within the prohibition of said Section 1199.

Section 10305, provides in part:

> "Every public officer who shall be authorized to sell or lease any property, to make any contract in his official capacity, or to take part in making any such sale, lease, or contract * * * shall be guilty of a gross misdemeanor."

Although you do not so state, we assume that the Water, Light, Power and Building Commission of your Village was established pursuant to Chapter 412, Laws of 1907, as amended (Mason's Minnesota Statutes of 1927, Sections 1852-60), or some statute similar to said Chapter 412. It will be noted that under the provisions of said Chapter 412, as amended, the members of such a Water, Light, Power and Building Commission are appointed by the City Council. However, the Supreme Court in construing said chapter has held that such a commission has full, absolute and exclusive control of the water, light and power plants, with full authority to operate the plants; and that the authority so conferred is lodged in the commission and not in the Village Council; and that said law created a department of the village responsible only to the people and that there is no revisory control vested in the Council or Mayor. See State ex rel. Village of Chisholm et al. v. Bergeron et al., 156 Minn. 276; and State ex rel. Briggs et al. v. McIlraith, 113 Minn. 237. In other words, the City Council has no control over such a Utilities Commission. Likewise, such a Utilities Commission or the members

thereof have no control or voice in matters vested in the Village Council. That is, we assume that the sewage system would be constructed under the jurisdiction and supervision of the Village Council.

You do not inform us under what statutory provisions the sewage system is being constructed. Attention is directed to Sections 1880 et seq., of Mason's Minnesota Statutes of 1927. These sections of the statute are general in their scope and apply to all villages in the state and to all cities having a population of 10,000 or less. It will be noted that Section 1880 authorizes the **Village Council** to maintain and extend any existing sewer system and to establish and maintain a general system of sewers, etc. We know of no statute authorizing a Water, Light, Power and Building Commission, such as created under said Chapter 412, Laws of 1907, to construct a sewage system. The power to construct such a system applying to villages operating under the 1905 code, is vested in the Village Council and not in said Utilities Commission.

Strictly speaking, therefore, it would seem that said members of your Water and Light Commission do not come within the prohibitions of said Section 10305, within the rule laid down by the Supreme Court in the case of County of Marshall v. Bakke, 182 Minn. 10. In this case the court said:

> "We do not consider G. S. 1923 (2 Mason, 1927) Section 10305, is applicable here, for that relates to officers authorized to enter contracts. Bakke was not authorized to take any part and took no part in making the depository contracts."

While the Supreme Court does not make the distinction clear, we have heretofore construed that decision as holding that if the officers in question take no part in making the contract on behalf of the municipality, the contract is valid and does not come within the prohibition of said Section 10305. You will note that in said Bakke case the Supreme Court also said:

> "It seems to us that this statute must be applied so as not to lead to absurdities and permit persons to be penalized for acts of others with which they had no connection whatever."

Assuming therefore that the power to construct the village sewage system is vested by statute in the Village Council and not in the Utilities Commission and that said Commission has no voice in the making of such a contract for the purchase of materials and supplies to be used in constructing said sewage system, we are of the opinion that the members of said Commission as individuals may submit bids for the furnishing of materials to be used in said sewage project.

DAVID J. ERICKSON,
Deputy Attorney General.

October 22, 1938. 469a-2

41

CITIES AND VILLAGES—Council—Mayor—Power of veto—Resolutions.

Mr. F. J. Rosemeier, City Attorney.

Your inquiry relative to the right of the mayor of your city to veto a certain resolution of the city council authorizing the issuance of bonds in the sum of $450,000.00 has been referred to the undersigned for reply.

You direct attention to your letter to this office under date of July 14, 1938, in which you requested an opinion relative to a similar resolution. In your former request you asked us to advise you by long distance telephone, since the matter was urgent, which we did.

It appears from your letter that another resolution has been adopted by the city council to take the place of the one which was "rescinded" by the mayor; and that a "majority of five passed the resolution of expediency authorizing the sale and issuance of $450,000.00 worth of bonds."

You inquire "whether the mayor has authority to veto" the resolution above referred to.

With your letter of July 14th, you enclosed a printed copy of the charter amendment to Section 97, of Chapter 5 of the charter of the City of Virginia, relating to the powers and duties of the city council. This charter amendment is dated February 8, 1938, and provides in part as follows:

> "Section 97-A. **The City Council shall have the power by a majority vote of all of the members thereof** to acquire by purchase, gift or condemnation, land for an additional public community building or buildings, to be used for civic, social and recreational purposes.
>
> **"The city council shall have the power, by a majority vote of all of the members thereof,** to erect upon said land so acquired, or upon any other land owned by the city, an additional public community building or buildings * * *.
>
> **"The city council shall have the power, by a majority vote of all members thereof,** to appropriate money, create any liability **or authorize the issuance of any bonds** of the city that may be necessary to purchase said land and/or to construct an additional community building or buildings * * *.
>
> "All provisions of the city charter that are inconsistent with this amendment are hereby repealed."

It is manifest from the above quoted language of said Section 97-A that the electors of your city, at the time of the adoption of said amendment dated February 8, 1938, did not intend that the mayor of the city should have any power of veto of a resolution adopted by the city council pursuant to said amendment. The powers to acquire land for an "additional public community building or buildings," to "erect upon said land so acquired" such a building, and to "appropriate money, create any liability or authorize the

issuance of any bonds of the city that may be necessary to purchase said land and/or to construct an additional community building or buildings," are conferred upon the city council "by a majority vote of all of the members thereof." The amendment deals wholly with the city council, and in express language confers the power to issue such bonds upon the city council by a majority vote of all of the members thereof. The mayor is not an official factor in the proceedings at all. Moreover, it will be noted that the last sentence of the said amendment expressly repeals all provisions of the city charter that are inconsistent with said amendment. Even without said repealing clause the last amendment would be controlling in so far as other provisions of the city charter, such as Section 81, are inconsistent therewith.

The Supreme Court of this state has definitely laid down the rule to the effect that the veto power of the mayor exists only when expressly granted, and shall never be deemed to exist by implication. American Electric Co. v. City of Waseca, 102 Minn. 329 (332); Meyers v. Knott, 144 Minn. 199. See also State ex rel. Wenzel, et al. v. May, et al., 251 N. W. 529.

The rule is also well established in this state that provisions of a home rule charter are of the same force and effect as a statute enacted by the legislature. No citations of authorities are necessary to establish that proposition.

As indicated to you over the telephone, the case of Meyers v. Knott, supra, seems to be squarely in point. In that case the city council duly adopted an ordinance or proposed franchise, granting certain privileges to a railway company. The ordinance in question was adopted by the city council in conformity with the rules governing its action in such matters, except that it was not submitted to the mayor for his approval or disapproval. The mayor of said city then instituted a civil action to restrain and enjoin the proposed election upon several grounds, one being that the adoption by the city council of the ordinance or proposed franchise was not in compliance with the statute or charter in that it was not submitted to the mayor for his approval or disapproval. The Supreme Court in holding that it was not necessary to submit the ordinance in question to the mayor for his approval, and that the mayor had no veto power over such ordinance, said:

> "Under the charter of the City of Minneapolis, the Mayor is given the power of veto of legislative enactments passed and adopted by the city council, and the veto, when used, annuls the enactment unless subsequently repassed by the council by a two-thirds vote of its members. * * * **To hold that the veto power of the Mayor must be taken into account and the proposed franchise submitted to him would necessarily nullify that part of the enabling act which declares that a majority vote of the council is all that is necessary to the valid passage of the ordinance,** and would result in adding to the enabling act, by judicial construction, the further provision 'that if the mayor shall veto any such proposed franchise, then to give it force or validity or entitle it to submission to the voters, a two-thirds vote must be had to repass the same over the veto.' This the Court has not authority to do. It is clear that the Legislature in enacting the statute did not intend that the Mayor

or other chief magistrate of the municipality acting thereunder, should be an official factor in the proceedings at all. The act deals wholly with the city council, and there exists no sound reason why the mayor and his veto should take part. * * * The fact remains that the enabling act does not provide for a mayor's veto and the Court is without authority to read one into the statute."

The charter of the City of Minneapolis, the same as the charter of the City of Virginia, conferred upon the mayor the power of veto of legislative enactments passed and adopted by the city council. However, it will be noted from the above quoted language of the Supreme Court, that where certain enabling legislation confers certain powers upon the city council by a majority vote, that the mayor had no veto power over such legislation so adopted by the governing body of the municipality. In the instant situation, the same as in the Minneapolis case, the charter amendment dated February 8, 1938, deals wholly with the city council, and the powers conferred by said amendment are conferred upon the governing body, and not upon the mayor. The enabling amendment does not provide for a mayor's veto and we are without any authority to read into the amendment any such veto power.

Answering your specific inquiry, therefore, we are of the opinion that the mayor of the city of Virginia has no power to veto the resolution in question.

DAVID J. ERICKSON,
Deputy Attorney General.

September 29, 1938. 61j

42

CITIES AND VILLAGES—Council—Meetings of—Mode of procedure in adopting resolutions, ordinances, etc.

Mr. Lawrence R. Lunde, City Attorney.

You inquire as to "whether or not it is legal for the City Council to declare an executive session during any of its meetings for the purpose of passing upon any question or resolution or ordinance before the Council."

Although you do not direct our attention to the applicable provisions of your city charter, we have examined the copy of your charter on file in the office of the Secretary of State, and we find no provision therein conferring any power upon your city council to "pass upon any question or resolution or ordinance before the council" at an executive session. In the absence of any such provision in your charter we are of the opinion that the council does not have the power to declare executive sessions for the purpose of passing upon any question, resolution or ordinance coming before the council. This is particularly true in view of the language contained in Sections 2 and 9, Chapter 4, of the charter to the effect that affirmative action by the council must be by "vote of a majority of the members of the common

council by ayes and nays which shall be entered in the records of the common council."

The general rule is that where the charter or law under which the municipal corporation is organized specifies the particular manner in which given action is to be taken, such provision is mandatory and cannot be disregarded. It is well known that men acting in a body, especially when under cover of corporate privilege, will often do what no one of them would be willing to do when acting alone and upon individual responsibility, and will sometimes say "yea" or permit a matter to pass "sub silentio" when they would not venture to record their names in favor of the measure. The inhabitants of the city are, as of right, entitled to know clearly the act and vote of every member of the council on every proposition relating to their public duties, and a record of such acts and votes should be plainly made and recorded in permanent form so that every inhabitant may have definite information relative thereto.

DAVID J. ERICKSON,
Deputy Attorney General.

December 2, 1937. 63a-5

43

CITIES AND VILLAGES—Council—Proceedings—Publication.

Mr. J. H. Manion, County Attorney.

You inquire:

"Will you please advise me whether or not Chapter 472, Mason's Session Laws 1937 is a mandatory measure, that is, does the measure compel village councils to publish the official proceedings in a legal newspaper once, which publication shall not be later than thirty days after the meeting takes place?"

Said Chapter 472 reads as follows:

Section 1. "The councils of all villages may cause to be published once, in some newspaper published in such village the official proceedings of such village, and such publication shall be made as soon as may be, and not later than thirty (30) days after the meeting at which such proceedings were had.

Section 2. "The term 'proceedings' as used in this act shall include a statement of all motions and/or resolutions passed by such council, and a brief itemized statement of claims allowed or disallowed, giving the name of the claimant and amount and general purpose of the claim.

"Nothing in this act shall abrogate the publication of ordinances, rules and by-laws as now required by statute."

It will be observed that said act provides that "the councils of all villages **may cause to be published** once, in some newspaper published in

such village the official proceedings of such village." On the other hand, the language following the above quoted provision provides that: "such publication shall be made as soon as may be." In construing statutory provisions it is a well settled rule that words used therein are to be construed as having their ordinary meaning unless obviously used in a different sense. On the other hand, it is equally well established that the use of the words "may" and "shall" is not decisive as to whether a statutory provision is directory or mandatory. However, our Supreme Court has held, in numerous decisions that the word "may" may be construed to mean "shall" or "must" but only when the interests of the public, or third persons may require it. See Dunnell's Digest, Vol. 6, Section 8979.

We are, therefore, inclined to the opinion that the words "may" and "shall" as used in said Chapter 472 should be construed as having their ordinary meanings. That is, we are of the opinion that the council of any village **may** cause such proceedings to be published, and that if the council determines upon such publication it then becomes mandatory that "such publication shall be made as soon as may be." In other words, we believe that the provisions providing that "such publication shall be made as soon as may be" is mandatory only in case the council may desire to cause such publication to be made.

Many of the villages in this state do not have newspapers published in such villages and it would be impossible for many villages to comply with the provisions of said act. If the legislature had intended that said act should be mandatory we believe that provision would have been made for either posting a record of such proceedings or authorizing publication in some newspaper published elsewhere in the county in cases of villages having no newspaper published therein.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

January 8, 1938. 59a-17

44

CITIES AND VILLAGES—Depositories—Funds—Deposit.

Mr. Clayton A. Gay, County Attorney.

You inquire whether or not trust agreements or participating certificates (Phelps Plan Trust) such as are secured by first mortgages insured by the Federal Housing Administration deposited with a lawful corporate trustee can be accepted as collateral security for county deposits from a designated county depository.

Such a plan (Phelps Plan Trust) provides a lawful method whereby participating trust agreements, certificates or debentures negotiable by assignment or other lawful manner of transfer, are issued and sold to investors, banks and other institutions, the certificates being secured as to principal

and interest by the deposit of one or numerous first mortgages and notes upon real estate within the United States, which have theretofore been duly accepted, approved and endorsed by the administrator of the Federal Housing Administration pursuant to an act of Congress, entitled the National Housing Act, Title 12, Sections 1707-1715 U. S. C. A. providing for insurance which covers the value of the real estate then mortgaged as well as the credit of the borrower. The insurance feature does not become operative unless the borrower defaults in the payment of principal, interest, insurance and taxes, in which event the mortgaged property is foreclosed and title conveyed to the Federal Housing Administrator, who thereupon issues Federal Housing Administration debentures due in three years and bearing 3% interest which are fully guaranteed as to principal and interest by the government of the United States to replace foreclosed mortgages insured prior to July 1, 1937.

The laws of Minnesota authorizing designated depositories of county, city, village, borough, town or school district funds to deposit securities in lieu of furnishing bonds, have gone through a process of development and modification. A new act, Laws of 1925, Chapter 173, authorized the enumerated governmental agencies to accept bonds, certificates, 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." This act was subsequently amended by Laws of 1933, Chapter 41, Section 1, relative to the subject under consideration so that designated depositories might pledge "notes secured by first mortgages of future maturity * * * on improved real estate * * * within the county wherein said bank or trust company is located, or within counties immediately adjoining such county in the State of Minnesota."

This provision was inserted without expressly repealing the preceding clause which we have quoted and was intended to modify the prohibition contained in the preceding clause. In both acts the more inclusive language relating to authority of governmental agencies of the state to accept "legally authorized investments for savings banks" is still retained. No doubt exists but what the legislature intended to remove, at least partially, the inhibition originally expressed by the language "except bonds secured by real estate," especially when considered in the broader sense of the framers of the act referring to deposits of investments which are lawful for savings banks, being acceptable in lieu of bonds.

This being true, we are called upon to consider the provisions of a still more recent act, Laws of 1935, Chapter 49, Sections 1 and 2, authorizing banks, savings banks, and other banking institutions to make loans, advances of credit and purchases in accordance with the provisions of the "National Housing Act." Section 1 of this chapter authorizes the banking institutions of the State of Minnesota, including savings banks, pursuant to proper regulations issued by the commissioner of banks, (a) "to make loans and advances of credit and purchase obligations of credit as are insured by the 'National Housing Act' * * *." and (b) "to make loans secured by mortgages on real property as are insured by said housing act and to obtain such insurance." Section 2 of this act further provides specifically that all of the

prohibitive and restrictive general statutes of the state prescribing the nature, amount, form of security, interest rates, or time for which such loans and advances of credit are made, shall not apply to the loans or advances under the "Housing Act." Implied if not express authority exists in the act and it has been established as the common law of Minnesota by the decision of the Supreme Court in the case of Bowden et al. v. Citizens Loan and Trust Co., 194 Minn. 113 (March 22, 1935) that the indirect obligations of participating first mortgage trust certificates or trust agreements secured by a deposit of approved first mortgages, suitable and otherwise lawful and proper in the first instance are themselves lawful means for the prudent investment of fiduciary funds. The implication in the statute is expressed in Section 2, Subdivision (a) of said chapter by the reference, such institutions may invest in notes or bonds secured by mortgage or trust deed insured pursuant to the Housing Act, and in securities issued by national mortgage associations or similar credit institutions now or hereafter organized under title 13 of said National Housing Act. The court in Bowden v. Citizens Loan and Trust Company, above, calls attention to a similar situation where it said that to object to this type of security being unlawful for fiduciary investment because of lack of unity of ownership and control "would apply with equal force were the investment made in a bond issue, such as a railroad bond. Yet under our statute relating to authorized investments, Mason's Minnesota Statutes of 1927, Section 7714 (6), such investments are authorized." The thing of importance to our mind is the fact that even though the unity of ownership and therefore the power of absolute control is not present in the hands of the banking institutions investing in this indirect type of security, still the securities are impressed with the equities of the original mortgages including insurance features provided by the National Housing Act and including the right to succeed to all of the right, title and interest which the trustee may acquire in the bonds or debentures which may be issued and guaranteed by the Federal Government as to principal or interest in the event of defaults occurring in the originally deposited securities, all of which rights would inure to the benefit of purchasers of the participating trust agreements or certificates with full force and effect of all pertinent principles of equity.

This being true, we have no difficulty in advising you that it is our opinion that investment trust agreements or participating certificates of the type referred to fall within the next provision of the Minnesota act, Chapter 49, Section 2, Subdivision (b) wherein

> "The notes, bonds and other securities herein made eligible for investment may be used as collateral or deposit security in any case where collateral or deposits shall be required or permitted by law of this state as security."

The legislature has by this express language specifically exempted this type of security from the harsher and more stringent provisions of Laws 1933, Chapter 41, Section 1, which we previously fully discussed, and we so rule.

FRANK H. OSTERLIND,
Assistant Attorney General.

January 18, 1937. 140f-11

45

CITIES AND VILLAGES—Fire department—Civil service commission—Establishment of.

Mr. L. P. Blomholm, City Attorney.

You state that the city of International Falls is one of the fourth class operating under a home rule charter; that the city has two regularly paid firemen who are on a monthly salary, and also a fire warden who is on a monthly salary; that in addition thereto, there are twenty firemen belonging to the fire department; that these members are not paid a salary but are paid so much for each fire; that the fire chief is paid five dollars for the first hour and one dollar for each additional hour; and that the other members of the fire department receive two dollars for the first hour and one dollar for each additional hour.

You direct attention to an opinion rendered by this office under date of August 7, 1934, to the village attorneys of St. Louis Park in which we held that said Chapter 57, Laws of 1929, did not apply to a city or village having a fire department "consisting of volunteers and two regularly employed and paid firemen."

You inquire "as to whether or not the city council of the city of International Falls would have authority to adopt a resolution accepting the provisions of the Civil Service Commission Act for Firemen, pursuant to Chapter 57 of the Laws of 1929 and acts amendatory thereto."

The opinion to which you refer is dated August 11, 1934, instead of August 7, 1934, and was rendered to the village attorneys of St. Louis Park.

Chapter 57, Laws of 1929, was amended by Chapter 13, Extra Session Laws of 1935-1936. The title of said Chapter 13 reads as follows:

> "An act to amend Laws 1929, Chapter 57, Section 1, relating to the creation of a firemen's civil service commission in cities not of the first class and in villages having a population of 2,000 inhabitants or over, and having a regularly employed and paid municipal fire department, defining the powers and duties of such commission, **so as to permit such cities and villages having a fire department consisting of two or more regularly employed and paid firemen to organize thereunder.**"

We have underscored the new matter in the title of said Chapter 13. Section 1 of said Chapter 57, Laws of 1929, as amended by said Chapter 13, Extra Session Laws of 1935-1936, reads as follows:

> "There may be created in every city, except cities of the first class, and in villages having a population of 2,000 inhabitants or more, and having a **fire department consisting of two or more regularly employed and paid firemen,** a firemen's civil service commission with powers and duties as hereinafter provided."

We have also underscored the new matter in Section 1 of said Chapter 57, as amended by said Chapter 13. It will be noted that Chapter 13 was

approved January 13, 1936. The opinion of August 11, 1934, was rendered prior to the taking effect of said Chapter 13, Laws of 1935-1936.

It seems apparent from the above quoted language of the title to said Chapter 13, as well as the new matter in Section 1, that the legislature intended to permit cities not of the first class and villages having a population of two thousand inhabitants or over and having a fire department consisting of two or more regularly employed and paid firemen, to organize a firemen's civil service commission with powers and duties as prescribed in said Chapter 57, as amended. Since your city has two regularly paid firemen who are on a monthly salary and also a fire warden who is on a monthly salary, it would appear that your city comes within the limitations of said act as amended.

Answering your specific inquiry, therefore, we are of the opinion that the council may avail itself of the provisions of said Chapter 57, as amended, by adopting a resolution in conformity with Section 3 of the act.

DAVID J. ERICKSON,
Deputy Attorney General.

July 9, 1937. 688b

46

CITIES AND VILLAGES—Fire department—Equipment—Purchase of—Fire station—Erection of—Issuance of certificates of indebtedness and bonds.

Mr. Milton F. Juhnke, County Attorney.

You state that the Village of Jeffers is without adequate fire protection and must purchase fire equipment and erect a building to house it; that the apparatus and equipment will cost approximately $3,000.00 and the building about the same figure, causing a total expenditure of approximately $6,000; that there are no funds available with which to purchase the equipment and erect a building, and you ask our opinion as to the authority to issue bonds or certificates of indebtedness for said purpose.

You further state that the Village of Jeffers has a population of between 400 to 500; that the assessed valuation of the village including real estate and personal property is $124,672.00, and that the outstanding indebtedness at the present time is approximately $6,000, which is in the form of waterworks bonds.

You also inquire as to the procedure relative to the issuance and sale of such bonds or certificates of indebtedness.

The Village of Jeffers is incorporated under the Laws of 1885, Chapter 145. Section 21, Subdivision 10 of said Chapter 145 reads in part as follows:

> "The president, the three (3) trustees and the recorder shall be the village council of said village, any three (3) of whom shall constitute

a quorum for the transaction of any business, and shall have full power and authority to enact, adopt, modify, enforce, and, from time to time, amend or repeal all such ordinances, rules and by-laws as they shall deem expedient, for the following purposes, viz.: * * * Tenth—to establish a fire department, to appoint the officers and members thereof, and prescribe and regulate their duties; 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; * * *."

It will be noted from the part of the section just quoted that the village council has the authority to purchase fire apparatus and equipment. Section 22 of the same chapter, as amended by Laws 1891, Chapter 100, Section 1, reads in part as follows:

"PROVIDED, HOWEVER, That any village of this state shall have the power to issue negotiable certificates of indebtedness for the purpose of purchasing fire engines and necessary apparatus for the extinguishment of fires, for the use of said village; but no certificates of indebtedness shall be issued for said purpose unless the amount of certificates that may be issued has been submitted to a vote of the legal voters of such village at some special or general election of said village, and a majority of the legal voters voting at such election have voted in favor of issuing said certificates. Said certificates so authorized may be for such time and of such denomination, and of such form, and bear such rate of interest, payable annually, not exceeding, however, six (6) per cent per annum, as the village council may, by resolution, determine; PROVIDED, HOWEVER, that the amount of such certificates outstanding at any one time shall never be in excess of five (5) per cent of the assessed valuation of the real and personal property of the village issuing the same, including all other indebtedness of such village."

It is plain that the above quoted portion of Section 22 authorizes the issuance of certificates of indebtedness. It will be noted, however, that the words "all other indebtedness" are not defined by said Chapter 145, as amended. Turning then to the statutes relating to public indebtedness (Chapter 10 of Mason's Minnesota Statutes of 1927, Section 1935) we find the following provision:

"The words 'net indebtedness,' as used herein, shall mean the sum of all outstanding money obligations of the corporation referred to, after deducting:

" * * *.

"4. Bonds issued for the purchase or construction of public waterworks, or for the enlargement, protection or distribution of the water supply, * * *."

From the above quoted section it is our opinion that in calculating "all other indebtedness" of the village, you are entitled to deduct the indebtedness caused by reason of the issuance of bonds for waterworks. The foregoing statement is also supported by Mason's Minnesota Statutes of 1927, Section

1938-3 (Laws 1927, Chapter 131) commonly known as the general bonding statute, wherein it is stated in Subdivision D(2):

> (D) "The words 'net debt' shall mean as to any municipality the amount remaining after deducting from its gross debt the aggregate of the principal of the following items so far as applicable to such municipality."
>
> (2) "Obligations issued for the acquisition, construction, maintenance, repair or improvement of public waterworks systems, and public lighting, heating or power systems, and of any combination thereof."

From the figures you submit it is evident that the village may issue certificates of indebtedness in the amount of $3,000.00 for the purchase of fire apparatus and equipment, and still be well within the 5% limitation of Section 22 above referred to.

As to the question involving the erection of a building to house such fire apparatus, we call your attention to Mason's Minnesota Statutes of 1927, Section 1942, which provides in part as follows:

> "When the governing body of any municipality shall have resolved that it is expedient to borrow money, for one or more of the purposes hereinafter named, and to an amount which will not increase its net indebtedness beyond the limit fixed by law, and a proposal so to do, if required by law, shall have been duly submitted to and approved by the voters thereof, the bonds of such corporation may be issued and sold, conformably to the provisions of this chapter, to the amount so authorized, as follows:
>
> "1. Cities, villages, and boroughs—In the case of a city, village or borough, for the acquisition, construction, maintenance, or improvement of any of the public conveniences mentioned in Section 1848, Subdivision 4; for the purposes of a permanent improvement revolving fund; for the purchase or erection of needful public buildings, * * *."

There seems to be no doubt but that a building to house such fire apparatus may be declared by the council to be a needful public building, and particularly in view of the fact that, as you state, there is no place within the village wherein such apparatus and equipment may be kept.

The next question that arises in consideration of your inquiry is that of the procedure of issuing the certificates of indebtedness and the bonds for the purpose outlined in your letter.

You will note that the quoted portion of Section 22 of the Laws of 1885, as amended by Laws 1891, Chapter 100, Section 1, relates to the issuance of certificates of indebtedness and the sale of the same after a majority of the legal voters voting at such election have authorized such issuance, provided, that the amount of the outstanding certificates will never exceed five per cent of the assessed valuation of the real and personal property of the village. This office has heretofore held that the above provision has been

modified by the general bonding statute (Laws 1927, Chapter 131, Sections 1938-3 to 1938-12 inclusive), which by its terms governs the issuance of bonds or certificates of indebtedness of this nature by all municipalities. Mason's Minnesota Statutes 1927, Section 1938-6, provides as follows:

> "No obligations subject to the provisions of this act as to the issuance thereof, except obligations issued to pay judgments lawfully rendered or for refunding obligations at maturity or at their optional or callable dates or to fund outstanding warrants heretofore issued shall be issued without the approval, first obtained, of the majority of the electors voting on the question of issuing such obligations, excepting that in the case of villages of five-eighths majority must be obtained, * * *."

It is our opinion that while the power to issue the certificates of indebtedness for the purchase of fire apparatus and equipment is derived from the 1885 law, and the power of erecting the building from Section 1942, Mason's Minnesota Statutes of 1927, that the procedure for issuing the certificates of indebtedness and bonds is restricted by the general bonding statute, Mason's Minnesota Statutes 1927, Sections 1938-3 to 1938-12 inclusive, and that it will be necessary for your village to comply with the requirements of the latter law with regard to the issuance thereof.

As a matter of information we call your attention to Mason's Minnesota Statutes 1927, Sections 1959 to 1968 inclusive, relating to the purchase of bonds and certificates of indebtedness by the State Board of Investment. In the event Council decides to proceed under these sections, the bonds or certificates of indebtedness may be sold to the state, and a five-eighths majority of the electors is not necessary, but merely a majority vote being required in order to issue such bonds or certificates of indebtedness.

We are enclosing copies of application for loan and notice of special election pursuant to the last quoted sections.

You have stated that it is very possible that some of the members of your local community might take up the certificates of indebtedness and bonds, and in that event we direct your attention to Laws 1935, Chapter 121 wherein the governing body of the municipality may sell such bonds or certificates of indebtedness by popular subscription or individual sale according to the terms of the resolution passed by a majority vote of such governing body. Of course this would not be done unless the issuance of the bonds were first approved by the electors of the village.

Finally, as far as the ballot for the special election is concerned, we feel that the matter should be submitted to the electors as two separate propositions and somewhat in the manner hereinafter set forth assuming the Council does decide not to sell the bonds to the state. In the event the bonds are to be sold to the state the ballot form provided on the application must be used.

The forms of ballot for general sale are as follows:

> Shall the certificates of indebtedness of the Village of Jeffers of Cottonwood County, Minnesota, be issued in the amount of $.....

bearing interest at the rate of.....per cent per annum, the proceeds thereof to be used for the purpose of purchasing fire apparatus and equipment for the Village of Jeffers, and to be numbered and to mature as set forth in the resolution now on file in the office of the clerk.

(Place your cross mark X in one of the squares.)

Yes. ☐

No. ☐

Shall the bonds of the Village of Jeffers, Cottonwood County, in the aggregate amount of $....., bearing interest at the rate of .....per cent per annum, the proceeds thereof to be used for the purpose of erecting a building for housing fire apparatus and equipment, and to be numbered and mature as set forth in the resolution now on file in the office of the clerk.

(Place your cross mark X in one of the squares.)

Yes. ☐

No. ☐

JOSEPH M. DONAHUE,
Special Assistant Attorney General.

June 27, 1938. 688c

47

CITIES AND VILLAGES—Fire department—Relief association—Investment of funds.

Mr. Joseph C. Vesely, Village Attorney.

You state that the Hopkins Fire Department "has purchased, or is contemplating the purchase of, new uniforms for members of the department."

You inquire:

> "Would it be legally permissible for the Hopkins Fire Department to borrow the money for the cost of these uniforms from the Hopkins Fire Relief Association upon a plain unsecured note payable in one to two years' time, carrying interest at four per cent per annum?".

Under the provisions of Section 1920 and Section 3726, Mason's Minnesota Statutes of 1927, as amended by Chapter 349, Laws of 1937, the funds derived from the one-tenth of a mill levy provided for in Section 1919, Mason's Minnesota Statutes of 1927, and the funds received from the state from the two per cent tax paid by insurance companies, as provided under the provisions of Section 3723, et seq. Mason's Minnesota Statutes of 1927,

as amended, and "all other money or property donated, given, granted or devised for the benefit of such funds * * * shall be kept in a special fund."

Said Section 1920, as amended by said Chapter 349, Laws 1937, provides for the investment of said funds as follows:

> "Provided, further, that said relief association is hereby authorized and empowered to invest its funds in such income paying properties and securities as the council of the village or city in which such organization is located shall from time to time authorize."

Said sections of the statutes, as amended, do not contain any provisions relating to the class of "properties and securities" which the council may authorize said funds to be invested in. The word "securities" in its ordinary meaning includes bonds, certificates of stock or of deposit, notes, bills of exchange and other evidences of indebtedness. (See Words and Phrases, 3rd Series, Vol. 6, page 999.)

The legislature has also recognized a note as being a "security" within the definition of the word "security" under the so-called Blue Sky Law (See Section 3996-1, Mason's Minnesota Statutes of 1927.)

We are, therefore, of the opinion that it is for the village council to determine whether such funds shall be invested in said unsecured promissory note of said fire department.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

May 6, 1938. 198b-5

48

CITIES AND VILLAGES—Incorporation of—Village—Election for determining.

Mr. Warren P. Adams, County Attorney.

You state that a petition has been presented to the county board for the incorporation of a village and that Section 1114, Mason's Minnesota Statutes of 1927 provides that the election shall be conducted, so far as practicable, in accordance with the laws regulating the election of town offices.

You inquire as to the hour of opening and closing of the polls at an election held pursuant to said section of the statute.

This office has heretofore held that the time of opening and closing the polls at the town elections is controlled by Mason's Minnesota Statutes of 1927, Sections 1033 and 1038.

Section 1033 provides that the annual town meeting must be called to order between nine and ten o'clock a. m. Section 1038 provides that the polls

shall be opened between nine and ten o'clock a. m., the proclamation of which shall be previously made by the moderator. Proclamation shall in like manner be made of the adjournment and of the opening and closing of the polls thereafter.

The statutes do not fix the hour at which the polls at such township meeting must be closed. This office has heretofore held that the time of the closing of such polls is a matter for the determination of the voters present at such meeting and proclamation thereof made.

JOSEPH M. DONAHUE,
Special Assistant Attorney General.

June 13, 1938. 484e-4

49

CITIES AND VILLAGES—Board of Health—Removing or abating nuisance.

Mr. Glen C. Sawyer, Village Attorney.

You state in effect that a small eat shop in the village of Lanesboro, which is located on the front of a certain lot, deposits garbage and other refuse in an excavation in the rear of said lot. You also state that other residents of the village in the vicinity of said excavation also throw garbage therein, and that in the summer months such garbage and refuse is a menace to the health of the community.

You inquire:

> "Has our village council power to invest the Board of Health with power to act and clear up the situation, or can the Board of Health merely recommend to the village council and then the village council have power to act and correct the situation?"

Although you do not so state, our information is that the village of Lanesboro is incorporated and operating under Chapter 145, Laws of 1885. Subdivision 23 of Section 21 thereof authorizes the village council to appoint a Board of Health which shall have all the powers of such a board under the general laws of the state. Said Subdivision 21 also declares what are nuisances and the method of proceeding to abate the same. Subdivision 28 of said Section 21, authorizes the village council to establish all ordinances and by-laws for the government and good order of the village and for the promotion of health.

This office has held that under the above provisions of said Chapter 145 the village council, rather than the local Board of Health, is vested with authority to declare what shall constitute a nuisance, and it is very questionable whether the village council may by ordinance delegate any of the police powers of the village to the Board of Health.

We are of the opinion that the authority to determine whether such garbage and refuse constitutes a public nuisance is vested in the village council. If the council finds that the same is in fact a nuisance we believe that it should adopt an ordinance declaring that such garbage and refuse is a public nuisance.

After the council has determined and declared by ordinance that such garbage and refuse constitutes a nuisance, we are of the opinion that the local health office should then proceed to cause the owner or occupant of the premises to remove the same as provided under Section 5379, Mason's Minnesota Statutes of 1927.

You also inquire whether the expenses involved in abating such nuisance can be "added to the landlord's taxes"?

Section 5380, Mason's Minnesota Statutes of 1927, provides as follows:

> "If the owner, occupant or agent shall fail or neglect to comply with the requirement of said notice, then said health officer shall proceed to have the nuisance, source of filth, or cause of sickness, described in said notice, removed or abated from said lot or parcel of ground and report the cost thereof to the city clerk, or other like officer, and the cost of such removal or abatement shall be assessed and charged against the lot or parcel of ground on which the nuisance, source of filth, or cause of sickness was located, and the city clerk, or other like officer, shall, at the time of certifying their taxes to the county auditor, certify the aforesaid costs, and the county auditor shall extend the same on the tax roll of the county against said lot or parcel of ground, and it shall be collected by the county treasurer and paid to the city, village or township, as other taxes are collected and paid."

Under the above referred to statutory provision the cost of such removal or abatement may be assessed and charged against the lot or parcel of ground on which such nuisance is located.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

April 14, 1938. 477b-20

50

CITIES AND VILLAGES—Library—Directors—Appointment of.

Mr. L. P. Blomholm, City Attorney.

You direct our attention to Section 5663, Mason's Minnesota Statutes of 1927, which section relates to the appointment of the board of directors of a public library established pursuant to the provisions of Section 5661, et seq., Mason's Minnesota Statutes of 1927.

You inquire:

"The question arises whether or not after the original appointments have been made and appointments are made annually thereafter the approval of the Council must be given to the subsequent appointments."

We have been unable to find any provisions contained in the home rule charter of the City of International Falls, providing for the establishment of a public library, and we assume that the public library in your city was established pursuant to the provisions of said Section 5661 et seq., Mason's Minnesota Statutes of 1927.

Section 5663, Mason's Minnesota Statutes of 1927, to which you refer provides as follows:

"When any such library or reading room is established, the mayor of the city or president of the village, **with the approval of the council,** shall appoint a board of nine directors, but not more than one of whom shall at any time be a member of such governing body. One-third of the members shall hold office for one year, one-third for two years, and one-third for three years from the third Saturday of July following their appointment, the term of office of each being specified by the appointing power; and annually thereafter such mayor or president shall appoint three directors for the term of three years and until their successors qualify. Such mayor or president, by and **with the consent of the council,** may remove any director for misconduct or neglect." Section 5664 provides:

"Vacancies in the board of directors shall be reported to the council, and filled by **like appointment** for the unexpired term. Directors shall receive no compensation for their services as such."

It will be noted that the original appointment of such directors is made by the mayor **with the approval of the council.** The provisions for the removal of any director also requires **the consent of the council.**

Although the provision providing for the annual appointments of successors to the directors whose terms have expired does not expressly provide that such appointments shall be approved by the city council, we believe that it was the intention of the legislature that all appointments to said board of directors should be approved by the city council.

It will be noted that Section 5664 relating to the filling of vacancies in said board provides that such vacancy shall be filled by "like appointment". The "like appointment" therein provided for undoubtedly refers back to the manner of appointment provided for in Section 5663. It seems to us that when the legislature used the term "like appointment" it intended that all appointments provided for in said Section 5663 should be made in only one manner, i.e., appointment by the mayor with the approval of the council.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

August 25, 1938. 59a-26

51

CITIES AND VILLAGES—Licenses—Electricians—Licensing by municipality.

Mr. Gerald E. Sveeggen, Village Attorney.

You state:

> "As village attorney for the Village of Richfield, a village organized under the laws of Section 1111 to 1115 of Mason's 1927 Minnesota Statutes, having a population at the last census of approximately thirty-five hundred and having an assessed valuation of approximately two and one-half million, I would like your opinion as to the constitutionality of an ordinance providing for the licensing of all electricians doing electrical work in the Village of Richfield."

The general rule is that a village has only those powers that are expressly conferred by statute or are necessarily implied and those which are expressly conferred. See Dunnell's Digest, Section 5684 and cases cited. We are not aware of any statute which expressly or by necessary implication confers upon a village organized under the General Laws of 1905 the power to adopt an ordinance providing for the licensing of all electricians doing electrical work in such village. In the absence of such a grant of power, it is our opinion that a village organized under the General Laws is not authorized to enact such an ordinance. However, electricians doing work in such a village must comply with the provisions of the state law which provides for the licensing of electricians. See Laws 1937, Chapter 314.

WILLIAM D. GUNN,
Special Assistant Attorney General.

March 24, 1938. 477b-37

52

CITIES AND VILLAGES—Nuisances—Undertaking establishments.

Mr. Glen C. Sawyer, Village Attorney.

You state that the Village of Lanesboro is organized and operating under the general village code; that the village does not have a zoning ordinance; that a certain "chain organization" contemplates the establishment of a burial service parlor in the heart of the residential district; this organization has purchased an abandoned church located "in the best residential district" of the village; that this building is to be "remodeled into a modern up-to-date funeral parlor."

You inquire:

> "How far can the Village Council go to stop the conducting of this obnoxious business which will definitely depreciate the value of the houses in this section."

Assuming that your village is operating under the general village statutes we direct your attention to Mason's Minnesota Statutes of 1927, Section 1186, Subdivision 17. This section provides, in part, that the village council shall have authority "to provide hospitals, and **regulate the burial of the dead**; to **define nuisances, and prevent or abate the same**; to require the owner or occupant of any grocery, cellar, tallow chandler's shop, factory, tannery, stable, barn, privy, sewer, **or other unwholesome or nauseous building or place, to remove, abate, or cleanse the same.**"

The question as to whether your village council may prohibit the establishment of such a business in the residential district of your village depends upon the proposition of whether such business or occupation which the council seeks to exclude from said residential district is one liable to become a nuisance, even if properly conducted in such district. It is generally recognized that such a business is not a nuisance per se. Our supreme court has said that the conduct of such a business in a residential section of a municipality may become a nuisance because of its "proneness to become injurious to health, or offensive to the senses or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, such as slaughter houses, tanneries, brick kilns, mills, laundries, livery barns, and the like." City of St. Paul v. Kessler, 146 Minn. 124. In this case the supreme court placed an undertaking business in the same category as slaughter houses, tanneries, brick kilns, mills, laundries, livery barns, and the like. The court quoted with approval the following language in the case of Osborn v. City of Shreveport, 143 La. 931, 79 South. 542, 3 L.R.A. 955:

> "We find no reason to doubt that plaintiff conducts his business after the most approved methods and with as little offense to those by whom he may be surrounded as the business will admit; but, to the incidents mentioned (odors from decayed corpses), there is to be added the fact that the business itself is a gruesome one, and that the psychological influence of being confronted, and having one's family confronted, day after day and at all hours of the day, with death, and its woeful trappings in the shape of hearses and other vehicles, carrying in and out of a neighboring building the mortal remains of some fellowbeing, is no more enlivening nor wholesome than would be the constant presence of the same corpse, or the immediate proximity of a graveyard, and we take judicial notice that the introduction of such a business into a residential neighborhood, where none has previously been established, will inevitably depreciate the value of the property as well as discommode the owners."

The court in the Kessler case further said:

> "We agree with the courts above mentioned that the ordinary normal person cannot live next door to an undertaking establishment or funeral home, where dead bodies are continuously carried in and out and are kept for longer or shorter periods, without thereby being more or less deprived of the comfortable enjoyment of his home. **The business, then, is such that it may be regarded as a private nuisance in**

residence districts. The only instance to which we have been referred where an injunction was refused is Wescott v. Middleton, 43 N. J. Eq. 478, 11 Atl. 490, but it is to be noted that the locality wherein the undertaking establishment was located was in a populous part of the city, and apparently **not in an exclusively residence district."**

See also Meagher, et al. v. Kessler, et al., 147 Minn. 182, which involves the same ordinance of the City of St. Paul as that involved in the Kessler case, supra. In the latter case the court said:

"We conclude that the rule must be considered as well settled, that when the prosecution of a business, of itself lawful, **in a strictly residential district, impairs the enjoyment of homes in the neighborhood,** and infringes upon the well being and comfort of the ordinary, normal individual residing therein, the carrying on of such business, in such locality, becomes a nuisance and may be enjoined."

We are of the opinion that the above quoted language of said Section 1186 vests ample authority in your village to restrict or prohibit such a business that is likely to develop into a nuisance when carried on in a strictly residential section of the village.

It will be noted that the language in said Section 1186 is substantially the same as that contained in the St. Paul charter pursuant to which the St. Paul ordinance, involved in the two cases above referred to, was adopted. It will also be noted that the court in the Kessler case indicates that such an ordinance might also be adopted under the general welfare clause pursuant to which a municipality may "prescribe districts within which no business or occupation of a noxious or offensive character, or which tends to interfere with the comfort and prosperity of others, may be carried on." State v. Houghton, 134 Minn. 226.

DAVID J. ERICKSON,
Deputy Attorney General.

June 21, 1937. 477b-20

53

CITIES AND VILLAGES—Officers—Aldermen—Vacancy—Removal from aldermanic district.

Mr. E. C. Meisinger, City Attorney.

You state that one of the aldermen from the third ward sold his home and for the past month has resided in the City of St. Paul with his family; that he has advised the city council "of his intention to retain his legal residence in the City of West St. Paul and of his intention to build a new dwelling in the third ward;" that "up to the present time no building is under construction;" and that he further "stated that he intended to take a room in the third ward within the next month."

You inquire:

"1. Is he qualified to act under the above situation.

"2. Would the taking of a room merely to establish a residence, and without actually living therein satisfy the provision of the Charter."

Chapter 2, Section 6 of the city charter, to which you direct attention, provides:

"Every Alderman at the time of his election shall be, and during his term of office shall remain, a qualified elector and resident of the Ward by which he was elected, and no alderman shall, during his term of office for which he was elected, hold any other City office."

Your inquiry involves a question of fact rather than a law. Our Supreme Court has said that "the right to vote and the right to hold office are declared to be coordinate." The Supreme Court has also said that, "whenever any public office of any kind is made elective, Section 7, Article 7 of the constitution becomes ex proprio vigore, applicable and operative and fixes the qualifications for eligibility."

Section 7, Article 7 of the constitution is as follows:

"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."

The above quoted constitutional provision is controlling as to qualifications for any elective office in this state and supersedes the above quoted charter provision in so far as the same is inconsistent with said Article 7.

Your questions resolve themselves into the proposition as to whether the alderman in question continues to be a legal resident for voting purposes of the election district or ward from which he was elected. The Attorney General cannot determine the legal residence of a person in a particular case either for voting purposes or for the purpose of holding an elective office.

Generally speaking we may say that mere absence from the aldermanic ward or election district does not necessarily determine the residence of said alderman either for the purpose of voting or of holding said elective office. The intention of the voter or of the officeholder is largely, if not entirely, the controlling factor in determining the question. Such intention can only be determined from all of the surrounding facts and circumstances together with the declared intention of such voter or officeholder. The fact that the alderman in question sold his home and for the past month has been residing in the City of St. Paul with his family may be an indication of intention to terminate his residence in said election district or aldermanic

ward. However, it appears from your letter that the alderman in question has advised the council of his intention to retain his legal residence in the City of West St. Paul and of his intention to build a new dwelling in the third ward. This declaration is evidence of intention on the part of this alderman to retain his residence in the City of West St. Paul. It does not seem to us, therefore, that this man has abandoned his residence in the City of West St. Paul. However, as hereinabove indicated, this is a matter upon which this office cannot pass since it involves question of fact.

DAVID J. ERICKSON,
Deputy Attorney General.

June 4, 1937. 63a-1

54

CITIES AND VILLAGES—Officers—Expenses of policeman incurred in prosecution for assault.

Mr. Burton R. Sawyer, Village Attorney.

You state:

"Last summer the night policeman, while leading home a man under the influence of liquor, is supposed to have hit the intoxicated party. This the policeman denies and claims that the man stumbled and fell on the cement sidewalk. In any event, whether the man was hit or not, he fell to the sidewalk and sustained what is claimed to be a skull fracture.

"His wife and some of the other relatives placed the case in the hands of attorneys with the idea of suing the village and recovering damages. It subsequently developed that as a matter of law the village is not liable. After the relatives learned this one of them swore out a complaint for the arrest of the policeman on the ground of assault in the second degree and this charge is now pending against him in the district court of Rice County.

"The village officials had given the policeman orders to keep the streets cleared of intoxicated persons, * * *."

Our opinion is asked as to whether or not the common council of the Village of Dundas has the authority to pay the attorney's fees and costs of the trial of the criminal charge now pending against the policeman in question. If the policeman was acting in good faith in the discharge of his official duties we are of the opinion that his attorney's fees and his costs in his defense in the criminal charges brought against him may be paid by Village of Dundas. If a police officer was absolutely responsible for his acts while in the performance of his official duties there would be a tendency on the part of the said officials to be overly cautious. On the other hand, if there was an absolute right on the part of the officer to have the expenses such as stated by you borne by the municipality for which he was employed,

regardless of good faith on the part of the policeman there would probably be a tendency on the part of such policeman to become reckless and overbearing in the exercise of his police powers.

The question of good faith consequently is a matter that must be determined by the local governing body. If after reviewing all of the facts the local governing body determines that the policeman in question was acting in good faith and in the exercise of his legitimate powers as a policeman, the law is plain that the village has a right to expend monies in the defense of such policeman. See City of Moorhead v. Murphy, 94 Minn. 123, 102 N. W. 219. In that case our Supreme Court held that in the absence of any charter provisions prohibiting such payment a municipality has the power to reimburse a police officer who is acting in good faith in the exercise of his official duties for expenses and attorney's fees incurred in an action for false imprisonment.

ROY C. FRANK,
Assistant Attorney General.

March 18, 1937. 469a-8

55

CITIES AND VILLAGES—Officers—President—Vacancy—Failure of president to qualify.

Hon. Andrew Finsteun, Village Attorney.

You state that the Village of Kenyon was organized and is operating under the Laws of 1885, Chapter 145; that a new president of the village council was elected at the last annual village election; and that he refuses to qualify.

You inquire:

> "Does or does not the former president whose term expired December 31, 1936 hold over under the law which says that he shall serve his term and until his successor is elected and qualified?"

This office has heretofore held that all villages operating under the general laws as well as those operating under Chapter 145, Laws of 1885, are governed by the provisions of Laws 1929, Chapter 413 in so far as the same relates to elections, terms of office and the filling of vacancies of village offices in such villages. Section 2 of said Chapter 413 provides:

> "In all of the villages or boroughs of this state the resident electors shall choose the following named officers under the provisions of this act: namely, a treasurer, two constables and a council composed of a president, a clerk and three trustees, and if said village or borough in a separate election district an assessor, and if there be no municipal court established in such village or borough two justices of the peace. All officers chosen and qualified as such shall hold office until their suc-

cessors qualify. **Vacancies in office may be filled for the remainder of the term for which said respective officers were elected by the council."**

Subdivision 6 of Section 6953, Mason's Minnesota Statutes of 1927, provides that a vacancy shall exist when the incumbent refuses or neglects "to take the oath of office, or to give or renew his official bond, or to deposit or file such oath or bond within the time prescribed."

This office in construing said Chapter 413, Laws of 1929, has heretofore held that there is no specific time limit within which village officers may qualify. In other words, newly elected village officers may qualify at any time before January 1 and within any reasonable time subsequent thereto.

If, therefore, the newly elected president of the village council indicates an intention not to qualify or shall fail to qualify within a reasonable time, it necessarily follows that a vacancy exists in said office which should be filled by appointment by the village council pursuant to said Chapter 413. The old president of the village council will continue to hold over until such appointee qualifies. In other words, when such a newly elected president of the village council fails to qualify within a reasonable time after January 1, a vacancy exists which should be filled by the village council for the remainder of the term of the newly elected president who so failed to qualify.

DAVID J. ERICKSON,
Deputy Attorney General.

January 13, 1937. 471m

56

CITIES AND VILLAGES—Officers—Recorder, compensation of.

Mr. Howard W. Anderson, Village Attorney.

You state that the Village Recorder was elected for a two year term at the December, 1936 annual village election; and that "on account of the greatly increased amount of work", the Council desires to increase the salary of the recorder to $90.00 per month. You inquire "whether the Council has a right, at the opening meeting of the year, to do this".

Although you do not so state, our information is that the Village of Grand Rapids is incorporated under Chapter 145, Laws of 1885. Assuming this to be true, the compensation of the Village Recorder in your Village is regulated by said Chapter 145 as amended by Laws of 1899, Chapter 115, which provides:

> "For the performance of all the duties hereinbefore set forth * * *, the Village Recorder shall receive such compensation as shall be fixed and determined by the Village Council of his Village; and the Village Council shall fix his compensation by Resolution thereof at their first regular meeting after the annual village election in each and every year."

You will note the difference between the above quoted language and the language of Section 1178 of Mason's Minnesota Statutes of 1927, to which you direct attention (applying to villages organized under the 1905 Revised Laws), which latter section provides:

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

It is true that at the time of the enactment of the above quoted Section of the 1885 Law as amended, as well as said Section 1178, the term of the Recorder was then one year in both classes of villages. The 1929 Legislature, by the enactment of Chapter 413, Laws of 1929, extended the term of the Recorder to two years. The 1929 Act, did not modify or change the above quoted statutory provisions relating to the compensation of the Recorder. It might be urged that the intent of the 1899 Act was to prevent any change of the Recorder's salary during his term of office, the reference to fixing the salary at each annual election being made because the term was then an annual term. But the intent of the legislature may have merely been to provide for the fixing of the salary annually to correspond with the provisions for the levying of taxes annually and in order that the Council might properly prepare an annual budget for the purpose of the tax levy. In any event the language seems clear and in our opinion the salary fixed by the Council in villages operating under the 1885 Law as amended, is for one year only. It necessarily follows that your present Council can change the salary of the Recorder at this time, the salary as fixed by the present Council to be in effect during the year 1938.

Your request with reference to the office of Dairy Inspector has been referred to Assistant Attorney General John A. Pearson, and the writer understands that Mr. Pearson has written you for further information relative to said matter.

DAVID J. ERICKSON,
Deputy Attorney General.

January 28, 1938. 470b

57

CITIES AND VILLAGES—Officers—Resignation.

Mr. Lyle A. Hamlin, Village Attorney.

You state that at the last regular meeting of the village council, held on July 7, the village clerk tendered his resignation "to become effective August 1, 1938"; that immediately upon the filing of said clerk's resignation "the council voted to accept the same"; that the matter of his successor was taken up and "of the four remaining members two favored one party and two another."

You inquire:

> "The question has now been submitted to me as to whether or not a special meeting might be called prior to August 1, the effective date

of the resignation, and if called whether the present clerk would have a vote."

The general rule of law seems to be that where terms or conditions are attached to a resignation of a public officer, it must be accepted, if at all, subject to such terms and conditions. In other words, a prospective resignation, even though accepted, does not take effect until the date named therein. (See 22 R.C.L., page 559, Section 263—46 C.J. page 979, Section 130).

In State ex rel. Young v. Ladeen, 104 Minn. 253, our Supreme Court stated the rule as follows:

> "To constitute a complete operative resignation of a public office there must be an intention to relinquish a part of the term, **accompanied by the act of relinquishment.**"

In view of the above referred to rules of law, we are of the opinion that the resignation of said clerk will not become effective until August 1, and we do not believe that the council has any present authority to vote on the question of electing a person to fill said office of village clerk. Until said resignation becomes effective there is no vacancy to fill.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

July 14, 1938. 471m

58

CITIES AND VILLAGES — Officers — Treasurer — Vacancies — Failure to qualify.

Mr. H. H. Bonniwell, Jr., County Attorney.

You state that a new treasurer was elected in one of the villages in your county; that within 10 days after such election, which occurred on December 8, 1936, the new treasurer filed his oath and took all necessary steps to qualify except that he has not filed a bond.

You direct attention to Mason's Minnesota Statutes of 1927, Section 6953 (6) relating to vacancies; Section 6963 relating to taking and subscribing of the oath prescribed by law; Section 1174 which provides that the village treasurer shall file such a bond as the council shall require; and Section 1077 and 1078. You also direct attention to opinion No. 36 of the Attorney General's Report for 1928 and opinions Nos. 774 and 776 of the Report for 1910.

You submit certain inquiries which will be answered in the order submitted.

1. "When should the village council fix the amount of the bond, that is, how soon after the election, under said Section 1174?"

You do not inform us the name of the village of which the man to whom you refer was elected treasurer. We assume, however, that the village in question is operating either under the 1905 Village Code or Chapter 145, Laws 1885.

At the outset, we direct your attention to Chapter 413, Laws 1929, which repeals Section 1134, General Statutes 1913, referred to in said opinion No. 36, in so far as said section is inconsistent with the provisions of said Chapter 413, Laws 1929. It will be noted from Section 2 of said Chapter 413 that "Vacancies in office may be filled for the remainder of the term for which said respective officers were elected by the council."

In answer to your first question, we are of the opinion that if the amount of the village treasurer's bond has not been fixed pursuant to an ordinance that the amount of said bond should be fixed by the new council at its first meeting in January following the preceding December election.

2. "Assuming that they meet and fix the bond the first day of the year, how long might the newly elected treasurer wait before filing his bond, or must he have it ready and file it the first day of the year?"

This office has heretofore held that there is no specific time limit within which village officers may qualify. In other words, newly elected village officers may qualify at any time before January 1 and within a reasonable time thereafter. If such officer fails to qualify within a reasonable time after the first of January a vacancy exists in such office which should be filled by the council pursuant to said Chapter 413. The old treasurer continues to hold office until the new one, whether elected or appointed, qualifies.

3. "Would his attempt to assume any of the duties of the office to which he was elected before filing such bond vacate his office, or must the council first meet and pass a resolution that the office is vacant?"

The first part of your question is answered in the negative. As to the second part of your third question, we are of the opinion that if the newly elected treasurer fails to qualify within a reasonable time after the first of January that some affirmative action should be taken by the council, by way of resolution, declaring the office vacant. The general rule seems to be that a failure to take the oath of office or to otherwise qualify within the time specified by law does not "ipso facto" create a vacancy which will prevent an officer from qualifying thereafter, if it is done before any steps are taken to declare a vacancy. See State ex rel. Webb v. Stratte, 83 Minn. 194.

DAVID J. ERICKSON,
Deputy Attorney General.

February 18, 1937. 456g

59

CITIES AND VILLAGES—Ordinances—Establishment of legitimate business not a nuisance per se—Prohibition of.

Mr. V. T. Conklin, City Attorney.

You state that there is one motion picture theatre in the City of Sauk Centre and that a second one is about to be built.

You further state that "there is considerable sentiment in favor of limiting the number to two."

You inquire:

> "In your opinion could the City pass an ordinance which would in effect limit the number of motion picture theatres in Sauk Centre?"

Section 3 of Chapter I of the city charter of the City of Sauk Centre authorizes the city to "license and regulate persons, corporations and associations employed in any business, occupation, trade or profession" and to "define, prohibit, abate, suppress, all things detrimental to the health, morals, comfort, safety, convenience and welfare of the inhabitants of the city."

Although the power to regulate found in said charter authorizes the city, through its council, to impose reasonable restrictions upon a trade or business, we do not believe that it authorizes an absolute prohibition of the right to engage in a legitimate business which is not a nuisance per se. See McQuillin on Municipal Corporations, Vol. 1, Section 372.

Our Supreme Court, in State v. Dirnberger, 152 Minn. 44, in upholding a city ordinance providing that no person could operate a laundry within said city without first obtaining a permit from the city council said:

> "It (the ordinance) does not prohibit the establishment of new laundries within a district. It merely requires one desiring to start a laundry in the city to obtain permission of the city council. The city council may never in fact exclude an applicant from a district where laundries are operated. It may never impose any condition not common among existing laundries. There may be no discrimination at all." See also State v. Clousing, 198 Minn. 35.

Answering your inquiry, we are of the opinion that the City of Sauk Centre may adopt an ordinance providing for reasonable regulations relating to the operation of motion picture theatres in said city, but may not prohibit the establishment of a legitimate business, such as a motion picture theatre, which business is not in itself a nuisance per se.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

August 2, 1938. 59a-32

60

CITIES AND VILLAGES—Ordinance—Licenses—Second hand automobile dealers.

Mr. O. K. Alger, City Attorney.

You enclose a copy of a proposed ordinance of the City of Morris entitled: "An ordinance defining, licensing and regulating dealers in second hand automobiles, and prescribing penalties".

You state:

> "It strikes me off-hand that this might be considered rather discriminatory on the part of the City Commission and somewhat in restraint of a legitimate line of business, and I am rather doubtful as to whether the ordinance could properly be sustained under its chief justification, which appears to be the justification of preventing frauds, as it would appear to me off-hand that second-hand cars are not much more distinctly subjects of fraud than the ordinary line of merchandise, any of which may be almost equally misrepresented to the public, and as to which licenses are not ordinarily required or approved."

You request the opinion of the Attorney General relative to the legality of the proposed ordinance.

The right to license must be plainly conferred or it will not be held to exist. Our Supreme Court has held that the authority to enact a licensing ordinance must appear in the charter and that it will not be inferred from terms of doubtful or uncertain import. See St. Paul v. Stoltz, 33 Minn. 233; St. Paul v. Traeger, 25 Minn. 248; and Crescent Oil Co. v. City of Minneapolis, 175 Minn. 276.

Ordinances must not be in unreasonable restraint of trade, and the power to enact an ordinance in restraint of trade must be unequivocally conferred. St. Paul v. Traeger, supra.

The first question to be considered is whether your city charter authorizes the enactment of an ordinance defining, licensing and regulating dealers in second hand automobiles. We have examined the provisions of the home rule charter of the City of Morris and we do not find that such authority to license and regulate dealers in second hand automobiles is specifically granted therein.

The licensing of employments is an exercise of the police power that the legislature may delegate to municipalities. See Dunnell's Digest, Section 6795. However, as above indicated, the authority to enact such an ordinance as the one referred to in your letter is not specifically granted in your charter, and we are not aware of any general law that delegates such authority to a city of the fourth class. On the other hand, the legislature has provided that dealers in both new and second hand automobiles must be licensed by the state. See Mason's Minnesota Statutes of 1927, 1936 Supplement, Section 2686. An ordinance cannot be in conflict with the gen-

eral laws of the state. While it is conceivable that a reasonable ordinance, licensing and regulating dealers in second hand automobiles, might be valid, if general power to enact it was conferred, we doubt if the ordinance submitted by you would, under any circumstances, be sustained.

The proposed ordinance provides for a license fee of $500 per year. This amount is so great that under the decisions of the Supreme Court of this state it appears so unreasonable as to be void. In Crescent Oil Co. v. City of Minneapolis, supra, a license fee of $100 for filling stations was held invalid. In Orr v. City of Rochester, 193 Minn. 371, a license fee of $250 for auctions and auctioneers was held to be so unreasonable as to be invalid.

Section 1 (a) of the proposed ordinance excludes from the operation of the ordinance a dealer in second hand cars who also sells new cars. Section 17 of the ordinance provides that its provisions shall not apply to a dealer who has been in business in the City of Morris for a period of three years.

As above indicated, the provisions of an ordinance must be reasonable. Section 6755 of Dunnell's Digest provides:

> "Ordinances must be reasonable, and if they are manifestly unreasonable the courts will declare them void. * * * * Whether an ordinance is reasonable or not is a question of law for the court."

From the foregoing you will observe that the question of whether or not an ordinance is reasonable is a matter for the court to pass upon. Upon the question of the reasonableness of an ordinance all that this office can do is to point out certain portions that appear to be unreasonable.

Answering your specific inquiry, it is our opinion that the proposed ordinance would be invalid because the power to enact such an ordinance has not been delegated to the City of Morris.

WILLIAM D. GUNN,
Special Assistant Attorney General.

December 21, 1937. 59a-32

61

CITIES AND VILLAGES—Ordinance—Nuisance—Filling Station—Closing hours.

Mr. A. J. Irwin, Borough Attorney.

You state that certain citizens of the borough of Belle Plaine have made complaint to the council that a gasoline filling station near their residences remains open and operating the greater part of the night; that by reason of the noise in conducting its business it has become a nuisance in disturbing the sleep of these residents; that these several residences and said station abut upon trunk highway No. 169; and that during the hot

weather livestock is generally transported by truck over said highway at night.

You further state that the council is of the opinion "that such noise that may be made in filling trucks and cars at such station adds but little to the general noise created by trucks and cars passing through without stopping and not sufficient of itself to create a nuisance, and has doubt of the legality of such an ordinance, if passed, that the question of nuisance in this matter is more a question of fact rather than of law, that the parties complaining have their remedy, if any, to establish the matter as a nuisance, and have it abated by court proceedings."

You inquire:

1. "Under the Borough charter (Chapter 36, Special Laws of 1868) has the council power to enact an ordinance regulating the hours of filling stations, if so is it discretionary so to do?"

2. "Can the council, under the circumstances stated, declare the station a nuisance?"

3. "Would an ordinance restraining the service of trucks and automobiles after a fixed hour, be considered as being in restraint of trade, or public welfare?"

The above questions may be conveniently considered together. Most of the cities and villages in this state have the power, pursuant to the charter or statutory provisions under which they are operating, to enact ordinances for the protection of the health, comfort and safety of their inhabitants. However, we have examined Chapter 36, Special Laws 1868, the charter of the borough of Belle Plaine, and the powers therein granted to the borough council with reference to the adoption of ordinances for the protection of the health, comfort and safety of its inhabitants are very limited. Section 5 of said Chapter 36 provides that the mayor and councilors shall constitute the council "to which body shall belong the exclusive right to exercise **all the legislative powers granted by this act to said corporation** except as otherwise therein specially provided." It will be noted from the above quoted language that the powers of the council with reference to the enactment of legislation in behalf of the borough are limited to such as are granted by said Chapter 36. We find no provision in said special act specifically authorizing the council to declare what shall constitute a nuisance. We believe, therefore, that it is very doubtful as to whether the borough council has the power to enact an ordinance regulating the hours of filling stations within the corporate limits of the borough.

It should be borne in mind that the business of conducting a gasoline filling station is a legitimate business and the person owning property within the corporate limits of the borough is entitled to use his property for such purpose without unreasonable interference. The question as to what constitutes unreasonable interference is one of fact committed in the first instance to the governing body. Speaking generally, we may say that the courts do not, as a rule, interfere with regulations imposed by ordinances unless they are unreasonable, arbitrary or discriminatory. This is par-

ticularly true where the municipality has the power to enact the ordinance in question pursuant to charter under which the municipality is operating.

As to the power of the council to declare such a filling station a nuisance we may say that we find no express provisions in the borough charter conferring any power upon the borough council to declare what shall constitute a nuisance. The only mention of a nuisance in the charter, so far as we have been able to find, is in Section 18, which provides, in part, that:

> "The council shall have power * * * to remove all nuisances and obstructions from the **streets and commons** of said borough, * * *."

It will be noted that the above quoted language from said Section 18 limits the power of the council to remove all nuisances from the streets and commons. In other words, this section does not seem to be broad enough to authorize the council to declare what shall constitute a nuisance when maintained on private property within the corporate limits of the borough. Nor does it seem to us that Section 19 of your charter applies to the situation outlined in your communication.

We believe that you are quite right in your conclusion that the question of whether the maintenance of the filling station in question constitutes a nuisance so that the same should be regulated by ordinance is one of fact and that the complaining parties have their remedy by bringing court proceedings to abate the same if such business is so conducted as to interfere unreasonably with the rights of adjacent property owners.

Speaking generally, we may say that what annoyance or combination of annoyances will constitute a nuisance in a given instance will depend upon the circumstances of each case as it arises. No particular kinds of annoyance are requisite to constitute a nuisance. Some kinds of business or occupations when located in close proximity to a family residence or other places of habitation are necessarily nuisances. But others which are not nuisances per se may, under certain conditions, become such.

The courts seem to have uniformly held that a municipal corporation may declare a thing a nuisance which is one in fact, but, without express charter power, the general rule is that the municipal corporation cannot declare by ordinance that a nuisance which is not so in fact, nor suppress in part or in toto any business within its limits which is not a nuisance per se. In brief, to constitute a thing a legal nuisance it must be so in fact, irrespective of an ordinance declaration on the subject. In other words, to make a thing a legal nuisance, it must be so in fact. That is, where property rights exist they cannot be taken away by an ordinance except when the property or the use to which it is put is a nuisance. An ordinance declaring that any specified thing is a nuisance does not make it so in fact. And this is so, even though the charter of the municipality purports to confer the power upon it to declare what shall constitute, and to restrain nuisances.

Even though the filling station in question may not be a nuisance per se but is being so conducted or operated as to be a public or private nuisance, it may be enjoined by the complaining parties in the courts to the extent

of abating such nuisance. As indicated, however, the question as to whether the station is so conducted as to constitute a public or private nuisance so that the same may be abated involves facts which are not before us and upon which we cannot pass.

DAVID J. ERICKSON,
Deputy Attorney General.

August 25, 1937. 477b-20

62

CITIES AND VILLAGES—Ordinance—Prohibiting certain employments—Engineer.

Mr. George Wilcox, Chief State Boiler Inspector.

You inquire:

"Assuming a stationary steam engineer duly licensed by the State of Minnesota and operating a steam plant consisting of the usual boilers, pumps, engines, refrigerating machines, steam water gas pipes and appurtenances;

"Question: Has a municipality the legal authority or power (through the enactment of city ordinances) to prohibit or prevent such an Engineer from repairing, altering or servicing such steam water or gas pipes as referred to above when such pipe lines are confined within the buildings or premises wherein such engineer is employed?

"You will of course readily agree that such pipe lines are a component part of any steam plant, and without such lines no plant could possibly operate. It is our contention that as the great majority of plants operate on a twenty four hour basis, the repairing, altering or servicing of such pipe lines, must in most cases be given quick and immediate attention in order to continue operation of the steam plant and prevent a complete shut down of the electrical refrigeration and steam heating systems. As licensed Engineers, our members feel that they are entitled to an interpretation from the Attorney General as respects their duties, authority and rights as outlined above in this letter and we respectfully request of you that you endeavor to secure as early a reply from the Attorney General as possible."

We answer the inquiry in the negative.

Your attention is called to the provisions of the general law of this state, Sections 5474-5494, pursuant to the provisions of which engineers, after due examinations conducted by the Industrial Commission, are licensed by the said commission and permitted to take charge of steam vessels, boilers and machinery in this state. You will note that there are no provisions therein delegating power to municipalities to enact ordinances to the effect stated in the inquiry or any other type of ordinances relative to the subject dealt with in the general law.

We deem that the legislature intended the general law, Sections 5474-5494, to be exclusive on the subject in this state and that engineers licensed thereunder who are employed are permitted to have charge of steam vessels, boilers and machinery within the buildings or premises where employed under the sole supervision of the Industrial Commission of Minnesota, including repairs such as are set forth in the inquiry, as well as the safe and proper operation of the said steam vessels, boilers and machinery. As we understand it, engineers licensed under the general law, Sections 5474-5494, have, since the enactment thereof, made the necessary and emergency repairs such as are set forth in the inquiry within the buildings and premises where employed entirely and solely under the supervision of the Industrial Commission. We deem this to be in accordance with the intent and purpose of the said general law.

It is obvious that a municipal ordinance prohibiting or preventing an engineer duly licensed by the State of Minnesota under the general law, Sections 5474-5494, from repairing, altering or servicing steam, water or gas pipes as referred to in the inquiry within the confines of the buildings or premises where such engineer is employed is repugnant and inconsistent with the general law and hence invalid.

An important general rule of law pertinent to the inquiry submitted is that without an express grant to a municipality on the part of the state that which is allowed by the general law of the state cannot be prohibited by ordinance. McQuillin on Municipal Corporations, Vol. 2, Sec. 683, page 566; Collins v. Hatch, 18 Ohio 523, 51 Am. Dec. 465; St. Paul v. Laidler, 2 Minn. (Gil.) 159; State v. St. Paul, 32 Minn. 329; St. Paul v. Robinson, 129 Minn. 383; Dunnell's Digest, Sections 6762 and 6763.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

June 14, 1938. 34f

63

CITIES AND VILLAGES—Ordinances—Regulation of trucks, tractors, etc., on city streets.

Mr. Alex Seifert, City Attorney.

You submit a copy of an old ordinance for our decision as to changes that are necessary due to Charter 464, Laws of 1937, the new highway traffic code. You state that you "do not contemplate and do not think it is necessary to frame a complete new ordinance but there are some things which are pending and of a local nature here at Springfield such as no parking of trucks along the business streets and two side streets; also a restricted area over certain streets in Springfield which have been treated with tarvia so far as tractors with lugs, and newly shod horses and other heavy machinery is concerned. Then we have the enforcement of stop signs on U. S. Highway No. 14 running through the northerly section of this City."

Relative to the "no parking of trucks along the business streets and two side streets" and the "restricted area over certain streets in Springfield which have been treated with tarvia so far as tractors with lugs, and newly shod horses and other heavy machinery is concerned," it is our opinion that that is entirely a matter of local regulation. Ordinances adopted by the city pertaining thereto will not be affected by Chapter 464, Laws of 1937, the new highway traffic code.

Concerning the "enforcement of stop signs on U. S. Highway No. 14 running through the northerly section of this city", we direct your attention to Sections 7, 10, 11 and 12 of said Laws of 1937, Chapter 464, and advise the city to correspond with the State Highway Department before adopting any ordinance pertaining thereto.

You also direct the attention of this office to the title of Chapter 464, Laws of 1937, and state that:

> "Some of the laws under the present city ordinance were repealed either outright or by implication. It is true that the ordinance as to most matters would still prevail but the question does arise just how much there is left of this old ordinance that is worth while to retain. I should be very pleased to have you give me your opinion concerning this matter. * * *"

If you will compare the provisions of the old ordinance with the provisions of Chapter 464, Laws of 1937, the new highway traffic code, you should have no difficulty in determining which sections of the old ordinance are in conflict with said Laws of 1937, Chapter 464. The statute supersedes the ordinance in so far as the latter is in conflict with the former.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

May 22, 1937. 396c-9

64

CITIES AND VILLAGES—Ordinances—Trunk highway—Angle parking.

Mr. V. T. Conklin, City Attorney.

You state that a number of years ago an ordinance was adopted in your city "permitting and requiring angle parking". You direct attention to Section 70 of Chapter 464, Laws of 1937, of the new Highway Traffic Act "pertaining to parallel and angle parking on streets of cities, which are also parts of the trunk highways" and inquire:

> "Do you interpret Section 70 to mean that it will be necessary for us now to get the approval of the Highway Commissioner to continue angle parking, or will the matter stand as it is, our ordinance having been passed before the State Law went into effect?"

The above question is answered in the affirmative. Section 70 of said Chapter 464, Laws of 1937, supersedes your city ordinance in so far as the latter is inconsistent with the former. The controlling language in said Section 70 reads as follows:

> "Except where angle parking is permitted by local ordinance every vehicle stopped or parked upon a roadway where there is an adjacent curb shall be so stopped or marked with the right-hand wheels of such vehicle parallel with and within 12 inches of the right-hand curb, **provided that such exception shall only apply to a state trunk highway after approval by the commissioner.**"

In our opinion the underscored language of the above quoted proviso in said Section 70 is controlling and supersedes any provision in your city ordinance inconsistent therewith.

DAVID J. ERICKSON,
Deputy Attorney General.

July 27, 1937. 59a-32

65

CITIES AND VILLAGES—Ordinances—Zoning—Authority to fix minimum cost of buildings to be erected in village.

Mr. Earl J. Lyons, Village Attorney.

You state that the Village of Brooklyn Center enacted an ordinance, which provides as follows:

> "Section 1. No building shall be constructed in Brooklyn Center Village for sale, or rent, to be used as a dwelling costing less than $1,500.00 when completed.
>
> "Section 2. No building in Village of Brooklyn Center shall be rerented to nonresidents without said dwelling having running water, bathroom, and sewage or disposal system."

You inquire as to the validity of said ordinance.

Our information is that the Village of Brooklyn Center is operating under the general laws relating to villages. We have been unable to find any statutory provisions authorizing such a village to enact an ordinance fixing the minimum cost of buildings to be erected in the village.

Chapter 176, Laws of 1929, authorizes any village in this state to enact zoning ordinances regulating the "location, size, use and height of buildings, the arrangement of buildings on lots, and the density of population." This office has held, however, that said act does not authorize a village council to regulate or fix a minimum cost or value of buildings to be erected within the village. We are, therefore, of the opinion that in the absence of statu-

tory authorization the village council of the Village of Brooklyn Center may not prescribe by ordinance the minimum cost of buildings to be erected within said village.

We are also of the opinion that the provisions of Section 2 of said ordinance are invalid. We do not believe that there is any substantial or logical basis for requiring that houses rented to nonresidents must have certain facilities which are not required in cases where houses are rented to residents of the village, and in our opinion said Section 2 of said ordinance violates the equal protection clauses of the state and federal constitutions.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

October 13, 1938. 477b-3

66

CITIES AND VILLAGES—Ordinances—Zoning—Consent by owners of real estate affected—Who are owners.

Mr. R. S. Wiggin, City Attorney.

You state that petitions for rezoning of certain districts within the City of Minneapolis are occasionally submitted to the City Planning Commission and the City Council. You further state that pursuant to the provisions of Section 1614, Mason's Minnesota Statutes of 1927, the written consent of the owners of two-thirds of the several descriptions of real estate situated within one hundred feet of the real property affected must be filed with the city clerk before the City Council may act in rezoning any such district. It appears from your letter that "recently petitions for rezoning have involved property adjacent to publicly owned tracts of land of all kinds, such as property in the name of the City of Minneapolis, but under the jurisdiction of the Park Board; property owned by and in the name of the Board of Education; property owned by the United States (Federal Housing Division, Sumner Field Project); and more particularly and by far in more numerous cases property unredeemed from tax sales, the title of which is vested in the State of Minnesota."

You inquire:

> "Did the legislature intend by the term 'owners', as used in Section 1614 of Mason's Statutes, to include the federal government, the State of Minnesota, the City of Minneapolis, or the Board of Education, or may said governmental bodies be excluded from calculation as such owners in a case where a private party seeks to obtain the written consent from the 'owners' of the required two-thirds of the several descriptions of real estate for the purpose of rezoning?"

Said Section 1614, Mason's Minnesota Statutes of 1927, provides in part as follows:

"That for the purpose of promoting the public health, safety, order, convenience, prosperity and general welfare, any city in the State of Minnesota now or hereafter having 50,000 inhabitants or over, acting by and through the governing body of such city, may by ordinance regulate the location, size and use of buildings, the height of buildings, the arrangement of buildings on lots, and the density of population therein, * * * and may thereafter alter said regulations or plan, such alterations, however, to be made only after there shall be filed in the office of the City Clerk a written consent of the owners of two-thirds of the several descriptions of real estate situated within 100 feet of the real estate affected, * * *."

In the absence of any provisions in said section indicating that the legislature did not intend to include all owners of real estate affected by such rezoning, we believe that all owners of the legal title to the lands so affected should be considered as "owners" of such real estate within the meaning of said Section 1614. It follows that if the United States Government, the State of Minnesota or the City of Minneapolis has acquired the legal title to any of the real estate within one hundred feet of the real estate affected by such proposed rezoning they should be considered as "owners" within the meaning of said Section 1614. If the legislature had not intended to include such governmental bodies as "owners" within the meaning of said section it seems to us that it would have defined the word "owner" or would have used language indicating that the owners of property, as used therein, should be limited to owners other than such governmental bodies.

As pointed out in your letter, the rezoning of a district might well affect the value and use of property owned by governmental agencies to the same extent that it would affect the value and use of other property in said district. Although we have been unable to find any case wherein the precise question has been passed upon by the courts, we believe that the following language found in Leighton v. City of Minneapolis, 16 Fed. Sup. 101, to which you refer, has as much application to governmental bodies owning such real estate as it has to any other class of real estate owners:

"The owners in a block or on both sides of the street generally have a common interest in maintaining the residential or business character of the block or street, as the case may be, and their composite judgment ordinarily will result in action for the public welfare. Presumably the restrictions have added value to the property and have been beneficial to the district; otherwise the action imposing them would not have been a proper exercise of the police power. Hence the reason why the Legislature has vested in the owners the power contained in the consent clause."

In connection with the question of what official or department of the State and Federal Governments has the power to consent for and on behalf of the State and Federal Governments, this office, in considering a charter provision of the City of St. Paul similar in its provisions to said Section 1614, held in an opinion under date of April 14, 1938, to the Commissioner of Conservation that where lands have reverted to the State for taxes said

Commissioner of Conservation is the proper state officer to give the written consent provided for in such cases.

We believe that the question of the proper officer or agency to consent for and on behalf of the Federal Government is one which should be taken up directly with the Federal Government or with the department or agency thereof having jurisdiction over said lands.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

August 25, 1938. 59a-32

67

CITIES AND VILLAGES—Ordinances—Zoning regulations—New ordinance after application.

Mr. Lawrence R. Lunde, City Attorney.

You state that an application for a permit for a filling station has been filed with the city council; that the proposed site of this station is in the zone within which filling stations are permitted under the present zoning ordinance; that this site, however, is located in one of the business blocks "in the immediate business district"; that the construction of a gasoline filling station upon this site may constitute a nuisance by increasing the fire hazard; and that the construction of such a building on said site would also constitute a nuisance by increasing the hazard to pedestrians and the users of automobiles since the proposed station is to be located "on the corner of the intersection of trunk highways Nos. 61 and 63."

You inquire whether the city council may amend the present ordinance "so as to exclude the site on which this station is to be constructed" and "whether or not such an amendment could now be effective after the filing of the application."

The above questions may be conveniently considered together. We do not find that the Supreme Court of this state has ever passed upon the precise question presented. The case of State ex rel. Lachtman v. Houghton, 134 Minn. 226, states the general rule with reference to the right of a municipality, pursuant to legislative authority, to adopt an ordinance regulating and restricting the manner in which the owner may make use of his property so far as may be necessary for the general welfare but that such regulations and limitations must tend to some degree to prevent harm to the public and must not unreasonably impair or abridge his property rights. However, this case is not analogous to the situation presented in your letter since in the Minneapolis case the new zoning ordinance was enacted after a permit had been granted by the city and after substantial improvements had been made upon the property involved in that case.

The rule is well established that there can, in the nature of things, be no vested right in an existing law which precludes its change or repeal, nor

vested right in the omission to legislate on a particular subject. Every citizen in making his arrangements in reliance on the continued existence of laws as they are, takes on himself the risk of their being changed. See 6 R. C. L., Section 296, page 309.

It has been held that the fact that one contemplating the erection of a particular building applies for a permit and institutes proceedings to compel its issuance, prior to the enactment of a zoning ordinance the effect of which is to prohibit the erection of the proposed building, confers no vested rights as of that time, and so does not bring him within the rule which forbids giving retroactive effect to such an ordinance. See McEachern v. Highland Park (1931; Tex. Civ. App. El Paso), 34 S. W. (2d) 676, and other cases cited in 86 A. L. R. 684, 685.

In Lansing v. Dawley (1929) 247 Mich. 394, 225 N. W. 500, it was held that the holder of a permit previously issued to him, unless he does something of a substantial character towards the construction of the building in question before enactment of the zoning ordinance, acquires no vested right by virtue of the permit to erect the building in violation of said ordinance.

On the other hand, in Sandenburgh v. Michigamme Oil Co., (1930) 249 Mich. 372, 228 N. W. 707, where a permit had already been issued by the proper authorities, it was held, under the circumstances, that the fact that a gasoline filling station at a particular point might prove a nuisance per accidens was no justification for the city's action in revoking the permit and amending the zoning ordinance classing the premises for "business use." However, in this case substantial improvements had been commenced upon the premises in question and the court said that the city's argument that the filling station would constitute a nuisance at that point should have been addressed to the city legislative body at some time during the nearly five year period that the zoning ordinance classed the premises for business use.

In various cases the courts have sustained the validity of emergency or so-called "stop gap" ordinances, preserving the status quo pending the adoption of a comprehensive zoning ordinance. See Downham v. Alexandria (1932; D. C. E. D. Va.) 58 F. (2d) 784; Lima v. Woodruff (1930) 107 Cal. App. 285, 290 Pac. 480; Fowler v. Obier (1928) 224 Ky. 742, 7 S. W. (2d) 219; McCurley v. El Reno (1929) 138 Okla. 92, 280 Pac. 467.

It would appear, therefore, under the above referred to rules of law, that the fact that the person in question contemplates the erection of a particular building and applies to the city council for a permit and even though he might also institute proceedings to compel the issuance of such permit prior to the enactment of a new zoning ordinance or an amendment to the old ordinance, the effect of which is to prohibit the erection of the proposed building, confers no vested rights as of that time and does not bring such person within the rule which forbids giving retroactive effect to such new or amended ordinance. If, on the other hand, before the effective date of the amended or new zoning ordinance and on reliance upon a valid permit, the person in question has commenced work of a substantial character towards the construction of such a filling station, the erection of which

is prohibited by the new or amended ordinance, the rule seems to be that he has thereby acquired a vested right to erect such a building which cannot be taken away by an ordinance subsequently adopted. See also Washington ex rel. Seattle Title Trust Company v. Roberge, 86 A. L. R. 654, 684 (278 U. S. 116, 73 L. Ed. 210, 49 S. Ct. 50, Nov. 19, 1928).

The question as to whether the construction of such a filling station upon a property in question will constitute a nuisance by increasing fire and traffic hazards involves facts which are not before us and upon which we cannot pass. In other words, as to whether such a building at such a place constitutes such a hazard is a matter for the determination of the local governing body. Each case where the validity of such zoning restrictions is called into question must be determined on its own peculiar facts.

DAVID J. ERICKSON,
Deputy Attorney General.

December 7, 1937. 59a-32

68

CITIES AND VILLAGES—Parks—Improvement of—Payment.

Mr. Glen W. Swenson, Village Attorney.

You state that the village council of the Village of Buffalo, Minnesota is contemplating landscaping and fixing up the local village park, which is located in the village limits and owned by the village; said work to be carried out as a WPA project and that the WPA will furnish the labor and the village will pay for the materials used.

You further state that in checking the village records you find that no assessment has been made for park purposes for some time past and, consequently, there is no money in a separate park fund. You also state that a park board has been established in the village which "has taken care of the parks."

You request our opinion as to whether or not the village council of the Village of Buffalo can use moneys from the general revenue fund to make such park improvement and thus avoid the necessity of a special tax levy.

Our information is that the Village of Buffalo is operating under the revised laws of 1905, as amended. However, you do not advise us under what statutory provision the village has acquired and improved the land used for such park purposes, nor under what statutes the park board was created. However, we assume that the said park was established either under the authority conferred by Section 1186, Subdivision 11 or under Sections 1264-3, as amended, and 1264-4, Mason's Minnesota Statutes of 1927, and that said park board was established pursuant to said Section 1186, Subdivision 11.

Assuming this to be true, we direct your attention to the provisions of Subdivision 11 of said Section 1186, which provides that the village council shall have power "to establish public parks, parkways and walks, and enclose, improve, ornament and protect the same; to appoint a park board and provide for and regulate the setting out and protection of trees, shrubs and flowers in the village or upon its property."

Section 1264-3, as amended, provides as follows:

> "The village council of any village in the state may by resolution or ordinance acquire, by gift, condemnation, or purchase for or in the name of the village, a tract of land, either within or without the corporate limits of the village, for park purposes and may appropriate money from the general revenue fund of the village for the purpose of purchasing such tract of land, not exceeding the sum of $2,000; provided that no tract of land so acquired by purchase or condemnation shall exceed 80 acres in area. Provided, however, that no village can acquire more than 40 acres unless the question of issuing bonds for acquiring a park shall have been submitted to voters of the village prior to January 1, 1936, and carried by more than a five-eighths majority."

Section 1264-4 provides:

> "Any village council, acquiring a tract of land pursuant to Section 1 of this act, may thereupon and thereafter, appropriate from the general revenue fund of the village sums of money for the purpose of inclosing, improving, ornamenting, maintaining and keeping in repair the land so acquired for park purposes, not exceeding the sum of two thousand dollars in any one year."

It will be noted that under said Section 1264-4 the village council is authorized to appropriate from the general revenue fund of the village "sums of money for the purpose of enclosing, improving, ornamenting, maintaining and keeping in repair" the land so acquired for park purposes.

Although Section 1186, Subdivision 11 does not expressly authorize the council to appropriate money from the general revenue fund for park purposes, there are no provisions in said section requiring a special tax levy to be made for park purposes, nor do we know of any statute prohibiting the use of moneys in the general revenue fund for park purposes.

Since said Subdivision 11 of said Section 1186 authorizes the council "to establish public parks and enclose, improve, ornament and repair the same," we believe that the village council has implied power to transfer moneys from the general fund to the park fund and use the same to improve said park, if outstanding warrants or orders against the general fund have been taken care of and if there is a surplus in said fund over the necessary requirements for the balance of the year.

The general rule as to the power of the governing body of a municipal corporation to transfer moneys from one fund to another is stated in McQuillan on Municipal Corporations (2nd ed.) Vol. 5, Section 2337, as follows:

"Municipal funds are either general or special. Certain claims are payable out of the general funds, and ordinarily general funds may be appropriated by the council to any municipal object. So when there is no requirement, by statute or otherwise, that money coming into the city treasury shall be kept in a special fund and applied to a particular purpose, it is proper, of course, to place it in the general fund, and to use it for general city purposes."

However, the council cannot ordinarily transfer moneys from a special fund to a general fund. This for the reason that the moneys in a special fund cannot be used for another and different purpose from that for which it was created.

You also inquire as to whether or not bids should be advertised for in accordance with the statutes relating to advertising for bids. We assume you have reference to the provisions of Section 1199, Mason's Minnesota Statutes of 1927, which requires that "all contracts involving the expenditure of $100 or more, if not to be paid from road or poll tax, shall be let to the lowest responsible bidder, after public notice of the time and place of receiving bids."

We note that you state in your letter that the labor in connection with such improvement is to be furnished by the WPA authorities and that the village is to furnish the materials used. If the materials used are purchased by the village and the amount of such purchase exceeds $100 we believe that the village must advertise for bids for such materials as required by said Section 1199.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

December 31, 1937. 476b-10

69

CITIES AND VILLAGES—Parks—Playground equipment—Liability for maintenance of.

Mr. Glen C. Sawyer, Village Attorney.

You state that the village of Lanesboro maintains a large public park within its corporate limits; that the management of this park has been delegated to a park commission by the village council; that in this park the village maintains playground equipment; that formerly there were two large slides for the children to use in this park; that last spring there were two injuries on these slides, children receiving slivers in their hands which festered and caused some trouble; that the village tore down the oldest slide and repaired the other one so that there would not be any more slivers; and that the steps are in good repair and the railings are solid.

You inquire:

"If we maintain this slide in good repair and keep the steps and railings solid, would we be liable as a municipality in case a child fell from the steps or from the top of the slide?"

The general rule seems to be well established in this state that a municipality in maintaining facilities in a public park is discharging a governmental function and hence not responsible for negligence to those making use of such facilities. However, if such facilities are maintained in such a manner as to constitute a nuisance the municipality might be liable for personal injury or death resulting from such a nuisance created or maintained by it in the exercise of its governmental power. As indicated, however, upon the ground that municipal corporations are not liable for negligence in the performance of governmental functions, a city or village which, through its park commission, provides free to its inhabitants instrumentalities for diversion or exercise in a public park is not liable to persons injured while using such instrumentalities because defective or out of repair, due to negligence of the city, its servants or agents. Dunnell's Digest, Section 6809; Emmons v. Virginia, 152 Minn. 295; Bojko v. Minneapolis, 154 Minn. 167; St. John v. City of St. Paul, 179 Minn. 12.

In the Emmons case, supra, the Supreme Court held that where a city equips its public parks with instrumentalities for diversion and exercise, for the free use of its inhabitants, it is not liable in damages to one injured in their use because of negligent construction or maintenance. Plaintiff in using it was injured because of an alleged defect in such slide. In this case the court said:

"Cities, through park and school boards, have of late provided playgrounds equipped with various instrumentalities for exercise and amusement. Where this is done for the public good and gratuitously, the cities and their servants are to be regarded as agencies of the government, and are not acting in a proprietary character.".

The court in this case further said:

"It seems to us that the law has heretofore been considered established in this state that, with the single exception of streets, municipalities are not liable in damages for negligence in performing their governmental functions. If the exception is to extend to parks and playgrounds, the legislature and not the courts should determine the question."

In the Minneapolis case, supra, the court in reaffirming the rule laid down in the Emmons case, said:

"The alleged failure had relation to a governmental function, a failure to perform which is not actionable, whether it be termed a nuisance or mere negligence."

In the St. John case, supra, the Supreme Court held that a municipality is not liable for negligence in maintaining a bathing beach. The fact that it charges a small fee for a bathing suit and other bathing facilities cannot render it liable where otherwise no liability exists.

The Supreme Court in the latter case reaffirmed the rule laid down in the above referred to cases that a municipality in this state in maintaining a public park is discharging a governmental function and "hence not responsible for negligence to those making use of the same."

DAVID J. ERICKSON,
Deputy Attorney General.

August 9, 1937. 844b-1

70

CITIES AND VILLAGES—Parks—Playgrounds and recreational facilities—Acquiring of—Liability of municipality.

Mr. Sidney S. Feinberg, Village Attorney.

You state that certain individuals and organizations in the village of Wilmont have erected a playground on property not belonging to the village; that they propose to give this playground equipment to the village, together with the right to use the property for that purpose, the same to be thereafter maintained by the village.

You inquire:

"1st. The right of the village to accept this gift and maintain the playground on property not belonging to the village.

"2nd. The liability of the village in the event of an accident occurring on the playground."

In answer to your first inquiry, we direct your attention to Laws 1937, Chapter 233, relating to the acquiring of recreational facilities and the operation of programs of public recreation and playgrounds.

Section 3 of said Chapter 233 provides as follows:

"Any corporation, board, or body hereinbefore designated, given charge of the recreation program is authorized to conduct its activities on

"(1) property under its custody and management;

"(2) other public property under the custody of any other public corporation, body, or board, with the consent of such corporations, bodies, or boards;

"(3) private property, with the consent of its owners; and

"(4) shall have authority to accept gifts and bequests for the benefit of the recreational service and employ directors and instructors of recreational work."

Subdivisions 3 and 4 of said Section 3 in our opinion give the village the authority to accept such gift and operate the same pursuant to the terms of the statute.

In answer to your second question, we do not believe that the village would be liable for damages or injuries to persons using such playground or its facilities. The village, in supervising and operating the playground, would be doing so in the exercise of its governmental functions. In this connection see the case of St. John v. St. Paul, 179 Minn. 12, in which it was held that the city of St. Paul, in the maintenance of bathing facilities in the public parks, was discharging a governmental function and hence not responsible for injury received by those making use of the same.

JOSEPH M. DONAHUE,
Special Assistant Attorney General.

June 13, 1938 844b-1

71

CITIES AND VILLAGES—Public utilities—Purchase of equipment by.

Mr. Lowell W. Benshoof, City Attorney.

You state that the City of Detroit Lakes is operating under Home Rule Charter; that the city owns its own electric light and water system; that the water and light system is managed and operated by the Water and Light Commission pursuant to Chapter 6 of the city charter; that the Water and Light Commission, with the approval of the City Council, is now enlarging the electric light plant by enlargement of the buildings and the generating equipment; that the city, at the commencement of this enlargement, had on hand about $170,000.00 in cash or negotiable securities in the Water and Light Fund with which to pay for said enlargement; that in addition to the said funds, it will be necessary for the city to raise about $30,000.00 to take care of part of the purchase price of some of the new equipment; that the Water and Light Board and the City Council desires to enter into a conditional sales contract and issue certificates of indebtedness amounting to about $30,000.00 to cover the purchase price of some of said equipment; that these certificates of indebtedness will be payable out of net earnings of the water and light plant, and that the city will be able to pay said certificates, if issued, out of the net earnings of said city owned utilities, in a period not exceeding eighteen months; that the net earnings of the Water and Light Plant, last year amounted to $41,000.00.

You inquire:

> "May the City Council enter into such a conditional sales contract, and issue such certificates of indebtedness, so payable out of the net earnings of said plant, which are not general obligations of the city, without calling a special election?"

Chapter 1, Section 1 of your city charter as amended on September 7th, 1926, provides in part that the city "shall be capable of contracting and being contracted with and **shall have all the general powers possessed by municipal corporations at common law**, and, in addition thereto, all powers

that may be granted to it under the general laws of the State of Minnesota, or by this charter."

The Supreme Court, in the case of Williams et al. vs. Village of Kenyon, 244 N.W. 558, said:

> "Conditional sales contracts are entered into by natural persons and are in common use. Nothing in the statutes so far quoted prohibits the village from using such contracts in dealing with personal property. The contract relates to proprietary powers of the village."

Chapter 6, Section 93 of your city charter, relating to the Water and Light Department provides: "The city may construct or purchase its water and electric light, power and heating plant, or either of them, and dispose of the same at will. The city may maintain, enlarge, extend, repair and operate the same * * *."

Section 94 provides that "The control, management and operation of all such water, light, heat and power plants shall be committed to a Board, to be known as the 'Water and Light Commission'."

Section 97 provides in part that "Said board shall fix and maintain the rents and rates for water, light, heat and power furnished by it, so that the water and light fund of the city shall, in each fiscal year, be at least sufficient to defray the cost of the operation, maintenance and extension of the water, light, heat and power system of the city * * *."

Section 103 provides that "No extension or enlargement of the Water and Light Plant of the City of Detroit Lakes shall be made except when ordered by said Board and approved by the Council."

It will be noted from the above quoted provisions of the charter that the city is expressly authorized to construct, purchase, maintain, enlarge, extend, repair and operate an electric light, power and heating plant, and that the control, management and operation of such plant is vested in the Water and Light Commission, subject to approval of certain contracts by the City Council. We find no provision in the charter requiring approval of the electors in extending or enlarging said electric plant. In other words, the power both to construct and enlarge the plant as well as the operation and maintenance of the same is vested in said Commission with the approval of the Council under certain circumstances. It would seem to follow therefore that unless there is some limitation or restriction in the charter prohibiting the said Commission and the Council from issuing such certificates of indebtedness and entering into such a conditional sales contract, that the power to do so is vested in said Commission and the Council. As said by the Supreme Court in the Kenyon case, supra, "Since the power to acquire such plant is expressly conferred, the means of accomplishing that object is left to the village so long as these are such as are customary and reasonable."

We are not unmindful of Section 89 of your charter which authorizes the city to issue bonds pursuant to an ordinance adopted by the City Council with the approval of the electors. This section provides one method for issuing bonds. It will be noted however that this section of the charter does not relate to revenue certificates of indebtedness or a conditional sales con-

tract payable out of net earnings of the municipally owned utilities of the city. Nor, do we believe that section 81 of your charter prohibits the issuance of such certificates of indebtedness so payable out of net earnings. The latter section relates to general obligations of the city.

Answering your specific inquiry therefore, we are of the opinion that your Water and Light Commission, with the approval of the City Council, may issue such certificates of indebtedness and enter into such a conditional sales contract payable solely out of net earnings from the Water and Light Plant. As indicated, such a contract and certificates of indebtedness are not general obligations of the city. The city, in making such a contract, does not obligate itself to pay any part of the purchase price of such equipment out of moneys raised by taxation.

DAVID J. ERICKSON,
Deputy Attorney General.

January 6, 1938 59a-36

72

CITIES AND VILLAGES—Public utilities—Franchise—Regulation of rates.

Mr. Hyman Edelman, Andrus Building.

You state that in 1916 the Village of Golden Valley entered into a franchise with the Minneapolis General Electric Company for a period of 25 years; that a maximum rate per kilowatt hour was fixed in the original ordinance granting said franchise, and that said ordinance has been amended and a new rate schedule adopted pursuant to agreement between said company and the village.

You inquire:

> "Does the Village, organized under the 1885 law, have power, upon due investigation, hearing and notice to the company, to fix rates to be charged by the company for the sale and distribution of electricity within the Village limits?"

We assume from your letter that the rates to be paid by the village for electric current are fixed by the terms of said franchise which does not expire for a period of about four years. Assuming, therefore, that the existing franchise authorizes said corporation to charge certain rates for electric current furnished to the village and its inhabitants, and that said franchise contains no provisions for a modification of those rates by the village, we are of the opinion that the municipality would have no power to revise or lower such rates so fixed in such franchise or contract, until the same terminates. This was held in St. Cloud Public Service Company v. City of St. Cloud, 265 U. S. 352, where the Supreme Court construed Section 1714, Mason's Minnesota Statutes of 1927, which relates to the power of cities of the third and fourth class with reference to entering into contracts with public service corporations for supplying electric current. It is true that said Section 1714 does

not apply to villages, but the rules laid down by the Supreme Court in that case, are just as applicable to a contract entered into by a village with a public service corporation. In the St Cloud case the court said:

> "And where a municipality has both the power to contract as to rates and also the power to prescribe rates from time to time, if it exercises the power to contract, its power to regulate the rates during the period of the contract is thereby suspended, and the contract is binding.
> * * * *
>
> "The general provision of the Laws of 1919, c.469, p.603, authorizing cities of the class of the appellee 'through its city council or like governing body, by ordinance, to prescribe from time to time the rates which any public service corporation supplying gas or electric current for lighting or power purposes within said city may charge for such service', has no application to the present case. Even if, in any aspect, it could otherwise be applicable, it is excluded from operating here by the specific proviso that it shall not be 'construed to impair the obligation of any contract or franchise provision now existing between any such city and any such public service corporation.' The City, clearly, could not avail itself of this statute to reduce the gas rates below the maximum prescribed in the contract of 1905; and the Company, conversely, cannot under it obtain higher rates. The contract is binding on both parties alike."

It is apparent from the rules laid down by the Supreme Court in the above case, that a franchise entered into by a municipality through its governing body within the scope of the authority of such body, and which the municipality had the power to make, cannot be set aside upon other or different principles than those that control other contracts. It would seem to follow, therefore, that where the existing franchise authorizes certain rates and not containing any provisions for a modification of those rates by the village, that the village would have no power to reduce or modify the rates during the term of the franchise.

The law seems to be well settled that a municipality has no power to fix rates for public service otherwise than by contract with the corporation or person rendering the service, unless the power to do so has been delegated by the state either expressly or by necessary implication. See McQuillin Municipal Corporations, 2nd Ed. Vol. 4, Sections 1875 and 1877, also Dillon Municipal Corporations, 5th Ed. Vol. 3, Section 1325.

The power to regulate rates for the furnishing of such public service to a municipality has been delegated by the state to some of our municipalities, such as cities operating under home rule charters. See Section 1283, Mason's Minnesota Statutes of 1927. As to the delegation of such powers to cities of the third and fourth classes, whether existing under general or special law or under a home rule charter, see Section 1714-15 and 16 (Laws 1919, Chapter 469). However, the above referred to sections of the statutes do not apply to a village operating under the Laws of 1885.

The only statute of which we are aware, the language of which is broad enough to apply to a village, is Section 7433 of Mason's Minnesota Statutes 1927. This section provides in part:

> "and every such corporation (public service corporation) obtaining a franchise from a city or village shall be subject to such conditions and restrictions as from time to time may be imposed upon it by such municipality."

The language of the above quoted section is very general in its provisions, and there have been but few cases construing the language thereof. Although it is true that the language used in said section is very broad and general in its terms, and would seem to have been intended to reserve to municipalities such as cities and villages, broad general powers and supervision and control over corporations obtaining franchises from cities or villages, it will be noted that the United States Circuit Court, District of Minnesota, Fourth Division, in the case of Minneapolis General Electric Company v. Minneapolis, 194 Fed. 215, above referred to, held that the city of Minneapolis had no power to regulate rates of the plaintiff corporation. It should also be observed that the court in this case based its decision on the ground that the legislature had never delegated to the city the right to so regulate such rates. The court said on page 218:

> "No section of the charter is cited by defendant which expressly delegates this power."

It will be noted that the court in this case referred to Section 2842, Revised Laws of 1905, now embodied in Mason's Minnesota Statutes of 1927, Section 7433, above referred to, and held that this section did not give the city the right to regulate rates. In the light of this decision it is doubtful whether the village has the power at this time to regulate the rates of the utility company operating in your municipality, and, as hereinbefore indicated, this is also particularly true in view of the decision of the United States Supreme Court in the case of St. Cloud Public Service v. City of St. Cloud, 265 U. S. 352, hereinabove referred to.

DAVID J. ERICKSON,
Deputy Attorney General.

September 16, 1937 624c-6

73

CITIES AND VILLAGES—Public utilities—Franchises—Submission to voters.

Mr. Joseph C. Vesely, Village Attorney.

It appears from your letter that the Village of Hopkins is operating under the Laws of 1885; that the village "for the past twenty or more years had a contract or franchise with the Northern States Power Company

regarding electricity;" that this franchise is about to expire "and the Council has for consideration a new franchise with the same company for a period of 20 years;" that this contract "is not exclusive and grants to the Company the use of the village streets and alleys and similar property for transmission lines and other equipment;" that "if adopted, this franchise is passed and published as an ordinance of the village;" and that "there seems to be no controversy over any of the terms of the franchise except the 20 year period therein provided for."

You inquire:

> "Can the Village Council legally submit the question of the granting of such a Franchise to a vote of the People of the Village either at a special or a general Election?"

We are of the opinion that your question should be answered in the affirmative. This office has heretofore held that a city or village may submit such a proposition to a vote of the electors even though the laws or charters under which such municipality is operating does not expressly so require.

One of the most important conditions attaching to any franchise is the period for which it is to run. During the years when neglect of the public interests in franchise negotiations was more the rule than the exception, a great many cities and villages granted long-term franchises. This policy has been severely criticized by some courts and other authorities. A long-term franchise of necessity in practically all cases means an exclusive franchise as well, thereby surrendering all power of control in the municipality for a long period of years, not provided for in the grant or expressly retained. While the proposed ordinance, on its face, does not purport to grant any exclusive franchise, yet the practical effect is almost necessarily to give the grantee, the power company, a monopoly for 20 years of the business of furnishing electric light and power to the village and its inhabitants. The tendency at the present time is toward lower rates for electric light and power, and on account of the electric light and power program of the Federal Government this tendency toward lower electric light and power rates will no doubt continue for some years to come. Moreover, it is much more difficult accurately to anticipate changing conditions, which affect the cost of production, and new inventions and the opportunities they present of affording other conveniences for the village and its inhabitants as well as the future cost of supply and other essential matters of business administration and control for a long period of years than for a short fixed period.

As indicated, in the light of past experience municipal corporations and their inhabitants have at times suffered great inconvenience and have been subjected to many disadvantages as the result of the granting, if not, indeed, the giving of franchises without cost or condition, or at least any adeqquate provision for the proper control over the service to be rendered and the rates to be paid therefor, because the municipal authorities making the grant failed to appreciate the future price tendency for the service rendered and the future needs and opportunities of the citizens of the municipalities as well as the reduction in cost of the service on account of improved condi-

tions resulting from new inventions and superior agencies for furnishing such service. It is apparent, therefore, that long-term electric light and power franchises are not favored at the present time; and there are few students of public utility questions, outside of those who may have a direct financial interest in the companies, who would now claim that a 20-year franchise for the use of the streets in furnishing electric light and power is for the best interests of the municipality and its inhabitants.

It seems to us therefore, that the proper course of procedure for the village council to follow is to submit the question of granting such a franchise to a vote of the electors for their approval. The voters of the village are directly and vitally interested in the length of time for which the franchise is to run as well as the rates and service to be rendered since they pay the rates fixed by such franchise. We may further state that our predecessors in office expressed the opinion that there was some doubt as to whether a village council of a village operating under the 1885 law had the power to grant such a franchise.

DAVID J. ERICKSON,
Deputy Attorney General.

August 24, 1937 624a-5

74

CITIES AND VILLAGES—Real estate—Dumping ground—Acquisition of.

Mr. Henry Polkinghorn, Village Attorney.

You state that for some years past the village of Proctorknott has been leasing some property outside of the village for use as a "dumping ground"; that the village council now contemplates purchasing this property for use as the village dumping ground.

You inquire:

> "Can a village purchase property outside of the corporate limits of said Village for the purpose of using the same as a dumping ground or for any other purpose?"

Our information is that the village of Proctorknott is incorporated and operating under Chapter 145, Laws of 1885. Assuming this to be true, we direct your attention to Section 21, the third subdivision thereof, of said Chapter 145, which authorizes the village council "to receive, purchase and hold for the use of said village any estate, real and personal, * * *."

Section 23 of said Chapter authorizes the village council " * * * to lay out, open, change, widen or extend any street, **land,** alley, **public grounds,** square **or other places,** * * * within or without the corporate limits, * * *."

We also direct your attention to Mason's Statutes of 1927, Section 1117, which provides that villages so organized and all others governed by this chapter shall 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 the above statutory provisions do not specifically authorize a village to acquire land to be used as a "public dumping ground," we have heretofore construed the same in the light of the need of a public dumping ground to authorize the village to establish such place outside the corporate limits, where necessary for proper conservation of the health of the village, and to acquire the same by purchase or eminent domain.

DAVID J. ERICKSON,
Deputy Attorney General.

April 6, 1937 469a-12

75

CITIES AND VILLAGES—Real estate—Acquisition of.

Mr. Glen W. Swenson, Village Attorney.

You state that the village has been contemplating putting in a municipal light plant but has not as yet received the consent of the voters pursuant to Mason's Minnesota Statutes of 1927, Section 1229; that at the present time there is a lot next to the power house which is owned by the village and which is being sold for taxes and the council "would like to purchase this lot as it will be necessary in case the village votes to put in their own light plant."

You further state that if the approval of the voters is not obtained for this project that the lot could be used for park purposes.

Although you do not so state our information is that the village of Buffalo is incorporated and operating under Chapter 145, Laws of 1885. Assuming this to be true, we direct your attention to Section 21, Subdivision 11 of said Chapter 145, which grants the village council authority "to lay out, open, change, widen or extend * * parks, squares or other public grounds, * *."

Subdivision "Third" of said Section 21 authorizes the council "to receive, purchase and hold for the use of the village any estate, real and personal, * *."

Section 23 of the same chapter provides that the council "* * may purchase or take by donation such grounds as shall be needed, by agreement with the owners, and take from them conveyances thereof to the village for such use or in fee; * * *."

Mason's Minnesota Statutes of 1927, Section 1264-3, provides that any village in the state may acquire a tract of land within the village for park

purposes, provided that no tract of land so acquired by purchase or condemnation shall exceed forty acres in area.

Construing the above statutory provisions, particularly said Sections 21 and 23 of said Chapter 145, Laws of 1885, we are of the opinion that the village council in the exercise of its official judgment and discretion may acquire such lands as it may deem necessary for village purposes without submitting the proposition of so doing to a vote of the electors. In arriving at this conclusion we assume that the village has sufficient funds on hand or in the process of collection with which to pay the purchase price of such land.

DAVID J. ERICKSON,
Deputy Attorney General.

April 6, 1937 469a-12

76

CITIES AND VILLAGES—Real estate—Leasing of for theatre.

Mr. Frank L. King, Village Attorney.

Your inquiry relative to the authority of the Water, Light, Power and Building Commission of your village "to enter into a lease with the Commission for a period of not less than ten years * * * of a theatre housed by and in a municipally owned building," has been referred to the undersigned for attention. You also enclose a copy of an opinion which you rendered to the Superintendent of the Water, Light, Power and Building Commission under date of February 27, 1937, relative to said matter.

It appears from said opinion that the theatre in question is located in and constitutes a part of the municipal building, which building, in addition to housing the theatre houses the fire department equipment, city jail, council room and two meeting halls.

Although you do not expressly so state, we assume from the language in your opinion that your Water, Light, Power and Building Commission was created pursuant to Chapter 412, Laws 1907, as amended by Chapter 278, Laws 1933 (Mason's Statutes of 1927, Section 1852, et. seq.).

Section 1857 to which you direct attention provides, so far as pertinent, that the Commission "shall have full, absolute and exclusive control of and power over the water, light, and power plant or plants, * * * including all other public buildings and halls owned by said municipality. They shall have the power and authority to operate the same and each thereof, * * * **provided, they shall not have the right to sell, lease, rent or in any way dispose of or incumber or suffer or permit, the said property or any part thereof, to come under the control of any other person/or corporation whatever**; provided, however, this shall not prevent the said commission from renting or leasing public halls or buildings for public use and entertainments."

It will be noted from the above quoted underscored proviso that the Commission is prohibited from selling, leasing, renting or in any way suffering or permitting property under its control, or any part thereof, from coming under the control "of any other person/or corporation whatever." It is true that the last proviso gives the Commission the power to rent or lease public halls or buildings belonging to the municipality for public use or entertainments. We take it, however, that this last proviso merely confers upon the Commission the power to rent or lease such public buildings for temporary purposes or for a short or limited period of time and in so doing the Commission is in no way authorized to surrender control of the building to third parties. We do not believe, therefore, that the Commission has the power under the above referred to statutory provisions to enter into a long-term lease whereby the municipality is wholly or partially divested of the possession or use of such municipal property. This does not mean that the village may not allow the auditorium or space in said building to be used incidentally for private purposes for compensation so long as the municipality does not surrender control of the building for a long period of time. Such private temporary use must not interfere with the application of the building or such space in said municipal building to the legitimate public needs of the municipality.

Ordinarily, a municipality cannot by lease or license permit its property acquired or held for public use, to be wholly or partly diverted to a possession or use exclusively private without specific legislative authority. It does not seem to us that the above quoted provision of said Section 1857 authorizes your village to permit its auditorium or space in one of its municipal buildings to be wholly or partially diverted to a possession or use exclusively private. In other words, the statute seems to expressly prohibit such absolute surrender or control of a municipal building for a long period of years. On the other hand, if property is held by the municipality in its corporate capacity as an ordinary proprietor, and not solely for the public use, the rule is different. That is, if parts of public property, including a public building, are not used for municipal purposes, or are not continuously used, the municipality may permit others to use such part, provided no public use is interfered with thereby.

Our Supreme Court in the case of Anderson v. Montevideo, 137 Minn. 179, 162 N. W. 1073, held that the City of Montevideo might lease the auditorium of a building no longer used for municipal purposes for use as a picture show house.

We also direct your attention to the case of Nerlien v. Village of Brooten, 94 Minn. 361, in which the village was enjoined from leasing the village hall for conducting therein a mercantile business and dealing in flour, grain, feed and cereals. It will be noted that in this case the lease was made without any money rental.

DAVID J. ERICKSON,
Deputy Attorney General.

March 31, 1937 469a-9

77

CITIES AND VILLAGES—Sidewalks—Certificates of indebtedness—Issuance of.

Mr. Thos. H. Strizich, Village Attorney.

You state that the village of Hibbing is operating under Chapter 145, Laws 1885; that the village is subject to Chapter 134, Laws 1935 (Mason's 1936 Supplement, Section 2066-7-8) and Chapter 208, Laws 1929 (Mason's 1936 Supplement, Section 2066-1 et seq.); that the village "is desirous of constructing a number of blocks of sidewalk * * * such construction to be ultimately paid for by the abutting property owners in three separate installments to be levied specially against the abutting property over a period of three successive years."

You inquire:

> "Has the Village the power to pay for the contemplated construction and thereby incur obligation in excess of its available revenue for the present year? In other words, has the Village the power to incur the necessary obligation for the proposed construction and issue its certificates of indebtedness which certificates of indebtedness are to be retired out of a special assessment levied against the property to be benefited, but which certificates of indebtedness would, however, increase the Village expenditure for this year beyond the amount of the funds budgeted and available for general purposes of the Village."

Section 1 of said Chapter 28, Laws 1929 (Section 2066-1, Mason's 1936 Supplement) provides:

> "That from and after January 1, 1930, no city or village in the State of Minnesota wherein the tax levied in the year 1928 exceeded $100.00 per capita of the population, as defined by Chapter 417, General Laws 1921 (Sec. 2061, herein, and Secs. 2062 to 2066, Mason's Minnesota Statutes, 1927), shall draw any order or warrant on any fund until there is sufficient money in such fund to pay the same, together with all orders previously issued against said fund."

Section 1 of said Chapter 417, Laws 1921, as amended and now embodied in Section 2061, 1936 Supplement, provides in part:

> "The total amount of taxes levied in the year 1921 and in each year thereafter, by or for any city or village, for any and all general and special purposes whatsoever, **exclusive of taxes levied for special assessments for local improvements on property specially benefited thereby,** * * * **etc.**"

Section 2 of Chapter 134, Laws 1935, now embodied in Section 2066-8 of Mason's 1936 Supplement, provides in part:

> "The total amount of taxes levied in the years hereinafter designated by or for any such city or village for any and all general and special purposes whatsoever, **exclusive of taxes levied for special assess-**

ments for local improvements upon property specially benefited thereby, shall not, * * * etc."

It will be noted from the above quoted statutory provisions that taxes levied for special assessments for local improvements upon property specially benefited are expressly excluded from the limitations contained therein. As indicated, in your letter, the cost of constructing said sidewalk is to be paid for out of special assessments levied against the property to be benefited by such improvement; and the village proposes to issue certificates of indebtedness which certicates are to be retired out of such special assessments so levied against the property benefited. It does not seem to us that the village is prohibited from issuing such certificates of indebtedness payable out of such special assessments against such benefited property for the purpose of paying the cost of constructing such sidewalks. Such certificates of indebtedness are not general obligations of the village. In other words, the village would not be pledging its credit for the payment of such certificates out of general ad valorem taxes. See Leslie v. City of White Bear Lake, 186 Minn. 543, 243 N. W. 786, and Judd v. City of St. Cloud, 198 Minn. 590, 272 N. W. 577.

DAVID J. ERICKSON,
Deputy Attorney General.

October 6, 1937 476a-4

78

CITIES AND VILLAGES—Sidewalks—Construction of—Bond issue for.

Mr. E. M. Perrier, County Attorney.

You state that the village of La Salle is contemplating the construction of certain village sidewalks as a WPA project; that under the proposed project sixty-six per cent of the total cost of the construction of said sidewalks will be paid for with WPA funds and the balance of thirty-four per cent will be paid by the village.

You further state that the village desires to construct said sidewalks "without any assessment to the property owners by assuming the thirty-four per cent entirely as a village obligation and issuing bonds therefor."

You inquire if the village is authorized to construct village sidewalks without making special assessments therefor and to issue its bonds to pay for the construction of said improvements.

We believe that under the decision of our Supreme Court, in Bradley vs. Village of West Duluth, 45 Minn. 4, a village may construct sidewalks without assessing the expense thereof against adjacent property. In that case the Court, in construing the provisions of Chapter 145, Laws of 1885, held that under Section 21 thereof the village council was authorized to construct village sidewalks without assessing the cost thereof against adjacent property. It was contended in said case that since Section 30 of said Chap-

ter 145 provided for the levying of special assessments to pay the cost of constructing sidewalks within the village, that the council was limited to that particular method of constructing such village improvements.

In answer to such contention the Court said:

> "Is this section to be construed as limiting the power of the council, in respect to the grading or otherwise improving streets or the construction of sidewalks, to cases where a petition therefor has been presented by the owners of the adjacent property which is liable to special assessment? Is it indispensable and a condition precedent to the power of the council to proceed with any such improvement, that local assessment of the expense, or of at least one-half of it, be made upon the adjacent property? Both of these questions we answer in the negative."

The Court further said:

> "Such public improvements are required not merely for the benefit of the adjacent proprietors, but for the benefit of the people in general; and the powers conferred upon the village council are intended to be exercised for the interest of the whole community."

Our information is that the village of LaSalle is operating under the general laws relating to villages. The provisions of Subdivision 8 of Section 1186 and Section 1205, Mason's Minnesota Statutes of 1927 are almost identical to the provisions contained in Sections 21 and 30 of said Chapter 145, and we are of the opinion that if sidewalks may be constructed in villages operating under said Chapter 145 without assessing the cost thereof against adjacent property, villages operating under the general laws relating to villages are not required to levy special assessments to pay the cost of constructing village sidewalks.

This office has held that if village sidewalks are constructed pursuant to the authority conferred under said Subdivision 8 of Section 1186, bonds may be issued under the provisions of Section 1942, Mason's Minnesota Statutes of 1927, to pay the cost thereof by submitting the question of the issuance of such bonds to a vote of the electors. It is assumed, of course, that the issuance of such bonds will not increase the total net indebtedness of the village beyond ten per cent of the assessed valuation of the taxable property of the village.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

May 11, 1938 480b

79

CITIES AND VILLAGES—Sidewalks—Obstructions on.

Mr. Eli R. Lund, City Attorney.

You state that a property owner of the City of Windom has made application to the city to build an outside stairway over the sidewalk in the business district of the City of Windom and inquire:

"1. Is it necessary for a property owner to make application to the City Council for permission to erect an outside stairway over the sidewalk?

"2. If the City Council grant such permit, would the City be liable for damages caused by the erection of said outside stairway?"

In answer to your second question, please be advised that our courts have held that streets and sidewalks of a city or village do not belong to the municipality or any of its officers, or to any individual or corporation. Such streets and sidewalks in municipalities of the state are dedicated to the public for a public use. It is the duty of the governing bodies of such municipalities to keep such streets and sidewalks in suitable condition for such public use and to prevent encroachment thereon, and it is also the duty of such governing bodies to remove obstructions from such streets and sidewalks that tend to interfere with or impair the full and free use thereof by the public. Streets and sidewalks are maintained not at the expense of any individual, but solely at the expense of the public and may not be lawfully taken or appropriated for private use for business or other purposes, even for a valuable consideration.

Whether a city is liable in case any one is injured as a result of such obstruction involves questions of fact upon which we cannot undertake to express an opinion. While no doubt the city council may permit temporary obstructions on the streets or sidewalks incidental to building operations or other improvements, it has no right to permit permanent obstructions such as an outside stairway would be.

It is the duty of the city to exercise authority given to keep its streets and sidewalks in safe condition. If it fails to perform this duty and an injury proximately results from such failure, the city may be liable for negligence. However, as hereinabove indicated, whether a specific condition is dangerous or whether the city is negligent in permitting it to exist are questions of fact upon which we cannot express an opinion.

We direct your attention to your city charter, Chapter 4, Section 72, Subdivision Fifth, wherein the city council has authority to regulate and prevent the use of its streets, sidewalks and public grounds for signs, sign posts, awnings, etc., and to remove and abate all nuisances, obstructions and encroachments thereon. The City of Duluth has a similar charter provision, which was discussed in the case of Mueller v. City of Duluth, 152 Minn. 159, and involved a clock standard which was erected on a sidewalk in the city. In that case the court said:

"It is the duty of the city to keep its streets and sidewalks reasonably clear of obstructions for the use of persons traveling thereon, and there can be no doubt but that the city would be liable in damages to any person traveling over the walk, in the night time, who, without fault on his part, was injured by running or falling against this obstruction, situated as it is within the limits of the walk. Nor is there any doubt but that the city has the right to treat it as a nuisance and to summarily abate the same."

In view of the fact that the governing body of the municipality is charged with the duty of keeping the streets and sidewalks in suitable condition for public use, we feel that application may be made to the City Council for permission to erect such stairway and that your first question should, therefore, be answered in the affirmative. We wish to state however that insofar as liability of the city is concerned for damages for injuries occasioned by obstructions, that the rules hereinbefore pointed out will govern and that the city may not relieve itself from liability by the granting of or the refusal to grant such permission.

JOSEPH M. DONAHUE,
Law Assistant.

June 23, 1938 63b-17

80

CITIES AND VILLAGES—Streets—Improvements—Advertising for bids.

Mr. Charles P. Stone, Village Attorney.

You state that in August of this year the Village of Medford, proceeding under Sections 1815, et seq., Mason's Minnesota Statutes of 1927, advertised for bids for the construction of curbs and gutters for a distance of four blocks along both sides of a certain street in said village. You further state that when said bids were opened all of such bids were rejected.

It appears that since the cost of making said improvements will be less per foot than the amount per foot contained in the lowest bid received, if such improvements are to be made by day labor, the village now desires to construct only two blocks of said curbing and gutters and "let the other two blocks go until next spring."

You state that the village council desires to construct said two blocks of curbing and gutters without again advertising for bids and you inquire whether the village may make said improvements by day labor where the cost thereof will be less than $500, or whether the council must again advertise for bids for the construction of the curbing and gutters in the two blocks above referred to.

Section 1819, Mason's Minnesota Statutes of 1927, provides, in part, as follows:

> "* * * whenever it shall appear to the council that the cost of the entire work projected shall be less than $500 then the council may directly purchase the materials therefor and cause the work to be done by day labor."

It appears from your letter that the cost of constructing the four blocks of curbing and gutters as originally planned will be in excess of $500.

This office has uniformly held that a project for a municipal improvement may not be divided into two or more separate projects to avoid advertising for bids. In other words, two or more contracts may not be let for separate parts of one project.

Section 1819 provides for the making of plans and specifications of the improvement to be made under the provisions of said Section 1815, et seq., Mason's Minnesota Statutes of 1927, and we assume that bids were advertised for pursuant to such plans and specifications. If such plans and specifications for such improvement included all four blocks, we believe that such four blocks of curbing and gutters constitute one project and that contracts may not be let for a part of said improvement in order to avoid advertising for bids.

However, this office, in construing the provisions of said Section 1815, et seq., Mason's Minnesota Statutes of 1927, has held that where the estimated cost of an improvement exceeds $500, the city council may call for bids for the making of such improvement, or it may, without calling for bids, cause the work to be done by day labor. In other words, the above referred to provisions of the statutes do not prevent the village from improving village streets by day labor even though the cost of such improvement exceeds $500. Said Section 1819 merely limits the power of the village to award a contract for the making of such an improvement in case the village undertakes to do the work by contract instead of by day labor.

However, if such improvement is not let by contract, it will be necessary for the village to advertise for bids for the material used in making said improvement. It is our understanding that the Village of Medford is operating under the 1905 Village Laws, as amended. Section 1199, Mason's Minnesota Statutes of 1927, provides, in part, as follows:

> "* * * and all contracts involving the expenditure of $100 or more, if not to be paid from road and poll tax, shall be let to the lowest responsible bidder after public notice of the time and place of receiving bids."

It follows that if said improvement is done by day labor, and if the material used in making said improvement will cost one hundred dollars or more, it will be necessary to advertise for bids for such material.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

October 6, 1938 396g-7

81

CITIES AND VILLAGES—Streets—Improvements—Assessment for cost of.

Mr. Arnold W. Hatfield, City Attorney.

You state that the streets in your city are "in a dangerous condition" and in need of repair; that these streets previously "had been improved with

asphalt"; that the city engineer has informed the city council "that before the streets are permanently improved, it will be necessary that they be treated with road oil and that the holes in the streets be repaired and allowed to settle for a period of sixty days"; that the total cost of this temporary improvement is estimated at about $2,000; that the city desires to borrow from its general fund the sum of $2,000 to make this temporary improvement, "and when the assessment is made, to include this sum in the cost of the whole improvement"; and that a petition has been presented to the council by 71 per cent of the property owners to be assessed, "requesting the improvement of the streets."

You inquire "whether the City Council can legally:

"1. Borrow $2000.00 from the general fund for the purpose stated.

"2. Later include this cost in the total assessment, the property owners interested not having had a chance to be heard until after the temporary improvement has been made."

Chapter 6, Section 36 of your city charter provides:

"The council shall have full authority over the financial affairs of the City, and shall provide for the collection of all revenues and other assets, the auditing and settlement of all accounts, the disbursement of all money, and in the exercise of a sound discretion shall make appropriations for the payment of all liabilities and expenses."

Section 50, Subdivision 4 of said Chapter 6 provides that there shall be maintained in the city treasury "a general fund for the support of such other funds and for the payment of such expense of the City as the council may deem proper."

Section 36 gives the city council very broad powers in carrying on the financial affairs of the city and in the disbursement of city funds in the payment of all proper city expenses. The maintenance and repair of city streets is one of the primary governmental functions of the city. The language of said Subdivision 4 of Section 50 of said Chapter 6 of the charter specifically provides that the "general fund" of the city shall be maintained "for the support of such other funds and for the payment of such expense of the City as the council may deem proper." We are of the opinion that the above quoted language of said Subdivision 4 of said Section 50 authorizes the city council to temporarily transfer or borrow money from said "general fund" for the purpose of making said temporary street improvements if the council in the exercise of its official judgment and discretion deems it proper and necessary to do so.

In answer to your second question, we direct your attention to Chapter 7, Section 53 of your charter which provides:

"The City of Wabasha, acting through the council, shall have power to lay and construct, extend, relay and repair, directly by day labor, or by contract, pavements, curb and gutter, sidewalks, sewers, water mains, electric conduits and any and all other local improvements, in or

under the streets, alleys, and public places in the City. The City shall also have power, under the conditions herein specified, to provide for the payment of the whole, or any part thereof of the cost of any such improvement by a special assessment upon the property specially benefited thereby. The amount assessed to the property specially benefited, to pay for such local improvements authorized by this section, shall not exceed the amount of benefits received by such property."

Section 57 of the same chapter provides:

"Any party interested in any property assessed under this chapter may appeal from such assessment to the District Court of Wabasha County, within thirty days after the publication of the notice of confirmation thereof by the council. Such appeal is hereby declared to be the exclusive way in which such assessment can be in any wise revised, modified, amended or annulled."

Although a property owner is entitled to notice and a hearing before his property can be subject to a special assessment or a tax, he is not entitled to a notice and hearing at every stage of the tax or assessment proceeding, nor to notice that such a proceeding is about to be undertaken which will result in an assessment or tax against his property. In other words, a statutory or charter provision does not infringe upon the due process of law requirement if the property owner has an opportunity to question the validity or amount of the assessment or tax either before the amount is determined or in subsequent proceedings for its enforcement. See In re Delinquent Taxes in Polk County, 147 Minn. 347.

We have examined the provisions contained in Chapter 7 of your city charter relating to the making of local improvements and assessing benefited property for the cost of such improvements, and we find no provision therein prohibiting the making of such temporary improvement and later assessing the cost of the same against benefited property so long as such property owner is given an opportunity to question the validity or amount of such assessment either before the amount of the assessment is determined or in subsequent proceedings for its enforcement.

DAVID J. ERICKSON,
Deputy Attorney General.

May 24, 1937 396c-6

82

CITIES AND VILLAGES—Streets—Improvements—Contracts for—Bids—Advertising for—Procedure.

TAXES—Levy—Maximum limitation as to.

Mr. Howard W. Anderson, Village Attorney.

You state that the Village of Grand Rapids is incorporated and operating under Chapter 145, Laws of 1885; that in the past the village in making

such improvements has paid for the cost of the same out of the general village fund; and that since WPA labor has become plentiful the village can no longer finance such projects without issuing anticipatory warrants, bonds or certificates of indebtedness.

You direct attention to Laws of 1885, Chapter 145, Sub-chapter 9, which covers every type of street improvement, including paving, sidewalks and sewers; to Chapter 167, Laws of 1901, which provides for sidewalks and sewer improvements; to Chapter 382, Laws of 1903, which relates to street improvements other than sidewalks; to Chapter 364, Laws of 1917, relating to street improvements including sidewalks, gutters and curbs; to Chapter 65, Laws of 1919, which provides for street paving; and to Chapter 382, Laws of 1925, which also relates to street improvements "but does not mention sidewalks."

You submit certain inquiries which will be restated and answered in the order submitted.

1. "Are all the acts above described still in full force and effect, and may the village choose which of these acts it may operate under in constructing improvements?"

This office has heretofore held that as to villages organized and operating under the provisions of Chapter 145, Laws of 1885, the provisions of Chapter 167, Laws of 1901, and Chapter 382, Laws of 1903, to which you direct attention, are still in full force and effect. The Supreme Court in the case of Borgerding v. Village of Freeport, 166 Minn. 202, held that a village operating under Chapter 145, Laws of 1905, had the option of proceeding in one of three ways in making street improvements such as those referred to in your letter, namely:

(a) Under Laws 1885, Chapter 145, Section 30;

(b) Under Laws 1919, Chapter 65, as amended;

(c) Under Laws 1925, Chapter 382.

Answering the above inquiry, therefore, we are of the opinion that your village may elect to proceed under any one of said acts in making the improvements referred to in each of said acts.

2. "Does the 1925 Public Improvement Act—Chapter 382—include sidewalk construction?"

The language in said Chapter 382, Laws of 1925, Section 1918-15, Mason's Minnesota Statutes of 1927, "By the word 'street paving' as used herein, is meant the laying of a pavement in any municipality on any street or graveling any street, and in the word is included all work incidental to any such improvement, such as grading and the construction of proper gutters, curbs, catch basins and storm sewers" is somewhat similar to the language used in Chapter 65, Laws of 1919, Section 1815, Mason's Minnesota Statutes of 1927, to the effect that "the council shall have power to improve any street, streets, alley or alleys, or parts thereof, by laying and maintaining pavements, gutters and curbs thereon * * *."

This office in construing the language in said Chapter 65, Laws of 1919, Section 1815, has heretofore held that said act is not broad enough to include sidewalks. It is true that the language in said Chapter 382, Laws of 1925, seems to be somewhat broader than that contained in said Chapter 65, Laws of 1919. However, it seems to us that if the legislature had intended to include sidewalks within the meaning of said Chapter 382, that it would have used language indicating such intent. If the proposed sidewalks can be said to be necessary or incidental to the paving in question it is possible that the court might hold that the 1925 law was broad enough to include such sidewalks. As indicated, however, we do not believe that said act was intended to include ordinary sidewalks.

3. "Has the village the right to proceed under the 1925 act without entering into a contract, but by having the work under the supervision of the street commissioner?"

We assume from this question that you intend to inquire as to whether the village may construct such street improvements by day labor without the letting of contracts after advertising for bids. In answer to this question we direct your attention to Opinion No. 139, Attorney General's Report for the year 1934, in which we construed Chapter 65, Laws of 1919, (Mason's Minnesota Statutes of 1927, Sections 1815 et seq.). In this opinion we said that Sections 1815 et seq. merely limit the power of a village to award a contract for the doing of such work in case the village undertakes to do the work by contract instead of by day labor. We are inclined to the view that the rules referred to in said Opinion No. 139 are equally applicable to said Chapter 382, Laws of 1925. It will be noted from said Chapter 382, however, that the language of the same is somewhat more restrictive than the 1919 act. It seems to us that it would be safer for you to proceed under the latter act.

As to the necessity of advertising for bids and the letting of a contract in making said street improvements we also direct your attention to Chapter 125, Laws of 1935. It seems to us that said Chapter 125, Laws of 1935, is ample authority for your village to proceed with such street improvements by the use of WPA labor without advertising for bids. The purpose of this act was to enable municipalities throughout the State to cooperate with the Federal Government in carrying on work projects in accordance with contracts or agreements entered into between the municipality and the Federal Government or its agencies in order to furnish work for unemployed persons.

It will also be noted that Section 9 of said Chapter 125, expressly provides that said act "is intended to aid in relieving the public emergency arising from unemployment by simplifying the procedure for the construction and financing of public works projects"; and that the act "is remedial in nature and the powers hereby granted shall be liberally construed."

The legislature in enacting said Chapter 125, had in mind work projects such as those referred to in your communication and intended to facilitate the employment of WPA labor upon such projects by the municipalities throughout the State. It seems to us, therefore, that since this act is sup-

plemental to the powers conferred by the above referred to statutory provisions and controlling insofar as the former acts are inconsistent with the latter that it is broad enough to confer upon your village the power to make such street improvements by day labor if the village council finds that it is necessary and convenient so to do in carrying on such WPA work projects.

4. "In issuing improvement fund warrants under Chapter 382, Laws of 1925, where the village levies a tax for payments of that which is chargeable to the village (Paragraph 15), is this to be deemed a part of the general corporation tax, and is it subject to that limitation?"

The above question is answered in the affirmative. This is in accordance with former opinions of this office. Your village, both under Chapter 145, Laws of 1885, as well as under Section 1225, Mason's Minnesota Statutes of 1927, is limited to a tax levy of not to exceed 2 per cent of the assessed valuation of the taxable property within its corporate limits. And by Section 2070 of Mason's Minnesota Statutes of 1927, the village council is prohibited from entering into any contract which will create a debt for the payment of either the principal or interest of which during the current or any subsequent years it shall be necessary to levy a rate of taxes higher than the maximum prescribed by law.

DAVID J. ERICKSON,
Deputy Attorney General.

May 21, 1937 396g-7

83

CITIES AND VILLAGES—Streets—Improvements—Several streets may be improved upon one petition.

Mr. Chester G. Rosengren, City Attorney.

You state that the City of Fergus Falls for some time past has graveled and treated with bituminous treatment the surface of streets and alleys in the city under and pursuant to Section 1815, Mason's Minnesota Statutes of 1927, and amendments thereto; that recently a petition was filed with the city council requesting that "several blocks upon one street be improved with bituminous treatment and also that several blocks of a parallel street one block away be similarly improved without any improvement of the crossing streets intersecting the two improved streets;" and that said "petition was granted and the city proceeded to oil the two streets." You further state that upon checking the petition you find that the "owners of more than 35% in frontage of the real property abutting on each of the improved streets signed the petition," and that insofar as the "jurisdictional requisites are concerned the petition satisfies the statute."

You inquire "as to whether or not * * * under this statute two separate streets may be improved under one petition assuming that the owners of the required percentage of property abutting on each street sign the same."

Section 1815, Mason's Minnesota Statutes, 1938 Supplement, under which said petition was filed, provides that in any city of the fourth class, whether said city is operating under a general or special law or home rule charter, the council "shall have power to improve any street, streets, * * * or parts thereof, by * * * subjecting the same to bituminous or other treatment, when petitioned for by the owners of not less than thirty-five per cent (35%) in frontage of the real property abutting on such street, **streets,** alley or alleys, or parts thereof, as may be named in the petition as the location for such improvement."

It will be noted from the above quoted language of said Section 1815 that the petition merely requires the signature of 35% of the owners of the real property abutting on such streets or parts thereof "as may be named in the petition as the location of such improvement." In other words, the statute does not require the signature of the property owners abutting upon cross streets intersecting the streets upon which the improvement is being made. Moreover there is no language in the statute indicating that separate petitions must be filed for each street where more than one street is being improved, so long as the petition contains the statutory percentage of signatures of the owners of the property abutting upon the streets named in the petition as the location of the improvement.

Answering your specific inquiry, therefore, we are of the opinion that two separate streets may be improved under one petition so long as the owners of the statutory percentage of property abutting on such streets sign the same.

We are enclosing herewith a copy of the opinion dated May 5, 1936, to Mr. James Mott, City Attorney of Worthington, Minnesota, to which you refer in your letter and which relates to a somewhat similar situation.

DAVID J. ERICKSON,
Deputy Attorney General.

November 14, 1938 396c-6

84

CITIES AND VILLAGES—Streets—Improvement along trunk highway.

Mr. Lawrence R. Lunde, City Attorney.

You state that State Highway No. 63 was rerouted and constructed through the business district of Lake City; that at the time of construction concrete was laid in two blocks, the center strip being paid for by the state and "the rest to be paid by the city."

You inquire whether the city may pay its share of the cost of construction "out of the general revenue fund or if it has to be paid in some other manner."

In answer to your inquiry we direct your attention to Mason's Statutes of 1927, Section 2557. Subdivision 1 thereof authorizes the governing body of any county, town, city, village or borough to enter into an agreement with the commissioner of highways for the construction of a roadway or structure, of greater width or capacity than would be necessary to accommodate the normal trunk highway traffic, upon any trunk highway within its boundaries, and permits the municipality in question to **"appropriate from any funds available"** such amount as may be agreed upon and pay the same into the trunk highway fund. There is the further provision that any city or village may construct a portion of the street or highway not included in the trunk highway system independently of any contract with the commissioner of highways, subject to such reasonable regulations as the commissioner may prescribe as to grade and drainage.

Answering your specific inquiry, we are of the opinion that under the above statutory provision your city council may pay its share of the cost of said street improvement out of the general revenue fund or from any other city "funds available."

DAVID J. ERICKSON,
Deputy Attorney General.

February 5, 1937 59a-22

85

CITIES AND VILLAGES—Streets—Vacation of.

Mr. L. R. Simons, Village Attorney.

You inquire as to whether the Village of Buhl, operating under Chapter 145, Laws of 1885, may proceed to vacate a certain village street pursuant to Section 1201, Mason's Minnesota Statutes of 1927.

The language in said Section 1201 is similar to the provisions contained in Section 29 of Chapter 145, Laws of 1885. Said Section 1201 provides, in part, as follows:

> "On petition of a majority of the owners of land abutting on any street or alley or any part thereof, in any village, the council may by resolution vacate the same or any part thereof, if it shall appear for the interest of the public so to do, first giving one week's published and posted notice of a hearing to be had thereon, * * * "

The above quoted language is broad enough to confer jurisdiction upon the village council "in any village" in the state, regardless of whether such village is operating under said Chapter 145, Laws of 1885, or under the 1905 village code. This seems to have been the construction placed upon said statute by the Supreme Court in the case of Tiedt v. Village of Argyle, 129 Minn. 259, 261. According to the Minnesota Year Book of the League of Minnesota Municipalities, the Village of Argyle, the same as the Village of Buhl, is operating under the 1885 law.

Answering your specific inquiry, therefore, we are of the opinion that the Village of Buhl, operating under the 1885 law, may proceed to vacate the village street or alley by complying with the provisions of said Section 1201. In other words, the village may elect to proceed under the latter section or under Section 29 of said Chapter 145, Laws of 1885.

DAVID J. ERICKSON,
Deputy Attorney General.

November 17, 1938. 396g-16

86

CITIES AND VILLAGES—Water and light department—Services—Discontinuance of.

Mr. Nahman Schochet, Village Attorney.
You state and inquire:

> "The village water, light, etc., commission sells the three following services: (1) water, (2) heat, and (3) electricity. The three items are billed on one statement, although itemized separately. Consumer, in our case, pays up his water and electricity in full, leaving the heat charges unpaid. Can the commission discontinue either of the other services (water or electricity) upon adoption of such a ruling as long as the heat is not paid?"

In the case of City of East Grand Forks v. Luck, 93 Minn. 373, our Supreme Court held that a municipality may adopt reasonable rules and regulations to enforce payment of charges for such services rendered to consumers by the municipality. As pointed out in that case, and also in the case of Powell v. City of Duluth, 81 Minn. 53, the obligation on the part of the consumer to receive and pay for such services rests upon contract and if the method of enforcement of payment for the same adopted by the municipality is reasonable and not prohibitory the consumer subjects himself to the rules and regulations of the municipality pertaining to such method of payment.

Under the rule laid down by our Supreme Court in the above referred to cases, we are of the opinion that said water and light commission may adopt a regulation providing that whenever any of the charges for services furnished by the water and light department of the village become delinquent any or all of such services may be discontinued until the consumer pays such delinquent bills.

You also inquire:

> "Would it make any difference if, when less than the total due on the commission's statement is paid, if the receipt were marked 'payment on account' instead of 'payment in full for water and electricity to.....'?"

If the commission adopts a regulation providing that when the charges for any of the services furnished to a consumer by the water and light department become delinquent all of such services may be discontinued until the charges therefor are paid, we believe that the commission's right to discontinue such services to delinquent consumers would not be affected by the commission's acceptance of a part of the amount due from the consumer.

DWIGHT N. JOHNSON
Special Assistant Attorney General.

November 2, 1938. 624c-4

87

CITIES AND VILLAGES—Water, Light, Power and Building Commission—City Council may not limit jurisdiction of.

Mr. H. H. Flor, City Attorney.

You state that the City of New Ulm owns a municipal electric light and waterworks plant and also operates the city heating system.

You inquire whether if a water, light, power and building commission is established under Chapter 412, Laws of 1907, as amended, the city council would have authority to "adopt a resolution which specifically and expressly limits that commission and the powers of the commission to operate, manage and control the Municipal Light, Waterworks and Heating Plant and systems and expressly state that the commission shall have no control or power over the management of the City Hall and Public Library and Museum building."

This office has held that when a water, light, power and building commission is established in a city under the provisions of said Chapter 412, Laws 1907, as amended, the city council is without authority to limit the jurisdiction of said commission.

When a city adopts a resolution expressly accepting the provisions of said act as provided under Section 8 of said Chapter 412, Laws 1907 (Section 1859, Mason's Minnesota Statutes of 1927) the commission appointed thereunder is vested with "full, absolute and exclusive control of and power over the water, light, and power plant or plants * * * including all other public buildings and halls owned by said municipality."

In State ex rel. Village of Chisholm v. Bergeron, 156 Minn. 276, the Supreme Court, in passing upon the powers and duties of a commission established under the provisions of said Chapter 412, Laws of 1907 as amended, said:

> "The duties and powers of the commission emphasize the legislative intent to create a body free from any coercion or control by the village council. * * * The commission shall have full, absolute and

exclusive control of the water, light and power plants including public buildings and halls owned by the municipality, with full authority to operate the plants, and rent the buildings for public use and entertainment."

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

May 19, 1938. 59b-13

88

Cities and Villages—Water and sewer systems located partly within and partly without the corporate limits.

Mr. Nahman Schochet, Village Attorney.

You state that "a village incorporated under the 1885 laws, owns its water distribution system and tank"; that the water supply for this system "is purchased from a private source with wells just outside the village limits"; and that "the village sewer system operates through a septic tank also just outside the village limits."

You inquire:

> "Is section 1250, Mason's 1927 General Minnesota Statutes, available in such a village? Or is the statutory requirement for ownership of a municipal sewer and water plant 'within the corporate limits' to be construed strictly?"

The statute, Section 1250, so far as pertinent, provides:

> "Whenever **any village in the State of Minnesota,** having power to do so, **installs, builds and constructs a municipal sewer and water plant** within its corporate limits **along any public street or alley,** it shall be the duty of every owner or occupant of any abutting property platted into lots and blocks having a dwelling house or business property situate thereon to install a toilet in said dwelling or business property, and make connection thereof **with the water and sewer in the street or alley adjacent thereto,** * * *."

The act is very broad in its terms, applying to any village in the state having power to install, build and construct a municipal sewer and water plant within its corporate limits along any public street or alley. The legislature evidently enacted said statute as a public health measure. This being true it seems reasonably clear from a context of the act as a whole that the legislature did not intend to limit its application to villages having water and sewer systems wholly within their corporate limits. In other words, we do not believe that the legislature intended to exclude a village owning its water and sewer distribution systems installed in its streets or alleys within its corporate limits even though the source of such water supply and the septic tanks of such sewer system might be located outside of the corporate limits of the village. It seems to us that to literally inter-

pret the words "within its corporate limits" would defeat the very object of the statute.

Many of the villages throughout the state obtain their water supply from outside their corporate limits. A great many village sewage disposal plants or septic tanks are also located outside the municipal corporate limits.

Answering your specific inquiry, therefore, we are of the opinion that the village in question may avail itself of the provisions of said Section 1250.

DAVID J. ERICKSON,
Deputy Attorney General.

April 22, 1937. 624c-16

89

CITIZENS—Accountants—Conviction of felony does not deprive one of citizenship rights under accountancy law.

Mr. Lyle W. Hines, State Board of Accountancy.

In your letter you state:

> "A holder of a Minnesota Certificate as Certified Public Accountant plead guilty to a Federal charge and the State Board of Accountancy subsequently revoked his certificate. This certificate was later on reinstated. It now appears that the Certified Public Accountant referred to has not had his civil rights restored. The Board is not clear as to the effect of our statutory provisions covering the citizenship requirement and its application to this set of circumstances."

You ask our opinion on the following question:

> "Was the Board of Accountancy acting within its authority in reinstating the certificate referred to in view of the fact that the applicant did not have his civil rights restored to him?"

We answer this question in the affirmative.

Mason's Minnesota Statutes of 1927, Section 5700, as amended by Chapter 236, Laws of 1933, states that:

> "No certificate for a certified public accountant shall be granted to any person other than a citizen of the United States, or person who has in good faith duly declared his intention of becoming such citizen * * *."

Section 5704, as amended by Chapter 283, Laws of 1933, authorizes the State Board of Accountancy to revoke any certificate granted by it by reason of the holder of such certificate having been, among other things, convicted of crime. Said section further provides that the board may, upon presenta-

tion of a petition within two years after revocation, reinstate such certificate.

While the conviction of a felony deprives the convicted person, under certain circumstances, of his right to vote and of his right to hold public office, until such time as these rights have been restored by the proper authorities, we are of the opinion that all of his citizenship rights and duties are not taken away from him by such conviction. We believe that the person referred to would be a citizen within the meaning of Section 5700, above quoted, and that your board was within authority to reinstate his certificate.

ROY C. FRANK,
Assistant Attorney General.

October 6, 1937. 882e

90

CITIZENS—Conviction for liquor offense—Loss of citizenship.

Mr. Robert G. Hamlin, City Attorney.

You ask:

> "Whether a man is qualified to hold the office of a councilman in a city of the Fourth Class operating under a Home Rule charter after being convicted of a violation of the liquor laws, either State or Federal."

While you do not specifically state that the city referred to in your letter is the city of Chaska, we assume such to be the case. Chaska was organized and is operating under the provisions of Chapter 2, Special Laws of 1891, and all general laws applicable to cities of the fourth class. Chapter II, Section 2, of said Chapter 2 sets forth the qualifications of aldermen as follows:

> "Each alderman shall be a resident and qualified voter of the ward for which he shall be elected, * * *."

No further qualifications are set forth in said Chapter 2.

You do not state whether or not the man in question lost his rights of citizenship by reason of such conviction and, if he did, whether or not they have been restored. Assuming that he did not lose his citizenship rights by reason of such conviction, we are of the opinion that there is no legal reason why such person cannot hold the office of councilman of your city. If such conviction resulted in the loss of citizenship rights and such rights have been restored, such person is eligible for the office of councilman of your city. If such rights have not been restored, then such person cannot hold the office in question.

ROY C. FRANK,
Assistant Attorney General.

February 15, 1937. 63a

91

COMMUNICABLE DISEASES—Control of—Expenses incident to.

Mrs. Mildred Lee, City Attorney.

You state that a pauper family "who are residents of the city of Granite Falls, but who are county charges of Chippewa County, which is their legal settlement, is ill with a communicable disease, namely, scarlet fever"; that "this family has been receiving aid from Chippewa County although now residing in Yellow Medicine County; and that Chippewa County contends that "the city should bear half the expense of nursing and medical attention."

You inquire "as to just what part of the expense for their care and treatment or the enforcement of quarantine regulations are chargeable to the city of Granite Falls."

Section 5351, Mason's Statutes of 1927, provides in part as follows:

> "* * * the municipality or town constituting such district shall be liable for all expense incurred in establishing, enforcing and releasing quarantine, half of which may be recovered from the county as provided for under sections 4647 and 4648, General Statutes of 1913."

This office in construing said Section 5351, as well as Section 5352, has heretofore held that the expenses incident to the care and relief of a person sick with a communicable disease, in the nature of medical care and advice, nursing, food, etc., are not legally chargeable against a health district and that it is only the expense required for the prevention or suppression of such communicable diseases which are chargeable against such health district. In other words, the city of Granite Falls, the health district, is chargeable with only the expenses incident to the establishment, maintenance and releasing of quarantine, one-half of which "shall be a claim against the county." The expenses incident to the care and relief of such a family, in the nature of medical care and advice, nursing, food, etc., are ultimately chargeable against the municipality in which said family has its place of settlement.

DAVID J. ERICKSON,
Deputy Attorney General.

June 8, 1937. 611a-6

92

COMMUNICABLE DISEASES—Tuberculosis—Expense of transporting patient to state sanitarium.

Mr. Charles A. Portier, City Attorney.

You state that B, a pauper, has a legal poor settlement in the city of Little Falls, Morrison County; that the city operates under the township

system of caring for its poor; that B, while in Duluth, Minnesota, became afflicted with tuberculosis, making his immediate hospitalization necessary; that he was placed in a hospital in Duluth; that application was then made at the request of the county board of Morrison County to have this person admitted to the state tuberculosis sanitarium at Walker; and that this person was transported from Duluth to Walker by ambulance and admitted to said state sanitarium.

You inquire:

> "Is the City of Little Falls liable for the cost of transportation of the pauper from the City of Duluth to the state sanitarium at Walker?"

Although you do not so state, we assume that the person in question received hospitalization at the state sanitarium at Walker pursuant to the provisions of Section 4545 of Mason's Minnesota Statutes of 1927. This assumption is based upon the statement contained in your letter that application for admission to said sanitarium was made "at the request of the county board of Morrison County."

Section 4545 provides as follows:

> "A person unable to pay such charges and without kindred legally liable therefor and unable to pay may be admitted on request of his county board, and **the charges shall be paid by the county.**"

The issue presented, therefore, as between Morrison County and the City of Little Falls involves a consideration of questions of fact. If the primary purpose of the treatment at the sanitarium was to benefit the patient by providing for his care and treatment, the provisions of Sections 4545 and 4546 of Mason's Minnesota Statutes of 1927 apply, and the duty of providing such care is imposed upon the county. If, on the other hand, the purpose was to isolate the patient in order to prevent the spread of a communicable disease, and thus to protect the public, the provisions of Section 5351, Mason's Minnesota Statutes of 1927, are applicable, and the expense of maintaining such patient should be paid by the City of Little Falls. The city, in such case has the right to be reimbursed by the county for one-half of such expense as provided by statute.

However, your statement of facts does not indicate that said patient was admitted to the state sanitarium at the request of your local board of health for the purpose of protecting the public from the spread of a communicable disease. As indicated, therefore, we assume that the person in question was admitted to said sanitarium at the request of the county board pursuant to the provisions of said Section 4545 for the purpose of providing care and treatment for the benefit of said patient. It would seem to follow, therefore, that since the obligation of caring for such a person at the state sanitarium is imposed upon the county, that the City of Little Falls is not liable for the cost of transportation of the person in question from the city of Duluth to the state sanitarium at Walker.

As hereinabove indicated, Section 5351 relates to the control of communicable diseases. This office has uniformly held that Section 4545 has no relation either to the poor laws or to the control of communicable diseases.

DAVID J. ERICKSON,
Deputy Attorney General.

August 16, 1937. 611a-8

93

CONSERVATION—Bounties—Fraudulent payment of—Liability of public officers.

Mr. Herman C. Wenzel, Commissioner, Conservation Department.

You state that an unusually large number of "wolves" are being reported for payment of bounties from certain counties and that an investigation has been made by the Division of Game and Fish whereby it was discovered that a number of township clerks have issued certificates for the payment of wolf bounties on fox, and that the pelts of such fox have been taken by the claimants as permitted under the wolf bounty statute, together with false certificates to certain county auditors who in turn have punched the ears of such fox hides as provided by law for wolves, and after examining the certificates have issued their county warrants for the payment of the $15.00 wolf bounties.

You further state that the Division of Game and Fish has definite evidence of such fraudulent practices, having seized a number of such fox hides upon which "wolf" bounties have been paid and the certificates and warrants issued for the payment of such bounties. You inform us that you deem it necessary to commence immediate prosecution of certain flagrant cases in order to curb such fraudulent practices and to protect the funds of the state from such unlawful depredations.

You inquire what action can be taken against the parties who have issued fraudulent certificates and warrants as well as the claimants of such bounties. You also inquire whether or not county auditors indulging in this practice can be charged with malfeasance or nonfeasance in the performance of their official duties for knowingly issuing warrants for the payment of wolf bounties to persons bringing in fox. You also inquire whether the moneys thus unlawfully misappropriated may be recovered.

Sections 6254, 6255, 6256 and 6257, 1936 Supplement, Mason's Minnesota Statutes of 1927, provides for payments of bounties on "wolves," the manner and time in which the claim shall be made, the duties of the town clerk in issuing certificates, and the duties of the county auditor in determining the validity of the claim and the issuance of county warrants in payment thereof.

Section 6258, 1936 Supplement of Mason's Minnesota Statutes of 1927, provides that such person who shall fraudulently claim or obtain any

reward for the killing of a wolf or issue any fraudulent or unauthorized certificate or warrant therefor, shall be guilty of a gross misdemeanor, the punishment for which shall be a fine of not less than $100.00 or more than $500.00, or imprisonment in the county jail for not less than sixty days nor more than six months, or both such fine and imprisonment. This section specifically provides that the provisions thereof shall not be deemed to supersede or to exclude the operation of any other penal law which may be applicable.

Section 10053, Mason's Minnesota Statutes of 1927, also provides that every public officer or person holding or discharging the duties of any office or place of trust under the state, or in any county, town, city or village, a part of whose duty is to audit, allow, or pay, or take part in auditing, allowing, or paying, claims or demands upon the state, or such county, town, city, or village, who shall knowingly audit, allow, or pay, or directly or indirectly consent to, or in any way connive at, the auditing, allowance, or payment of, any claim or demand against the state or such county, town, city, or village, which is false or fraudulent, or contains charges, items, or claims which are false or fraudulent, shall be guilty of a felony, and punished by imprisonment in the state prison for not less than two nor more than five years, or by a fine not exceeding five thousand dollars, or by both.

By reason of the specific exception provided for in Section 6258, it is obvious that the general provisions of Section 10053 are also applicable and that any or all of the guilty officers may be charged with the commission of the offense specified in either of these laws.

The constitutional provision of the state, Article 13, Section 2, authorizes the legislature to provide for the removal of inferior officers for malfeasance or nonfeasance in office.

The legislature has provided in Section 6953, Mason's Minnesota Statutes of 1927, that every office shall become vacant on the happening of either of the following events, before the expiration of the term of such office. Subparagraph 5, of said section, provides:

> "His conviction of any infamous crime, or of any offense involving a violation of his official oath."

It is the opinion of this office that conviction under either of the statutes above cited would constitute a violation of the officers' official oath and result in a vacancy in that public office.

The legislature has further empowered the Governor to remove from office under the provisions of Section 6953, Mason's Minnesota Statutes of 1927, certain public officers, including a county auditor, whenever it appears to him by competent evidence that such officer has been guilty of malfeasance or nonfeasance in the performance of his official duties.

In State ex rel. Kinsella vs. Eberhart, 116 Minn. 313, 321; 133 N. W. 836, 861, our court has said that "terms 'malfeasance' and 'nonfeasance' have no technical meaning in the sense in which they are employed" in the statute. Under this construction of the said statute relating to the Gov-

ernor's power of removal from public office, it is our opinion that intentional wrong doing or corrupt conduct such as recited by you in the statement of facts in this matter, would constitute malfeasance in the performance of official duty. Conviction of a crime is not essential in order that the Governor may exercise those powers under this section of the statute, nor would it be sufficient defense that the accused officer has already been acquitted in a previous criminal proceeding on the same charge as the removal proceeding is based upon. State ex rel. Kinsella 313, 321; 133 N. W. 856, 861. In Re Application for Removal of Nash, 147 Minn. 383, 387, 391; 181 N. W. 570, 572, 573-4. The misconduct or malfeasance recited in this case is directly related and connected with the performance of certain official duties required to be performed in the officers involved.

We are further of the opinion that the state may recover the sums of moneys of which it has been defrauded, from those persons benefiting or participating in such fraudulent conduct and against whom proof is available. Each bounty warrant paid would however constitute an item requiring some proof.

FRANK H. OSTERLIND,
Assistant Attorney General.

March 17, 1938. 47f

94

CONSERVATION—Commissioner—Authority of and duties.

Mr. Herman C. Wenzel, Commissioner of Conservation.

You state that the Conservation Department, Division of Game and Fish, pursuant to the provisions of Section 5630, Mason's Minnesota Statutes of 1927, established the Thief Lake Public Hunting Grounds and Game Refuge. Proceedings were had in the District Court of Marshall County and were completed in November, 1931. In these proceedings the State of Minnesota acquired certain lands by condemnation for the purpose of restoring the water level of Thief Lake of Marshall County for conservation purposes. The said statute, Section 5630, provides that in case the project involves or necessitates any material extension, alteration or relocation of a public drainage ditch or system, that the court has complete jurisdiction in the premises and that in proceedings supplemental to the condemnation proceedings, it has the power to determine the nature and extent of the alterations, extension or relocation to be made and also to determine and specify to what extent the original drainage, ditch system or highway be vacated and abandoned and that upon completion of the project in accordance with such order, the original drainage, ditch system or highway be deemed vacated or abandoned to the extent specified in such order.

It appears that prior to 1931, Thief Lake and the area contiguous thereto had been drained by the construction of Judicial Ditch No. 21. Pursuant to proceedings had for the restoration of Thief Lake, fee simple

titles and easements to lands were acquired for the purpose of restoring and perpetually maintaining the waters of Thief Lake in eastern Marshall County, at an elevation of 1,163 feet, sea level datum, for a game refuge and small game public hunting ground. The court determined the right and authority of the state perpetually to obstruct the flow of water in Judicial Ditch No. 21 of Beltrami and Marshall Counties, Minnesota, and in its branches and laterals, by increasing and perpetually maintaining the water surface elevation therein at 1,163 feet, by means of a concrete reinforced control dam at the outlet of said Thief Lake. The Court authorized and extended such increased water level upstream in said ditch, its branches and laterals, to a point where such increased elevation coincides with the natural water elevation therein. The need for restoring the lake level was duly determined by the court in these proceedings; and it authorized the department to do and perform all acts necessary for the perpetual maintenance of such lake at said water elevation for such purposes.

Assuming that the proceedings referred to have been regular and that all parties having any interest therein, or adversely affected thereby were parties to the action, or had notice thereof, it is our opinion that, to the extent specified in the order, Judicial Ditch No. 21 has virtually been abandoned and that it was the purpose and intention of the proceedings to accomplish the abandonment of that ditch to the extent specified in the Court's order. The Department of Conservation has authority under the order of the court, pursuant to the provisions referred to, to establish a level in Thief Lake of not to exceed 1,163 feet, which level may extend upstream in said ditch and its branches and laterals to a point where such increased elevation coincides with the natural water elevation therein.

You further state that the Department of Conservation, in conjunction with the Civilian Conservation Corps, in 1936 sponsored and constructed another dam in Moose River known as the Haroldson Dam, about two miles above its outlet into Thief Lake, on lands owned by the State which has a fixed weir crest of 1,157 feet, with provisions to regulate the waters therein up to an elevation of 1,163 feet above sea level, the level fixed by the court in the original proceedings for Thief Lake. The stop logs have never been placed and the dam has not as yet functioned as a control structure. You further state that as a result of excessive rains in the fall of 1937, and the spring of 1938, this entire region has been adversely affected by excessive water and floods and that there is agitation by the settlers living in eastern Marshall County for a complete removal of the dam referred to in the Moose River. You further state that this secondary dam was planned and constructed in good faith to accomplish a beneficial public use and that there is no evidence to indicate that the structure itself has caused the flooding of any privately owned lands.

You inquire whether you have authority to reconstruct, repair, remove or abandon either of these dams or control structures.

It is our opinion that pursuant to the provisions of Chapter 468, Laws 1937, you have and possess authority to reconstruct, repair, remove and abandon dams, reservoirs and other control structures within this conser-

vation project area and that where you find, after a hearing held for that purpose, that control structures now existing in this conservation project area are not adequate to control flood conditions, appropriate proceedings may be instituted under the provisions of Chapter 468, either by the application of interested persons, or upon the commissioner's own initiative. Under the act the commissioner is authorized to receive applications or initiate such proceedings and upon notice, to hold hearings relative to the facts, investigate and hear the evidence, make findings and make such final order in the premises as may be proper. In certain emergency situations we believe you may dispense with a hearing.

FRANK H. OSTERLIND,
Assistant Attorney General.

May 25, 1938. 273b

95

CONSERVATION—Commissioner—Duties—Delegation of.

Mr. Herman C. Wenzel, Commissioner of Conservation.

You state that a question has arisen in connection with the administration of Chapter 468, Laws 1937, as to whether the Commissioner of Conservation has authority under that act to delegate any of the duties and functions imposed upon him.

Chapter 310, Laws 1937, defining the duties and powers of the commissioner, provides in Section 2 that:

> "The Commissioner of Conservation shall have and exercise all of the powers and shall perform all of the duties now by law vested in or imposed * * * by any other existing law. * * *."

Section 4 of the act provides that:

> "The Commissioner of Conservation may, by written order filed in his office, delegate to the Director of any Division of the Department any of the powers or duties vested in or imposed upon the Commissioner by this act. Such delegated powers and duties may be exercised or performed by the respective Directors in their own names, or in the name of the Commissioner, as the Commissioner may direct."

Section 3 of the act provides that:

> "The Department of Conservation shall be organized with a Division of Forestry, a Division of Drainage and Waters, a Division of Game and Fish, a Division of Lands and Minerals, and a Division of State Parks. Each Division shall be under the immediate charge of a Director, subject to the general supervision and control of the Conservation Commissioner. The Directors shall be appointed by the Commissioner to serve at his pleasure."

Subdivision (b) provides that:

"Every such Division shall have charge of administering the activities indicated by its title, together with such other activities as may be assigned by the Commissioner, subject to the right of the Commissioner to revise and change assignments of any and all activities among the several Divisions at any time as he may see fit; provided that in general the Division activities shall be as follows:
* * *

Section 3 (b) 2 provides that:

"DRAINAGE & WATERS . . . shall have administration over State waters and water power, including regulation of drainage, elimination of stream and lake pollution, and the establishment and maintenance of minimum lake levels and water storage basins, such minimum levels, however, at no time to be lower than the natural level in its original state of nature."

Chapter 468, Laws 1937, is a complete act relating to the appropriation and use of surface and underground waters of the state; to control the construction, reconstruction, repair and removal of dams and water-way obstructions and reservoirs in any waters of the state; to devise and develop a general water resources conservation program for the state; to provide for hearings on application for permits and to grant permits to appropriate and use the waters of the state and to construct, reconstruct, repair or remove dams and water-way obstructions and reservoirs; and provides for the investigating or examining of any existing reservoir, dam or water-way obstruction; and provides for the making of rules and regulations to enforce the purposes of the act; provides for appeals from any determination of the commissioner, and provides penalties for violating the provisions of the act.

The act in none of its provisions specifically authorizes the commissioner to delegate any of his powers and duties conferred upon him by that act.

You inquire whether the Commissioner of Conservation may, under the provisions of Chapter 468, delegate any of the duties and functions outlined in that act to his deputy, the director of the Division of Drainage and Waters, or other persons designated by him.

We believe that under the provisions of Section 4, Chapter 310, which is an act relating to the organization, powers and duties of the agencies created for the purpose of conserving and controlling the public domain and natural resources of the state, that the Commissioner of Conservation may by written order filed in his office delegate to the director of any division of the department, any of the powers and duties vested in, or imposed upon, the commissioner which may be exercised or performed by the respective directors in their own names or in the name of the commissioner, as the commissioner may direct. We believe the acts should be construed together and that the administration of Chapter 468 should in so far as is possible be governed by the administrative provisions of Chapter 310, the organization act passed at the same session.

In many instances it may be advantageous to have the directors act in the name of the commissioner, as the commissioner may direct.

The foregoing conclusion is as general as the question propounded, but there may be specific instances or circumstances, or exceptions, which do not fall within the rule. Certain acts of finality might require the commissioner's action or approval.

FRANK H. OSTERLIND,
Assistant Attorney General.

August 3, 1938. 983d

96

CONSERVATION—Ditches—County and judicial—Bridges and abutments "are water-way obstructions" within the meaning of C. 468, L. 1937.

Mr. Lloyd J. Hetland, County Attorney.

You state that the county plans to reconstruct a bridge across a certain "dry run" known as Coon Creek, and that the plans for such structure call for a twenty-four foot span with concrete deck and abutments.

It is also stated that said county has advertised for bids for certain repair work and improvements to certain county and judicial ditches consisting of "excavating the ditches to their original depth and width; also, clearing and grubbing brush and trees in and upon the ditch right-of-way."

Our opinion is requested as to whether or not the provisions of Chapter 468, Laws of 1937, apply to such projects.

Section 5 of said Chapter 468 provides:

> "From and after July 1, 1937, it shall be unlawful for the state or any agency thereof, any person or persons, partnership, association, private or public corporation, county, municipality or other political subdivision of the state, to construct, reconstruct, remove or abandon any reservoir, dam or water-way obstruction; or to make or construct, or permit to be made or constructed, any change therein or addition thereto; or to make, or permit to be made, any change in, addition to, remove or abandon any existing dam, reservoir or water-way obstruction; or in any manner other than in the course of usual operation of dams beneficially using water prior to July 1, 1937, to change or diminish the course, current, or cross-section of any stream or body of water, wholly or partly within this state, without a written permit from the commissioner previously obtained, upon written application on forms to be furnished by the commissioner therefor to said commissioner as provided in Section 4 of this act. Nothing in this section shall be construed to apply to any dam or obstruction in a stream or other body of water which has less than one square mile of drainage area or a normal flow of less than two cubic feet per second or to the erection,

use or control of structures operated or to be operated for the production of water power."

This office has held that a bridge and its abutments are "water-way obstructions" within the meaning of said Chapter 468, for the construction of which municipalities are required to secure permits from the Commissioner of Conservation, except where such bridges or abutments are constructed in a stream or other body of water which has less than one square mile of drainage area or a normal flow of less than two cubic feet per second, or where such construction work consists of ordinary or emergency repairs and replacements.

It appears from the county highway engineer's letter to you that the water course referred to therein is a "dry run" creek. It is not stated, however, whether said creek is dry only during certain seasons or whether it is more or less dry throughout the year. In other words, the question of whether such creek has one or more square miles of drainage area and whether it has a normal flow of two or more cubic feet per second involves questions of fact upon which this office cannot pass.

If said "dry run" creek has one or more square miles of drainage area, and has a normal flow of not less than two cubic feet per second, we believe that the provisions of said act apply to the construction of such bridge and its abutments.

On the other hand, if said "dry run" creek does not have one or more square miles of drainage area, and does not have a normal flow of at least two cubic feet per second, we do not believe the provisions of said act apply to the construction of said bridge and its abutments. As above stated, questions of fact are involved upon which this office cannot pass.

We do not find that this office has ever had occasion to pass upon the question of whether the excavation or improvement of public drainage ditches come within the provisions of said Chapter 468.

An excavation or improvement of a drainage ditch which constitutes an inlet or an outlet of a navigable body of water might, however, in some cases "change or diminish the course, current or cross-section" of such body of water, and we believe that in such cases where such body of water comes within the provisions of said Chapter 468, said act would apply to such an excavation or improvement of such a drainage ditch.

Likewise, we believe that where a navigable stream or body of water coming within the provisions of said act constitutes a part of a drainage system or is so connected with such drainage system as to cause "the course, current or cross-section" of such navigable stream or body of water to be changed or diminished by such an excavation or improvement of such drainage system, the provisions of said Chapter 468 should be complied with.

We do not believe, however, that a public drainage ditch is to be considered as being a navigable stream or water course within the meaning of

said Chapter 468, and we are of the opinion that, except as pointed out above, said act should not be construed as applying to the making of improvements to such ditches.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

September 19, 1938. 148a-14

97

CONSERVATION—Game and Fish—Commercial fishing—Power of Commissioner.

Commissioner of Conservation, State Office Building.

You inquire as to the extent of your discretionary powers relative to commercial fishing in this state.

The right to fish, commercially or otherwise, is covered entirely by legislative enactment. The basic act relating to the preservation of game and fish in this state is Chapter 400, Laws 1919, which has been amended at various times subsequent thereto, and is codified as Chapter 32, Sections 5495 to 5655, Mason's Minnesota Statutes of 1927.

Section 5497 of Mason's Minnesota Statutes of 1927 provides, in part, that:

> "No person shall at any time of the year, pursue, take, wound or kill, in any manner, number or quantity, any wild animals protected by law, * * * except as permitted by this act."

Section 5649, Mason's Minnesota Statutes of 1927, Subsection (19), provides that:

> "The term 'wild animals' means 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 5499, Mason's Minnesota Statutes of 1927, provides, in part, that:

> "Fish, unless otherwise specifically permitted by this chapter, shall only be taken by angling."

Section 5595 of the 1936 Supplement to Mason's Minnesota Statutes of 1927 provides for commercial fishing in Lake St. Croix and the Mississippi River where the waters form a common boundary between Minnesota and Wisconsin. This section also provides for supervision of such fishing operations and provides further that:

> "The provisions herein contained requiring supervision of commercial fishing by game wardens shall not apply to fishing with licensed

set lines and shall not take effect and be in force as to the boundary waters between the State of Minnesota and the State of Wisconsin until the State of Wisconsin shall have enacted a similar law. Provided, further, that restrictions of this section as to open seasons for fishing and size of mesh nets, shall not apply to lakes or streams on interstate boundaries, where the laws of the adjoining state are more favorable or less restrictive in these respects than are the laws of this state, but on such interstate waters the open season for fishing and the size of mesh of nets shall be the same as provided by the laws of the adjoining state where such laws are more favorable or less restrictive than the laws of this state."

Section 5598 of the 1936 Supplement to Mason's Minnesota Statutes of 1927 provides for commercial fishing operations in Lake of the Woods, Rainy Lake and Namekan Lake, all or part of such lakes being a common boundary between the State of Minnesota and the Dominion of Canada. In fixing the open season for commercial fishing in those waters the section provides in part:

"* * * that if the season for the commercial taking of any such fish shall be open in the Canadian portion of any of said waters during any time when the season is closed in the Minnesota portion thereof, as herein provided, the commissioner may, in his discretion, open the season in the Minnesota portion of said waters during all or any part of such Canadian open season."

Section 5599 of the 1936 Supplement to Mason's Minnesota Statutes of 1927 provides for commercial fishing operations in Lake Superior which lake is a common boundary between Minnesota and Wisconsin. In fixing the closed season for the taking of herring the section provides that:

"Herring, except as herein provided, may not be taken hereunder between November 16th and November 30th, both inclusive, provided this restriction as to the taking of herring shall not apply until the State of Wisconsin shall by law provide for a similar restriction."

It appears that the legislature, in enacting the foregoing sections, desired and contemplated all possible uniformity in commercial fishing operations in waters forming a common boundary between Minnesota and other states of the union and provinces of the Dominion of Canada, and that consequently these sections govern in conducting commercial fishing operations in the state except as may be hereinafter set forth.

It also appears that the legislature realized it could not advantageously enact legislation that would in itself fully promote conservation, and consequently it vested the commissioner of conservation with certain executive or administrative discretionary powers in order to properly conserve the natural resources of the state, including wild life, game and fish. By virtue of Section 5598 herein referred to the commissioner is given discretionary power to open the season in Lake of the Woods, Rainy Lake and Namekan Lake during all or a part of the time during which the season is open in the Canadian portion of such waters. In addition thereto Section 5648 of

the 1936 Supplement to Mason's Minnesota Statutes of 1927 provides, in part, that:

> "In all cases where the date for the opening of the season for taking fish in waters forming a common boundary between this and other states and the Province of Ontario, is later, or where the day for the closing of the season for taking fish in such waters is earlier in Minnesota than it is in any other state or states or Province of Ontario bounded by such waters, then and in such case the director of game and fish may promulgate and publish an order fixing the days for the opening and the closing of the season for taking fish in such waters coincident with the opening and closing days of the season of such other state or Province of Ontario for taking fish in such waters, and thereafter and until said order is amended or repealed such open season for taking fish in such water shall be as in said order provided."

With particular reference to commercial fishing the same section further provides:

> "Provided, further, that those waters lying within the State of Minnesota and forming a common boundary between the State of Minnesota and the Province of Ontario and/or Manitoba, not already closed, shall be closed to commercial fishing when the proper authorities of the Province of Ontario and/or Manitoba shall close to commercial fishing that portion of such boundary waters forming a common boundary between the State of Minnesota and the Province of Ontario and/or Manitoba as lie within the Province of Ontario and/or Manitoba. It is provided further that these waters may be closed separately in the event that the proper authorities of the Province of Ontario and/or Manitoba close one or more body or bodies of water and not all such boundary waters. The director of game and fish is hereby authorized and empowered to enter into arrangements jointly with the proper authorities of such other state or Province of Ontario bounded by such waters for the supervision of fishing therein, for the closing thereof, for the stocking thereof, for the enforcement of fishing laws of both states or Province of Ontario in such water, and for locating the boundary line."

The legislature further provided in Section 5630, Subsection (6), Mason's Minnesota Statutes of 1927, as amended:

> "The Commissioner shall be charged with the execution of the laws of this state relating to wild animals, and he shall have the power and it shall be his duty:
>
> * * *
>
> "(6) To set aside and reserve any of the waters of this state for the purpose of fish propagation, * * *. The taking of fish from any of the waters so reserved and set aside, except as may be permitted by the commissioner, is prohibited."

It appears from the foregoing quoted subsection that certain discretionary powers are vested in the commissioner of conservation for the purpose

of closing waters in the state, such closing being for the purpose of fish propagation. The constitutionality of this subsection was challenged in Schmidt v. Gould, 172 Minn. 179, in which it was contended that the discretionary power so vested in the commissioner was an improper delegation of legislative authority. The court upheld the constitutionality of the law and, in discussing the constitutional question, said:

> "The legislature cannot delegate its authority to make a law. It may, however, authorize a commissioner or departmental head to do things which it might properly, but cannot conveniently or advantageously, do itself. It is not every grant of power, involving the exercise of discretion and judgment that amounts to a delegation of legislative power. (Citations omitted.) The legislature declared the law and policy of such propagation in conservation of our natural resources. The commissioner is informed as to the requirements and necessary condition for successful spawning beds. This law relates to details concerning a very limited area of waters of the state. Obviously, the selection of the waters to be used, which involves technical knowledge, cannot conveniently or advantageously be made by the legislature itself. It is wholly for the public welfare and hence a liberal construction is demanded. Indeed, in our opinion, this statute is justified constitutionally, in this respect, on the ground that the power granted is only a determination of details in the nature of the administration of the game laws. The commissioner did not make the law. He merely acted as the agent of the legislature in selecting the necessary and appropriate waters for the purpose of carrying out the laws made by the legislature as found in G. S. 1923, c. 32."

By way of summary we are of the opinion that the commissioner of conservation has executive or administrative discretionary powers relative to commercial fishing in the state as follows:

1. To open the season for commercial fishing in the Minnesota portion of the Lake of the Woods, Rainy Lake and Namekan Lake forming a common boundary with Canada during all or any portion of the time during which the season for commercial fising is open in the Canadian portion thereof.

2. To enter into arrangements jointly with the proper authorities of other states or provinces, having jurisdiction over waters forming a common boundary with Minnesota, for the supervision of fishing in such waters, for the closing thereof, for the stocking thereof and for the enforcement of the fishing laws of adjoining states and the boundary provinces of Canada.

3. To set aside and reserve any of the waters of the state when in the opinion of the commissioner such closing is in furtherance of fish propagation in such waters. The administrative discretionary powers so vested in the commissioner must be reasonably exercised and should not be arbitrary nor influenced by whim or caprice. Regard should be had for the disturbance of economic conditions resulting from the exercise of his power.

FRANK H. OSTERLIND,
Assistant Attorney General.

October 6, 1937. 9831

98

CONSERVATION—Game and Fish—Licenses—Fish caught in adjoining state.

Department of Conservation, State Office Building.

In your letter of September 20, 1938, addressed to the Attorney General, William S. Ervin, you state that several people have inquired whether or not it is legal for a person holding a resident fishing license in Minnesota and also a Wisconsin nonresident fishing license, to take and have in possession in Minnesota the limits of fish allowed under each license.

In an opinion rendered by this office on August 18, 1930, it was stated with reference to bag limits allowed in possession that the language of the statute should be limited to fish "which have been caught in Minnesota waters." We do not believe that the language of the statute regulating the number of fish permitted to be had in possession should be thus construed or that the addition of words constituting an entire phrase to the statute is permissible under well settled and established rules of construction. Without the addition of this language the statute, which is otherwise clear and unambiguous, such as Section 5579, Mason's Minnesota Statutes of 1927, as amended, and which reads, "or have in possession more than 20 such fish at any time," which refers to the protected varieties of game fish, would not authorize a licensee to have in possession more than 20 of such fish regardless of where they may have been caught and regardless of the number of foreign licenses he may hold. The difficulties of law enforcement are obvious if the former construction is permitted to stand because it is impossible to differentiate or to distinguish between fish caught in Minnesota or fish caught in an adjoining state of the same species. We do not hesitate, therefore, to reverse that portion of the former opinion and to hold that bag limits authorized in possession must include fish taken in both states. Section 5579 of Mason's Minnesota Statutes of 1927, as amended, provides that:

> "Except as otherwise expressly permitted by law, no person shall take more than 15 fish of protected varieties in the aggregate of all kinds in any one day, or have in possession more than 20 such fish at any time, but this shall not extend any limit otherwise expressly fixed by law."

Under this provision it would seem that a Minnesota resident having both a resident and nonresident fishing license would not be permitted to have in possession more than 20 game fish of the protected varieties on any one day. Where such fish may have been taken in boundary waters which are the subject of joint state game and fish regulations made, for example, under authority of legislative acts of both Wisconsin and Minnesota, and where the daily take has been limited by regulation and the regulation itself has become part of the law, it would seem that the last clause of Section 5579, "shall not extend any limit otherwise expressly fixed by law," becomes operative and applicable and the fact that a licensee has both a Minnesota and a Wisconsin license will not extend the limit permitted to be taken in any one day or had in possession, and Minnesota licensees will be limited to

the number fixed by such joint regulation as provided in Order No. 772, Sections 4 and 5, dated August 23, 1927. For the purpose of ascertaining both daily and maximum limits of fish of the protected variety which may lawfully be had in possession under the foregoing construction, fish taken in boundary waters which are subject to such lawful joint regulations should be considered as fish taken from Minnesota waters and a Minnesota resident holding a license from both states would not be permitted to take and have in possession the total number of the limit of protected varieties allowed by both states, but only the number allowed by the state of his residence.

FRANK H. OSTERLIND,
Assistant Attorney General.

September 30, 1938. 211a-6

99

CONSERVATION—Lakes—Unauthorized drainage of.

Mr. Herman C. Wenzel, Commissioner of Conservation.

You refer to Section 10437, Mason's Minnesota Statutes of 1927, which provides that it shall be a misdemeanor for any one to drain or cause to be drained in any manner any meandered pond or body of water, and stipulates the punishment to be imposed for violation of the section.

You also call attention to the provisions of Chapter 468, Laws of 1937, which delegates wide powers to the Commissioner of Conservation to regulate in the public interest the waters of the State. No specific reference is made to the manner in which the Commissioner shall handle complaints which come to him because of alleged violations of Section 10437.

You inquire whether the enforcement of the criminal provisions of the statute referred to prohibiting the drainage of meandered lakes has been expressly or by implication delegated to the Commissioner of Conservation as provided in said Chapter 468.

It is our opinion that the enforcement of the criminal section referred to is required to be enforced by the County Attorney of the county in which the violation occurs and should be instituted by the County Attorney upon proper complaint being made. Such complaint may be made by any interested person having knowledge of the facts or by the Commissioner or his agents as he chooses.

The question of whether the Commissioner should or ought to institute proceedings under the provisions of Chapter 468, Laws of 1937, is one within his discretion. Such proceedings are of a civil nature and may be instituted upon the complaint of any proper person or his own initiative.

The act further provides in Section 13 thereof that any person violating or failing to comply with any order of the Commissioner shall be guilty of

a misdemeanor and provides for punishment. Until an order has been made pursuant to a hearing duly held no criminal proceeding could be instituted thereunder.

We do not believe the provisions of the criminal code, said Section 10347, have been repealed by the provisions of Section 18 of said Chapter 468, which repeals acts and parts of acts inconsistent with that act.

FRANK H. OSTERLIND,
Assistant Attorney General.

July 29, 1938. 273c-1

100

CONSERVATION—Rough fish—Sale of—Municipal ordinances.

Mr. Thorild Peterson, City Attorney.

You state that the City of St. Peter, which operates under Special Laws of 1891, adopted an ordinance in 1911, which provides that no person, firm or corporation desiring to engage in business within said city as a transient merchant shall so engage until granted a license by the common council, for which a license fee shall be fixed at not to exceed $100.00 per week. Violation of the ordinance, upon conviction, is punishable by a fine of not exceeding $100.00 and costs of prosecution.

You further state that on the 5th day of November, 1937, two persons, presumably under contract, or employees of a person under contract, with the State of Minnesota for the removal and sale of rough fish from certain waters in Nicollet County, under the supervision of a game warden of the Division of Game and Fish, Department of Conservation of the State of Minnesota, who was also present, sold some rough fish to several citizens of the City of St. Peter within the city limits. The persons who sold the fish contend that they were agents of the State by virtue of the contract referred to and entitled to seine and sell rough fish anywhere and under any conditions. The game warden contends that it was his duty to supervise the enforcement of the terms of the contract, both as to taking and selling of rough fish, the latter being the only duty involved in the present situation, that he acted within the scope of his employment as an employee and agent of the State, and claims immunity from the operation of the transient license ordinance.

You inquire:

1. Whether the two private parties referred to are agents of the State of Minnesota, or independent contractors, under the terms and conditions of the contract relating to their authority to take and sell fish.

Although you do not so state, this office has been informed that the two persons referred to as the contractors have been arrested. If this is true,

it would preclude us from ruling upon the question, although the Court should have no difficulty in determining the status of these persons from the express language of various provisions of the contract.

You further inquire:

> 2. If agents of the state, are they subject to the control, effect and operation of the ordinance of the city relating to licensing of transient merchants?

For the same reasons stated in our answer to your first question, if these persons are under arrest the matter is now presumably before a court of competent jurisdiction for determination and it would be imprudent for this office to render an opinion relating to either the issues of fact or law now before the Court for determination.

You further inquire:

> 3. Are game wardens of the State of Minnesota permitted and authorized to participate in and supervise the sale of rough fish?

We answer your third question in the affirmative. Rough fish taken from the waters of this State under the contract are until sold the property of the State and the State being a party to the contract is entitled, both as a matter of law and pursuant to the terms of the contract involved, to the proceeds resulting from the sale of such fish, less the compensation and expenses agreed to be paid by the State to the agent or contractor.

You further inquire:

> 4. If game wardens are permitted to sell rough fish or supervise the sale thereof under the circumstances related by you, must said game wardens comply with the provisions of the city ordinance relating to licensing of transient merchants?

We answer your fourth question in the negative. A game warden supervising the sale of fish under the circumstances related would not, in our opinion, be a "transient merchant" within the meaning of that term as used in your ordinance.

FRANK H. OSTERLIND,
Assistant Attorney General.

December 2, 1937 208i

101

CONSERVATION—Timber—Cutting and sale of on State Trust Fund lands.

Mr. Herman Wenzel, Commissioner of Conservation.

You state that regulations of the Civilian Conservation Corps, a federal agency, provide one-half of the proceeds of any timber or other products produced or sold as a result of any forestry project in which they are

engaged are required to be paid to the federal government. You state that in some instances timber cut in clearing rights of way for truck trails and other forestry improvements are not required for actual, physical improvements to said state forests and that the surplus timber is offered for sale to the highest bidder. Such sales have been handled like sales in trespass cases. The question arises whether complications may be involved in paying the federal government the amount which it requires in such cases because the Civilian Conservation Corps may be placed in the position of a technical trespasser.

You inquire:

1. "Whether or not these cases can be handled as a simple sale of timber products and not as trespass cases.

2. "Whether 50 per cent of the proceeds from such sale remaining after paying the federal government its share would satisfy the trust fund requirement, or whether some other procedure would be necessary, for example, deducting the appraised value of the stumpage when paying it to the trust fund and then dividing the remainder on a 50 per cent basis with the federal government."

An amendment to the constitution of the State of Minnesota, adopted November 3, 1914, Article 8, Section 7, provides:

"Such of the school and other public lands of the state as are better adapted for the production of timber than for agriculture, may be set apart as state school forests, or other state forests, as the legislature may provide, and the legislature may provide for the management of the same on forestry principles. The net revenue therefrom shall be used for the purposes for which the lands were granted to the state."

A further constitutional amendment adopted November 4, 1924, Article 17, Section 1, provides:

"The state and (or) any of its political subdivisions, if and whenever authorized by the legislature, may contract debts and pledge the public credit for and engage in any work reasonably tending to prevent or abate forest fires, including the compulsory clearing and improvement of wild lands (whether belonging to the public or privately owned) and the assessment against such lands of the value of all benefits so conferred and the payment of damages so sustained in excess of such benefits."

By virtue of the foregoing constitutional amendments both school and other public lands, including those held in trust for the purposes for which they were granted, may be set apart by the legislature as state school forests or other state forests under the direction and control of the legislature. It has been vested with express power to protect and preserve the forests of this state, both public and private, from the ravages of that feared and dreaded scourge of the forest, uncontrollable forest fire. Even in the absence of express and direct authority the state would have the unquestioned right and reserved power to enact necessary and adequate laws providing for the

protection of its forests from destructive fires. It would be a valid exercise of its police power.

The legislature in a resolution, part of Section 1, Chapter 113, Laws of 1937, declared:

> "* * * it is desirable and necessary in meeting the exigencies of recent Federal legislation as well as in following out the established state program to provide adequate means of controlling the spread of fires within the forest areas of this state, and
>
> "* * * it is within the police powers reserved in the state to enact necessary and adequate laws to protect the forests of this state, and
>
> "* * * adequate fire breaks are a prerequisite to the perpetuation and protection of forest areas and an asset to the beautification of highways, roads and trails."

Nothing need be said to elucidate or make articulate the intention or purpose of the legislature relative to the powers conferred upon the Department of Conservation, Division of Forestry as disclosed by the subsequent sections of the same chapter, as amended, wherein it has provided that, "all highways, roads and trails within forest areas are declared to be established fire breaks" and has further provided in Section 3:

> "The Director of the Division of Forestry may permit under his direct supervision and control, any Civilian Conservation Corps, Works Progress Administration, or other State or Federal relief agency, actually engaged in the improvement and conservation of State Trust fund lands within the boundaries of any state forest, to clean up and remove all dead and/or down timber, underbrush, rotting logs, stumps, and all other inflammable refuse and debris which is deemed to be a fire hazard or the removal of any trees in forest stand improvement and cultural operations which is advisable in the interest of good forest management; and to use so much of said cutting for firewood and other forest development needs while said camps are thus actively engaged in the improvement and care of said forests."

Pursuant to the express provisions contained in the constitutional amendments referred to and in the express provisions of the enabling legislation it is our opinion that;

You have authority to meet the "exigencies of Federal legislation" which would include in our opinion conforming with all reasonable and necessary rules and regulations germane to the subject, which may be validly promulgated by any federal or state relief agency which is engaged, or may become engaged in the improvement of state trust fund lands within the boundaries of any state forest.

You are not required to predicate the sale of standing, dead or down timber upon a technical trespass, but you should, by license, or agreement, expressly provide that the lawful requirements of the governmental agency co-operating in such project be complied with, assented to, or embodied in the terms of a license, operations, or suitable project agreement. The nec-

essary and reasonable cutting of timber in any forest for the purpose of furthering a necessary and desirable improvement or conservation project which may be "advisable in the interest of good forest management" and which will result in benefiting the whole forest, should not be classified as the ultimate cutting of timber for commerce, or for public sale, within the meaning of the timber sale acts. This conclusion may be reasonably implied from the constitutional provisions as a whole as well as from that part of the language used in Section 3 of the statute which reads, "or the removal of **any trees** in forest stand improvement and cultural operations which is advisable in the interest of good forest management" and which further authorizes the "* * * use so much of said cuttings for firewood and other forest development needs * * *."

Whatever net amount remains after the payment of such forest fire protection project costs, including therein such amounts as may be required to be paid to the federal government Civilian Conservation Corps, pursuant to its lawful rules and regulations, will be required to be paid into the State Treasury for the benefit and use of the trust fund to which it may belong. We can see no reason why timber cut as a result of the execution of a beneficial forest conservation project should not be handled as a simple sale of timber products and not as a sale resulting from an act of trespass. The doing of an authorized and lawful act can not constitute a trespass.

FRANK H. OSTERLIND,
Assistant Attorney General.

August 4, 1938 27b

102

CONSERVATION—Timber—Dead—Sales of on State land.

Hon. Herman C. Wenzel, Commissioner of Conservation.

You request an opinion as to the legal right of the Department of Conservation to make sales of dead and down timber, and inquire as to the title the department can give the purchaser of such timber on reverted tax lands within the boundaries of the Red Lake Game Preserve, other established conservation areas and also outside of those areas.

Laws 1929, Chapter 258, relates to the creation, establishment and maintenance of the Red Lake Game Preserve and for the management and control of timber and other resources, the acquisition by the state of unredeemed delinquent tax lands and the use and disposition thereof. Section 2 provides in part:

> "Said Red Lake Game Preserve shall be under the management and control of the Department of Conservation, which shall have, and is hereby given, full power and authority to make, establish, promulgate and enforce all necessary rules and regulations not inconsistent with the laws of the state * * *. Such rules and regulations may also provide for

the afforestation and reforestation of lands now or hereafter owned by the state in said Game Preserve and Hunting Grounds, and for the sale of merchantable timber from such lands * * *."

The right to sell merchantable timber as provided in this section would include the right to sell dead and down timber of state owned lands within the Red Lake Game Preserve. The section further provides:

"The department shall also make and enforce such rules and regulations not inconsistent with the laws of the state concerning the burning of grass, timber slashings, and other inflammable matter, and the clearing, development and use of lands in said preserve and hunting ground as may be necessary and advisable to prevent destructive forest fires and grass fires which would injure the use and development of said area for * * * the proper protection of the forest and wooded areas thereof."

The removal or sale of dead and down timber, by reason of the inflammable nature thereof, would also be justified and proper within the contemplation of the act as a measure for the proper protection of the wild life and of the forest and wooded areas of the preserve.

Laws 1931, Chapter 407 and Laws 1933, Chapter 402, are acts providing for the creation, establishment and maintenance of conservation areas.

Section 2 of Chapter 407, Laws of 1931, provides in part:

"Each of such projects, so approved and accepted, shall be under the management and control of the Department of Conservation, which shall have and is hereby given full power and authority to make, establish, promulgate and enforce all necessary rules and regulations not inconsistent with the laws of the State for the care, preservation, protection and development of forests * * * and for the prevention of forest fires therein, and for the sale of merchantable timber from lands acquired by the State therein when and where, in the opinion of such Department, the same may be sold and removed without damage or injury to the purposes of such project."

Section 3, Chapter 402, Laws of 1933, is in substance similar to the matter hereinabove quoted from Section 2, Chapter 407, Laws of 1931.

In our opinion the right to sell merchantable timber as provided in both of said acts would include the right to sell dead and down timber and the power to make rules and regulations for the care, preservation, protection and development of the forests would include the right to remove fire hazards including dead and down timber.

In regard to the tax reverted lands outside of the Red Lake Game Preserve and other established conservation areas herein ruled upon, it appears that Laws of 1935, Chapter 386, relates to the leasing and sale of such delinquent tax lands and the sale of certain products therefrom.

Section 4 of that act provides in part:

"Until after the sale of any parcel of forfeited land, the county auditor may sell hay stumpage on said land and may lease agricultural

and non-agricultural lands subject to sale, as directed by the county board, and may sell dead, down and mature timber upon any tract that may be designated by the conservation commission, * * *."

It will be observed that the sales of dead and down timber on lands outside of the established conservation areas are made by the county auditor upon any parcel of tax forfeited land that may be designated by the conservation commission. The commissioner of conservation, pursuant to Laws 1937, Chapter 310, Section 2, has succeeded to the powers of the conservation commission in this respect.

The right to make sales of hay stumpage, or to lease agricultural and non-agricultural lands, subject to sale, or to sell dead, down and mature timber upon any parcel of forfeited tax lands, outside of conservation areas, as designated by the conservation commissioner is subject to the rights of former owners to repurchase pursuant to the provisions of Laws 1933, Chapter 407, Laws 1937, Chapter 485, and Laws of Extra Session 1937, Chapter 88. The right of former owners to repurchase tax sale forfeited lands pursuant to the provisions of Laws of 1933, Chapter 407, will expire as provided in Section 8 of Chapter 88, Special Session Laws of 1937, on September 1st, 1937, and the right of former owners to repurchase pursuant to the provisions of Special Session Laws 1937, Chapter 88, Section 1, will expire on March 1st, 1938. The right of former owners to repurchase pursuant to Laws 1937, Chapter 485, will apparently expire (Sec. 1, Sub. (b)) December 31, 1937.

The redemption or repurchase acts are substantially acts granting to former owners the option or right of repurchase, subject however to intervening terms and conditions which may have been imposed by the legislature. Where it has previously authorized the sale of dead and down timber or the right exists to manage and control, or sell dead and down timber, those rights are preserved to the State as implied conditions of the former owner's right or option to repurchase.

It is our opinion that the conservation department may sell and give good title to such timber within conservation areas where the tax forfeiture proceedings are otherwise regular and valid and where the sales are made in conformity with the provisions of the acts pertinent thereto and referred to herein.

FRANK H. OSTERLIND,
Assistant Attorney General.

August 16, 1937. 700d-31

103

CONSTITUTIONAL LAW—Legislative Amendment—Violates Constitution under facts stated.

Mr. Robt. D. Beery, Commissioner of Banks.

You state that an amendment has been offered to Section 7774-4 (e),

Mason's Minnesota Statutes, 1927, so that the same, when amended, would read as bold face herein, namely:

> "To invest in any investment legal for savings banks or for trust funds in the state **and in shares or deposits of the 'League Credit Union' incorporated under the laws of this state.**"

You ask if such proposed amendment is not a special or private law, giving special or exclusive privileges, immunities, or franchises to a particular corporation, and as such within the prohibition of Art. 4, Sec. 33, Constitution of Minnesota.

It is my opinion that your question should be, and it is, answered in the affirmative.

Art. 4, Sec. 33, Minnesota Constitution, so far as here material, provides:

> "The legislature shall pass no local or special law . . . granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever, . . ."

The proposed amendment, as heretofore indicated, and in my opinion, is clearly within such constitutional prohibition.

HARRY W. OEHLER,
Assistant Attorney General.

February 24, 1937 29a-19

104

CONSTITUTIONAL LAW—Personal property—Exemption.

Hon. Frederick J. Miller, Chairman of Senate Tax Committee.

You ask whether or not it is constitutional to include in a moneys and credits tax law a provision exempting $2,000 in moneys and credits from taxation.

The power to tax inheres in the state as an attribute of its sovereignty and is not dependent upon a grant of power from the Constitution. Constitutional provisions relating to taxation are not grants but limitations of power. Dunnell's Digest, Section 9115.

It is elementary that the power of taxation is inherent in sovereignty and that under our system of government it reposes in the legislature except as it is limited by the state or the national Constitution. In other words, the constitutional provisions are not a grant of but a limitation upon this power. Reed v. Bjornson, 191 Minn. 254, 253 N. W. 102, March 23, 1934.

The right to make exemptions is involved in the right to select the subjects of taxation and apportion the public burdens among them and must

consequently be understood to exist in the law-making power wherever it has not in terms been taken away. Reed v. Bjornson, supra.

Section 1, Article 9 of the State Constitution, so far as here material, provides:

> "The power of taxation shall never be surrendered, suspended or contracted away. Taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes, but public burying grounds, public school houses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property and houses of worship, institutions of purely public charity, public property used exclusively for any public purpose, shall be exempt from taxation, and there may be exempted from taxation personal property not individual or head of a family, and household goods and farm machinery, as the legislature may determine."

In Reed v. Bjornson, supra, the Minnesota Supreme Court held that the enumeration in the Constitution of certain exemptions does not prohibit the legislature from making others. The Court said:

> "We hold that the enumeration of exemptions in our constitution does not forbid making others which do not offend the uniformity clause or the federal constitution. The power to fairly exempt is inherent in the power to tax."

We have given careful consideration to the question as to whether or not the term "personal property" as used in the Constitutional provisions above quoted includes intangible property. We have also considered the possible implications of the expression "not exceeding in value $200." That the term "personal property" as used in the so-called corporate excess tax laws (Section 1530 of General Statutes 1894 and Section 2021 of Mason's Minnesota Statutes of 1927) referred solely to tangible personal property was held by the Minnesota Supreme Court in the cases of State v. Duluth Gas and Water Co., 76 Minn. 96, and Bemis Bro. Bag Co. v. Wallace, 197 Minn. 216.

In Chapter 242, Laws of 1911, the legislature exempted state and municipal bonds and certificates of indebtedness from taxation. In so doing it may have assumed that the state constitutional provision relating to the $200 personal property exemption does not prohibit the exemption from taxation without limitation as to amount of the class of personal property which includes such evidences of indebtedness.

In the case of Reed v. Bjornson, supra, the Court said:

> "The right to make exemptions * * * must consequently be understood to exist in the law-making power wherever it has not in terms been taken away."

In the same case Mr. Justice Loring in discussing the scope of the 1906 amendment to the Constitution said:

"The history of the times indicates clearly that the people, in adopting the 1906 amendment, were liberating the legislature from most of the previous constitutional restraints in regard to taxation. The fair adjustment of tax burdens under rapidly changing social conditions demanded more comprehensive powers in the legislature; and the people, relying upon the responsibility of that body to its constituents, relaxed the restraints theretofore existing. They were enlarging, not curtailing, the legislative power."

We recognize that there is considerable doubt whether the exemption concerning which you make inquiry would be constitutional as against the provision in Section 1 of Article 9 of the State Constitution relating to a $200 exemption of personal property. However, having in mind the broad liberating purpose of the 1906 amendment to the State Constitution and the Supreme Court's statement above quoted that the right to make exemptions must be understood to exist in the law-making power wherever it has not in terms been taken away, we conclude that the legislature has the power to exempt from taxation personal property of the class of moneys and credits subject to the limitations of the uniformity clause of Article 1, Section 9 of the State Constitution and the equal protection clause of the fourteenth amendment to the National Constitution.

We consider next the effect upon the legislature's power of the clause of Section 1, Article 9 of the State Constitution requiring that "taxes shall be uniform upon the same class of subjects."

In the case of Apartment Owners' Association v. City of Minneapolis, 191 Minn. 365, 254 N. W. 443, decided April 13, 1934, our Supreme Court said that classification for the purpose of taxation may be based on value as well as on use, protection, benefits received by the taxpayer and ability to pay. The Court said:

"The classification based upon value is not an innovation. The iron ore tax, hereinbefore referred to, was based upon value, as were also the classifications in the income tax law (wherein $1,000 and more exemptions were allowed and a graduated rate imposed), the inheritance tax, and the automobile tax laws. Such classifications have been upheld. Reed v. Bjornson, 191 Minn. 254, 253 N. W. 102; State ex rel. Graff v. Probate Court, 128 Minn. 371, 150 N. W. 1094, L.R.A. 1916A, 901; Dohs v. Holm, 152 Minn. 529, 189 N. W. 418.

"Protection and benefits received by the taxpayer and ability to pay may properly be taken into consideration by the legislature in classifying property for the purpose of taxation."

This question is not free from doubt. However, in view of the language of our Supreme Court in the above case, and other applicable authorities, we are of the opinion that the proposed exemptions of $2,000 from the moneys and credits tax would not violate the uniformity clause of the State Constitution.

We consider next the effect of the equal protection clause of the fourteenth amendment of the National Constitution.

In the case of Lake Superior Consolidated Iron Mines v. Lord, 271 U. S. 577, 581, 46 Sup. Ct. 627, 628, 70 L. Ed. 1093, 1101, the United States Supreme Court said of our constitutional requirement of uniformity that:

> "It seems to us sufficiently plain that this provision goes no further than the Fourteenth Amendment."
> See Reed v. Bjornson, supra, page 260.

This question also is not free from doubt. However, it is our opinion that the proposed exemption would not violate the equal protection clause of the fourteenth amendment of the National Constitution.

JOHN A. PEARSON,
Assistant Attorney General.

July 6, 1937. 421b

105

COOPERATIVES—Amendments to by-laws.

Mr. Chas. Ommodt, Commissioner,

Department of Agriculture, Dairy and Food.

You inquire whether amendments to the by-laws of a cooperative association organized and existing under and by virtue of Chapter 326, Laws of 1923, as amended, must be approved by the Attorney General.

Section 7835, Mason's Minnesota Statutes of 1927, as amended, in the third paragraph provides:

> "* * * Proposed amendments to such articles of incorporation and the by-laws and amendments thereto of such co-operative associations shall also be subject to examination and approval by the Attorney General as above provided and the articles of incorporation and by-laws and amendments thereto of any such co-operative association shall not be effective or held to be binding upon the members of such association unless they have been so examined and approved by the Attorney General. * * *"

The previous clause in the same paragraph referred to in the foregoing clause requires persons who desire to organize a cooperative association under the provisions of this act to submit to the Attorney General in duplicate written copies of the proposed articles of incorporation of such proposed cooperative association for examination and approval. If upon such examination by the Attorney General such proposed articles of incorporation are found to be in proper and legal form and if the purposes of such proposed cooperative association and the other provisions of such proposed articles of incorporation are found to be within the provisions of the act, the Attorney General shall endorse such proposed articles of incorporation with his approval.

It will thus be seen that the by-laws are examined and approved by the Attorney General in the same manner as articles of incorporation or amendments thereto. The by-laws may not violate the provisions of the statute nor of the articles of incorporation but must be in harmony therewith.

You further inquire what would be the effect of the adoption of an amendment to the by-laws under the provisions of this act which had not been approved by the Attorney General.

The said paragraph of said section specifically provides that the "by-laws and amendments thereto of any such co-operative association shall not be effective or held to be binding upon the members of such association unless they have been so examined and approved by the Attorney General." The amendments to the by-laws do not become effective until they have been approved and prior by-laws which have been approved remain in effect until subsequent amendments have been approved. Failure to approve amendments would not invalidate previously adopted by-laws which had theretofore been approved.

You further inquire whether amendments to the by-laws adopted by the members of a cooperative association organized under and by virtue of the provisions of Chapter 326, Laws of 1923, as amended, must be filed with the Attorney General.

We answer this question in the negative. The by-laws are not required to be filed with the Attorney General, but must be approved by him in duplicate, after which they are returned to the corporation where the original is filed with the secretary.

You further inquire whether such amendments to the by-laws must be published and filed or recorded in the office of the register of deeds or secretary of state.

We answer this question in the negative. The last paragraph of Section 2 (Section 7835) provides that:

> "The articles of incorporation of any co-operative association organized under this act, or amendments to such articles of incorporation, shall be published in a legal newspaper of the county of the principal place of business of such co-operative association for two successive issues. The original articles of incorporation, or a certified copy thereof, verified as such by the affidavits of two of the incorporators, shall be filed with the Secretary and a copy thereof, certified as above required shall be filed and recorded in the office of the register of deeds of the county in which the principal place of business of the association is located."

There is no reference in this paragraph or in any other section of the act requiring the by-laws or amendments to the by-laws to be published and recorded in the office of the register of deeds or filed with the Secretary of State.

Section 7844 provides, in part, that in case an amendment to the articles of incorporation is adopted it shall be filed and recorded with the office

in which the original articles of incorporation are filed or recorded, together with a copy of the resolution adopted by the board of directors, a copy of the notice given to stockholders and the certificate of the president and secretary verifying the action of the meeting at which such amendment was adopted. This section relates only to articles of incorporation and does not relate to by-laws.

FRANK H. OSTERLIND,
Assistant Attorney General.

January 5, 1938. 93a-5

106

COOPERATIVES—Amendments to by-laws—Manner of origin.

Mr. Chas. Ommodt, Commissioner, Department of Agriculture, Dairy and Food.

You inquire whether amendments to the by-laws of cooperative associations organized under and by virtue of the provisions of Chapter 326, Laws of 1923, as amended, must originate by resolution of the board of directors, citing the original section to be amended and also the proposed amendment.

There is no provision in the various sections of said Chapter 326, Laws of 1923, as amended, which specifically states how the by-laws or amendments thereto shall originate. Section 7834 provides generally in the second paragraph in part:

> "* * * the plans of organization and the business practices of which shall be stated in its articles of incorporation and by-laws and shall provide * * *." (Enumerating thereafter the requisites contained in clauses lettered (a) to (e) inclusive.)

It is quite clear that amendments to the by-laws may not conflict and must be in harmony with the statutory provisions contained in the enumerated clauses and with other sections of the statute and with the articles of incorporation. The by-laws and amendments thereto are subject to approval by the Attorney General in the same manner as articles of incorporation or amendments thereto.

The act is silent as to the method of adopting by-laws and amendments except as above stated. However, it is provided in the general corporation laws, Section 7453, that:

> "The first board of directors, trustees, or managers shall adopt by-laws, which shall remain effective until and except as amended by the stockholders or members at any regular or special meeting called therefor."

The original articles of incorporation of most of the cooperative associations formed under Chapter 326, Laws of 1923, as amended, usually pro-

vide that the incorporators constitute the first board of directors and, consequently, the by-laws originally adopted by them as directors or as incorporators and directors have been approved by this office pursuant to the provisions of the third paragraph of Section 7835. There are no explicit directions in the statutes except the general corporation section, 7453, to which we have called your attention, which does not indicate that it is necessary that amendments to the by-laws must originate by resolution of the board of directors or that it is necessary to state the original section to be amended, as well as the proposed amendment. However, it has generally been the practice since Chapter 326 was adopted to follow the same procedure established by statute for adoption of amendments to the articles of incorporation. The amendments to the by-laws must finally be approved by the stockholders or members regardless of what prior steps have been taken. Usually it is necessary to examine the provisions of both the articles of incorporation and of the by-laws to further ascertain what method, if any, may have been adopted by the corporation relating to the method of adopting amendments to the by-laws. Any method which does not violate the provisions of the statute or of the articles of incorporation will be approved.

It will be observed, however, that the last paragraph of Section 3 of Chapter 326 (Section 7836 established a method for voting by mail upon a ballot which is originated by the board of directors and where it is required that the ballot shall contain the exact text of the proposed motion, resolution or amendment to be acted upon at such meeting and the date of the meeting, and shall also contain spaces opposite the text of such motion, resolution or amendment in which such stockholder may indicate his affirmative or negative vote thereon.

This provision would indicate that where a mailed ballot is used the amendment to either the articles of incorporation or the by-laws should originate with the board of directors and be submitted to the stockholders or members for approval in the same manner as an amendment to the articles of incorporation.

The answer above stated to your question also contains the answer to your question relating to whether or not the text of the whole section of the by-laws, as well as the proposed amendment thereto, must be included in the notice to the members for special or annual meetings at which such proposed changes will be considered.

FRANK H. OSTERLIND,
Assistant Attorney General.

January 5, 1938. 93a-4

107

COOPERATIVES—De Facto—Reorganization—Expiration.

Mr. J. H. Hay, Agriculture, Dairy and Food Department.

You state a creamery company, organized under Chapter 351, Laws of

1897, which laws were carried forward in the Revised Laws of 1905, Sections 3073 to 3078, inclusive, now stated as Sections 7822, 7826, 7827, 7828, and 7829 of Mason's Minnesota Statutes of 1927. The foregoing sections of Revised Laws of 1905 and Mason's Minnesota Statutes of 1927 refer to cooperative creameries. You state that although Chapter 351, Laws of 1897 did not then provide for the organization of creameries on a cooperative basis, the corporation referred to in your letter, claims, nevertheless by reason of the by-laws and method of distributing patronage dividends, that it has in fact operated on a cooperative basis as a cooperative association ever since its organization. It is possible, as a result thereof, that it may fairly be classed as a de facto cooperative creamery association, or one not perfected pursuant to law.

It is difficult to give you accurate advice without the Articles of Incorporation and By-Laws together with any amendments thereto before us. However, you have made a strong statement of facts in favor of at least classifying this corporation as a de facto cooperative association.

One of the first questions to be determined before authorizing a reorganization under Chapter 326, Laws of 1923, would be to ascertain whether this corporation's term of existence, or charter, has expired. If the term has expired and there are no curative acts in effect applicable to the present situation it would seem that the simplest and most expeditious method of procedure would be to reorganize with new articles and by-laws under the provisions of Laws 1923, Chapter 326, new shares being issued in exchange for old shares accompanied by a transfer of physical assets, real and personal to the new association from the old corporation.

A dissolution would not be necessary if the corporate life of this company has not expired. The foregoing statement of facts being true and it being the desire of the stockholders to avail themselves of the benefits of the provisions of Chapter 326, Laws of 1923, Section 10, we believe the corporation may do so by taking the steps provided for by said Section 10 (7843, Mason's Minnesota Statutes of 1927) which provides in part:

> "Any co-operative corporation or association heretofore organized and doing business under prior statutes of this state, or under the laws of other states, or which has conducted its business upon the co-operative plan, which retains the same corporate name or title, may come under the provisions of this act and be bound thereby upon amending its articles of incorporation to conform to the requirements of this act in the manner hereinafter provided for the adoption of amendments. * * *" (Chapter 326, Laws 1923, Section 11 or Section 7844, Mason's Minnesota Statutes 1927).

However, it is obvious that the corporation may not take steps to amend its articles after its term has expired, when the only steps it can take are those relative to winding up its affairs, or dissolution. The legislature seldom fails to pass, at each session, a curative act which permits corporations whose terms have expired to take steps to extend their terms of existence. These acts are usually very limited as to time. However, a bill prepared by this office for the present legislature, has a provision which will be operative

until the next session of the legislature, or for two years. Most of the expired curative acts contained a short period, such as thirty days to six months, within which a corporation could take steps to extend its corporate life after the passage of the act.

Section 7292-2, Mason's Minnesota Statutes 1927—1936 Supplement, does not relate to this subject as stated in the letter accompanying your communication. We believe the correct reference should be Section 7492-2, Mason's Minnesota 1936 Supplement, which would indicate that this corporation, under the statement of facts submitted, should re-incorporate under the co-operative laws referred to, although many private business corporations engaged in the creamery business are incorporated and doing business under the private business corporation acts. And we do not rule that every corporation doing a creamery business should be incorporated as a cooperative creamery association.

FRANK H. OSTERLIND,
Assistant Attorney General.

February 10, 1937. 93a-33

108

CO-OPERATIVES—Dissolution.

Mr. Chas. Ommodt, Commissioner of Agriculture.

You inquire whether provisions of Chapter 300, Laws 1933, relating to voluntary proceedings for dissolution of corporations are applicable to co-operative corporations.

The Act is commonly termed the Uniform Business Corporation Act and provides for the formation, conduct, merger, consolidation and dissolution of certain business corporations organized for pecuniary profit.

Section 1 of the Act provides in sub-paragraph (I) under definitions as used in that Act " 'Corporation' means a corporation formed under this Act, (c. 300, laws 1933) or one which has accepted or comes under this Act.

It is our opinion that the subsequent section of the Act (c. 300, laws 1933) relating to voluntary dissolution, Sections 45 and 46, have no application to co-operative corporations and are limited to corporations organized or coming under the business corporation Act.

We believe that dissolution proceedings for a co-operative corporation must be effected pursuant to the provisions of Sections 8015 to 8019, Mason's Minnesota Statutes of 1927, as amended. These sections no longer apply to business corporations organized or coming under the provisions of Chapter 300, Laws of 1933, pursuant to specific directions of Section 62 of that Act, but the said Sections 8015 to 8019 have not been repealed and continue in effect as to certain corporations such as co-operative corporations.

FRANK H. OSTERLIND,
Assistant Attorney General.

March 7, 1938. 93a-10

109

COOPERATIVES—Expiration of corporate term—Transfer of all property.

Hon. Charles Ommodt, Commissioner of Agriculture.

You state that the corporate period of existence of a cooperative corporation has expired and that no curative act is now available under which it can renew its corporate existence.

You inquire whether the stockholders of such a cooperative corporation may authorize the sale of the corporation's assets to a new cooperative association formed for the express purpose of taking over the business of the expired corporation for a nominal consideration and for the issuance of an amount of stock by such new association, equal to the assets and business of the old corporation, the settlement of all the obligations of the old corporation and the purchase of the shares at their value of the old shareholders who do not consent to the exchange of their stock. The latter must be done where the corporate term is extended. The rule is the same.

The general rule is that as long as a corporation is solvent and remains in control of its property and assets, it may dispose thereof the same as an individual subject only to charter limitations upon its powers, provided the corporation is not a quasi public corporation and at least whenever it is necessary or proper to do so for the best interests of its stockholders and creditors or where all the stockholders consent and there are no creditors. Such a transaction would not constitute an exchange of stock where the old company sells all its property and those of its stockholders who so desire receive payment in stock of the purchasing company and those who do not so wish are paid in cash. See Fletcher on Corporations, Chapter 32, Section 1203, 1211, Note 57. See Bowditch v. Jackson Co., 76 N.H. 351, L.R.A. 1917 A 1174, Ann. Cas. 1913 A 366, 82 Atl. 1014.

You then inquire what becomes of the old expired corporation.

Section 7843, Mason's Statutes (L. 1923, C. 326, Sec. 10), provides that any association may dissolve and cease to exist as a corporation by proceeding under the provisions of Section 8015, Mason's Minnesota Statutes provided that the stockholders of such association have had due and proper notice and that a meeting of such stockholders has been called as provided in this act, C. 326, at which all the facts may be presented to such stockholders and upon such information they shall be given the opportunity of expressing themselves and taking action upon such proposed dissolution. It would seem that under this section a meeting could be called for the purpose both of ratifying the transfer of the assets to the new corporation and resolving to dissolve the old corporation as such.

It also seems to be the general rule that a corporation is dissolved and ceases to exist, without any judicial proceeding being necessary, when its charter has expired, unless there is some statutory provision to the contrary. Our Statute, Section 7485, authorizes corporations to continue their existence for the purpose of winding up their business for the period of three years after its existence has terminated by limitation. In other words,

the expiration of the charter of a corporation ipso facto dissolves the corporation. After such time it is not even a de facto corporation according to the better rule.

Owing to the fact that many corporations, both private and cooperative, fail to take steps to extend their corporate terms of existence, it has been the custom of the legislature of this state at almost every session to pass special curative acts by which they permit such corporations, if they act within the time limited by the curative act, to extend their corporate terms. The last such act relating to cooperative corporations was Chapter 60, Extra Session Laws of 1937. That act provided that proceedings to obtain renewal must be taken within six months after the passage of the act on July 15, 1937. This act expired Jan. 15, 1938. We have no doubt but what a similar act will be passed at the next regular or extra session of the legislature.

FRANK H. OSTERLIND,
Assistant Attorney General.

January 31, 1938. 93a-8

110

CO-OPERATIVES—Filing of articles.

Hon. Mike Holm, Secretary of State.

Pursuant to your request, we return to you herewith the Articles of Incorporation of the Forest Telephone Association which recite that the corporation is formed pursuant to the provisions of Chapter 58, Revised Laws 1905. It is possible that an attempt is being made to incorporate under Section 7823, Mason's Minnesota Statutes 1927, which was part of Chapter 58, Revised Laws 1905, relating to rural telephone companies and which has been carried forward from the first commonly termed cooperative law, Chapter 29, Laws 1870, by way of various amendments. We do not believe that these old types of cooperative corporations should be confused with the cooperative association contemplated by Chapter 326, Laws 1923. They had some of the fundamental characteristics but not all of those now required by such laws as Chapter 326, Laws 1923.

Section 7823, Mason's Minnesota Statutes 1927, is still in effect and if the present association, Forest Telephone Association of St. Louis County, desires to incorporate under the articles herewith submitted, we do not believe that you are entitled to receive them for filing in your office but that they should be filed in the office of the clerk of the city or town in which the business is to be conducted. The articles as submitted do not conform to the provisions of Chapter 326, Laws 1923, and for this reason we also decline to approve them as to form and legality.

This office has heretofore stated in an opinion of March 26, 1934 (93 b-33) that rural telephone companies desiring to incorporate as a cooperative association should do so under Chapter 326, Laws 1923, as amended,

rather than to endeavor to incorporate under Section 7823. This is particularly true if such association desires to enjoy the benefits, privileges and advantages of a cooperative association under the provisions of said Chapter 326, Laws 1923, as amended.

FRANK H. OSTERLIND,
Assistant Attorney General.

April 7, 1937. 93b-33

111

COOPERATIVES—Interest on shares.

Mr. Chas. Ommodt, Commissioner,

Department of Agriculture, Dairy and Food.

You state with reference to a cooperative association organized under and by virtue of the provisions of Chapter 326, Laws of 1923, as amended, that Section 1 of the act (Section 7834) provides in Subdivision (d) that interest shall not be paid on outstanding or paid up capital stock of the association in excess of six per cent per annum, which pursuant to the fifth paragraph of Section 7 (Section 7840) shall be paid on all paid up capital stock only when the net income of the association for the previous year is sufficient and such interest shall not be cumulative, and that you desire to be informed whether an association having sufficient earnings to declare a dividend may set this dividend up in its books as a liability and to the credit of the various stockholders but not to be paid in cash for three or four years.

You state that the purpose of this procedure would be to permit the association to use the dividend money as additional working capital.

The act provides that the directors of an association for the purpose of creating a reserve for permanent surplus may set aside all of its net income for its first and second years and must set aside at least ten per cent of the annual net income for that purpose until the reserve for permanent surplus equals fifty per cent of the paid up capital. The members may provide in the by-laws of the association that an amount equal to the paid up capital may thus be set aside. The directors are also authorized to deduct 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 any indebtedness incurred for such purposes before determining what remains as net income.

It is apparent, therefore, that the question you propound is one of management and should be decided by the directors in the best interest of the company. We hesitate to approve the plan which you have suggested in view of the fact that if all the facts were disclosed it is possible that no dividends should be declared at this time.

It will be noted that the last paragraph of Section 7 (Section 7840) provides that if the board of directors of any cooperative association organized under the act authorize the payment of interest on the paid up capital stock in excess of the amount authorized by law or cause income of the association to be apportioned or distributed in any other or different manner than therein provided, such act shall be cause for the cancellation of the charter of such association, and the attorney general may in the name of the state commence and prosecute appropriate proceedings for the cancellation of such charter.

We are, therefore, of the opinion that if the corporation is in need of borrowing money to restore or increase its working capital or to provide improvements which may be made from reserves created for that purpose as outlined in the statute that that method should be followed and the plan suggested in your letter would not meet with our approval. However, it is not unlawful for a corporation to borrow money, within its debt limitations, from banks, its members or other sources.

If the facts disclose that no dividends or interest have actually been earned over and above operating costs and expenses, no dividends should be declared. This would be particularly true where operations have resulted in an actual loss to working capital.

FRANK H. OSTERLIND,
Assistant Attorney General.

January 4, 1938. 93a-17

112

COOPERATIVES—Patronage dividends.

Hon. Chas. Ommodt, Department of Agriculture, Dairy and Food.

You inquire whether cooperative associations organized under the provisions of Chapter 326, Laws 1923, as amended, may provide in their by-laws that if a patron fails to pay his open account for goods or merchandise purchased within a certain stated period of time that such patron shall not participate in the patronage refund arising from the sale of goods to him during the delinquent period.

It would seem that as long as a member is continued or being carried as one in good standing, even though he may have violated certain provisions of the articles or by-laws pertaining to credit for which he may be subject to expulsion, he would, until expelled, be entitled to be treated as a member in good standing. However, we can see no objection to a by-law which would provide that patronage dividends may not be paid in cash to those members whose accounts are delinquent until the account has been made good or that such patronage dividends shall be credited against any past due indebtedness owing by such member to the association.

FRANK H. OSTERLIND,
Assistant Attorney General.

April 12, 1938. 93a-11

113

COOPERATIVES—Patronage dividends.

Mr. Chas. Ommodt, Commissioner,

Department of Agriculture, Dairy and Food.

You inquire whether a County Welfare Board has authority to require compliance with its own ruling that "undivided surplus" available for distribution among the members of a cooperative association, organized and existing by virtue of the laws of this state, shall be turned over to the County Welfare Board contrary to the provisions of the statute (Section 7840, Mason's Minnesota Statutes of 1927, as amended) which requires such distribution to be made among the members of such cooperative association on the basis of patronage and which further provides, on certain conditions, that non-member patrons shall participate upon equal terms with member patrons.

The awards by the County Welfare Boards to relief clients are outright grants of assistance. Unless the County Welfare Board is itself engaged in the business of making purchases from cooperative associations for redistribution among its clients so as to qualify for membership in such cooperative association, it has no authority to require, by its own order, rule, or regulation, that refunds of patronage dividends shall be made in violation of, or contrary to the cooperative statutes of this state, or of the Articles of Incorporation, or By-Laws of any such cooperative association lawfully adopted in conformity with such cooperative statutes.

FRANK H. OSTERLIND,
Assistant Attorney General.

April 13, 1938. 125a-64

114

CO-OPERATIVES—Profession—Practice of by.

Hon. J. H. Hay, Deputy Commissioner of Agriculture.

You state:

> "It appears that a group of fifty farmers in Minnesota desire to organize themselves under the co-operative laws of this state for the purpose of collective employment of veterinarian. Each member will contribute a certain annual fee for the services of the association. This fee will be collected by the association and submitted by it to the veterinarian."

You ask whether there are any legal obstacles to such a co-operative set-up.

We advise you that the plan suggested by you is illegal.

The law is well settled and entirely within the scope of sound reason that learned professions cannot be practiced by corporations through the medium of employing licensed practitioners to act for them.

The courts of the various states have held, on various occasions, that corporations cannot practice law, dentistry, medicine, optometry and other professions. In the case of In re Otterness, 181 Minn. 254, 232 N. W. 318, our Supreme Court said:

> "Neither a corporation nor a layman, not admitted to practice, can practice law, nor indirectly practice law by hiring a licensed attorney to practice law for others for the benefit or profit of such hirer. For this bank to employ defendant to conduct law business generally for others, for the benefit and profit of the bank, amounted to the unlawful practice of law by the bank. * * *."

After commenting on the Otterness case and citing it with approval, our court, in Granger v. Adson, 190 Minn. 23, 250 N. W. 722, made the following statement in reference to the practice of medicine by a corporation:

> "We are just as firmly convinced that it is improper and contrary to statute and public policy for a corporation or layman to practice medicine in the same way. The obligation of Dr. Grave under his contract was to plaintiff, not to the subscribers. * * * What the law intends is that the patient shall be the patient of the licensed physician, not of a corporation or layman. The obligations and duties of a physician demand no less. There is no place for a middleman."

In like manner in the matter presented by you the veterinarian would be employed by the corporation and not by the person whose animals he treats. The law insists that where professional services are involved the relationship and contract of hire should be between the patient or client and the professional man, or as in the case of a veterinarian between the owner of the animal treated and the veterinarian. On April 1, 1936, this office rendered an opinion to the effect that a co-operative optometry association could not be organized under the laws of this state.

In the case of Re Co-operative Law Co., 198 N. Y. 479, the New York court made the following statement:

> "The practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, * * *. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. **As it cannot practice law directly, it cannot indirectly, by employing competent lawyers to practice for it, as that would be an evasion which the law will not tolerate.** * * * A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it, any more than it can practice medicine or dentistry by hiring doctors or dentists to act for it."

In like manner if a co-operative association cannot directly practice as a veterinarian, which, of course it cannot, it cannot practice such profession indirectly by hiring a veterinarian to act for it. We see no reason why a distinction should be made between a physician or dentist or optometrist and a veterinarian. They are all engaged in learned professions.

ROY C. FRANK,
Assistant Attorney General.

January 12, 1937. 465

115

COOPERATIVES—Residents—Persons forming.

Mr. Charles Ommodt, Dept. of Agriculture, Dairy and Food.

You inquire whether persons acting as corporators of a co-operative association under the provisions of Chapter 326, Laws 1923, as amended, are required to be residents or citizens of this state. The only qualifications of corporations are found in Sections 1 and 2 of this act (Mason's Minnesota Statutes, 7834-35) as amended.

Section 1 (7834) provides:

> "For the purpose of this Act a co-operative association shall be defined as any corporation or association of ultimate producers and/or consumers organized under this Act * * *."

Section 2 (7835) provides:

> "A co-operative association may be organized under the provisions of this act by five or more incorporators, who may act for themselves as individuals or as the agents of other co-operative associations, whether organized under this act or otherwise.

And further provides:

> "Persons forming a co-operative association under this act shall sign and acknowledge written articles of incorporation specifying "* * * (e) the names and places of residence of the incorporators and whether such incorporators are acting for themselves as individuals or as the agents of other associations; * * *."

The foregoing provisions of this act do not especially provide that all or a certain number of the corporators are required to be either citizens or residents of this state, and according to the weight of authority it is well settled that in the absence of an express requirement to this effect none of the corporators need be either residents or citizens of the State under whose laws the formation of the corporation is sought.

Fletcher on Corporations, Volume 1, Chapter 3, Section 104; Chapter 7, Section 200, and cases cited.

Other co-operative acts heretofore passed and in effect in this state have had various provisions in them relating to the qualifications of the corporators.

We cite the provisions of some of those acts.

In Section 7822, Mason's Minnesota Statutes, it was required:

"* * * A majority of the incorporators shall be residents of the county of its principal place of business, * * *"

and Section 7823 required:

"Seven or more persons of lawful age, inhabitants of this state, may, * * * associate themselves together * * *,"

and Section 7824 required:

"* * * A majority of the incorporators that reside in this state shall be residents of the county of its principal place of business * * *,"

and Section 7443 required:

"Any three or more persons may form a corporation * * *."

Applying the rule to your question we are of the opinion that persons forming a corporation under provisions of Chapter 326, Laws 1923, as amended, are not required to be residents of this state.

FRANK H. OSTERLIND,
Assistant Attorney General.

August 22, 1938. 93a-29

116

CORPORATIONS—Fees—Penalties.

Hon. Mike Holm, Secretary of State.

You state that on the 13th day of October, 1930, a certain corporation organized under the laws of the state of Delaware (a foreign corporation), filed the necessary instruments pursuant to the provisions of Sections 7493-4-5, Mason's Minnesota Statutes of 1927, and paid to the state treasurer the fee prescribed by Section 7475, Mason's Minnesota Statutes of 1927; that your department thereupon issued a certificate licensing and authorizing it to do business in this state for the effective term set out in Section 7494, Mason's Minnesota Statutes of 1927; that thereafter this corporation failed to comply with the provisions of Section 22(c) of Chapter 200, Laws of 1935, and that pursuant to the foregoing statement of facts you desire to be advised whether or not this corporation is subject to the penalizing provisions of Section 20(c) of said Chapter 200, Laws of 1935.

Chapter 200, Laws of 1935 has been codified in the 1936 Supplement as a new Section 7495 with subsections numbered identically the same as the

subsections in Chapter 200. For the sake of brevity we will refer to the subsections only of Section 7495, Mason's Minnesota 1936 Supplement or said Chapter 200, Laws of 1935.

Generally, except as restrained by the constitution and laws of the United States, the state has absolute power to prescribe the conditions upon which foreign corporations may be authorized to do business within its borders. Corporations, foreign or domestic, exist only in contemplation of law and their authority is confined to the state of their creation; they exercise their powers elsewhere only by comity, and that comity is usually expressed by legislative enactments. See Section 2086, Dunnell's Digest and cases cited.

It appears that Sections 7493-4-5, Mason's Minnesota Statutes of 1927 were the sections of the statute in effect at the time the instant corporation sought permission, qualified and was licensed by the Secretary of State to do business in the State of Minnesota. Subsequently, and on April 20, 1935, the legislature acting within its lawful powers repealed the said sections and enacted in lieu thereof, Chapter 200, Laws of 1935, which is termed the Minnesota Foreign Corporation Act.

Pursuant to Section 22 of this new act, provision was made for the manner in which foreign corporations then licensed and authorized to do business in this state, could comply with the provisions of the new act.

It is provided:

> "(b) Licenses to foreign corporations to do business in this state existing on the effective date of this act shall continue in full force and effect until March 1, 1936, and shall then terminate without further act.

It would appear therefore that the phrase in the foregoing subsection (b) "and shall then terminate without further act" is the source of difficulty in applying the act to the present situation. In the absence of this particular phrase it would have been necessary for the Secretary of State or the Attorney General, under the provisions of either Section 17 or 18 of the act, to have taken affirmative steps to revoke the certificate licensing and authorizing said foreign corporation to do business in this state as heretofore granted to it by Section 7494, Mason's Minnesota Statutes of 1927. This section provides in part, that upon compliance with the provisions of Sections 7493 and 7494:

> "the secretary of state shall issue to it a certificate licensing and authorizing it to do business in this state. Said license shall remain effective as long as such foreign corporation continues thereafter periodically to file sworn statements and make payment of additional fees, as hereinabove required; but no longer in any event than thirty years from the date of issuance thereof, nor after the expiration of the charter of such foreign corporation."

The question then arises whether this corporation by coming into this state and complying with its laws thereby acquired a contractual right which precludes subsequent state legislation imposing other requirements.

Having given a foreign corporation a license to do business within the state, the state may revoke it in its discretion for good cause or without any cause at all, and its motive in doing so is not open to any inquiry, subject of course, to the constitutional requirements with respect to the obligation of contracts, vested rights and due process of law. With like limitations, additional requirements, conditions and restrictions may be imposed upon foreign corporations already licensed to do business within the state. 14A C.J. p.1247, Section 3948; also 60 A.L.R. 1170, 49 A.L.R. 747, Southern Railroad Co. v. Greene, 216 U.S. 400, 54 L. Ed. 436, 3 S.C. R. 147 reversing 160 Ala. 396, Louisville and N. R. Co. v. Gaston, 216 U.S. 418, Baltic Min. Co. v. Mass 231 U.S. 68, confirming 207 Mass. 381, and 212 Mass. 35, also Cas. 1913 C. 803, Marconi Wireless Telegraph Co. v. Commonwealth, 218 Mass. 558, 106 N.E. 310 and Cas. 1916 C. 214, State ex rel. Young v. Standard Oil Co., 111 Minn. 85, 94.

The statute in question must stand, the Minnesota Foreign Corporation Act, unless it is plainly in conflict with some constitutional provision, and if there is doubt as to its constitutionality the doubt must be resolved in favor of the legislature. 14A C.J. p. 1148, Section 3949.

An examination of the Minnesota Foreign Corporation Act reveals nothing discriminatory as applied to foreign business corporations in comparison with similar requirements of domestic corporations.

If effect is to be given to 22(b) the corporation's license terminated March 1, 1936, by operation of the words of the statute. This being true, Section 2 of the act which provides in part:

> "No foreign corporation whose certificate of authority shall have been revoked or cancelled pursuant to the provisions of this act shall be entitled to obtain a certificate of authority except in accordance with the provisions of Section 19 of this act."

Section 19 of the act provides that:

> "Any foreign corporation whose certificate of authority to do business in this state shall have been revoked or cancelled may file with the secretary of state an application for reinstatement."

and Subdivision (b) of Section 19 provides that:

> "If the certificate of authority was revoked by the secretary of state pursuant to section 17 of this act, the corporation shall pay to the state treasurer $100.00 before it may be reinstated."

It appears from the statement of facts that the foreign corporation under consideration failed to requalify and to pay the fees required by Section 22 (c) and that it failed to pay the annual report fee and perhaps other items not mentioned.

Section 17 of the act provides:

> "(a). The certificate of authority of a foreign corporation to transact business in this state shall be revoked by the secretary of state if it fails:

(1) To pay any fee due under the provisions of this act";

It is obvious that the corporation's license to do business in the state existing on the effective date of the Minnesota Foreign Corporation Act, March 1, 1936, was then terminated by operation of law and that the secretary of state was relieved of the duty of revoking the license as provided for in Section 17. We are of the opinion however, that the corporation is obligated to pay the reinstatement fee provided for in Section 19(b), together with such other fees as the act provides for.

The Attorney General has not instituted an action against this corporation under the provisions of either Section 18 or Section 20(c) and therefore the penalties provided by these sections are inapplicable. Section 19(c) provides that:

> "If the certificate of authority was cancelled by a judgment pursuant to Section 18 of this act, the corporation shall pay to the state treasurer $500.00 before it may be reinstated."

In the instant case no judgment has been procured. It is likewise true that the Attorney General has not instituted proceedings for the collection of the penalties provided in Section 20(c) wherein it is stated:

> "Any foreign corporation which transacts business in this state without a certificate of authority shall forfeit and pay to this state a penalty not exceeding $1,000.00 and an additional penalty not exceeding $100.00 for each month or fraction thereof during which it shall continue to transact business in this state without a certificate of authority therefor. Such penalties may be recovered in the district court of any county in which such foreign corporation has done business or has property or has a place of business, by an action in the name of the state brought by the attorney general."

An examination of the preceding quoted section reveals that the penalty stated therein shall not exceed $1,000.00 and the additional penalty shall not exceed $100.00 for each month, which amounts, if any, are recoverable only in an action at law brought for that purpose, and presumably can be fixed as to exactness and become a liquidated definite amount only upon a judgment of the court. These penalties have not been determined or definitely fixed.

In conclusion therefore, it is our opinion that this certain corporation is not subject at this time, for the purpose of applying for a certificate of authority to do business in this state, to the penalties which have not been determined, fixed or liquidated by a proper tribunal as provided in the provisions of said Section 20(c), and therefore your question must be answered in the negative.

FRANK H. OSTERLIND,
Assistant Attorney General.

January 28, 1937. 92c

117

COUNTIES—Board—Committee meetings—Per diem and mileage.

Mr. L. A. Wilson, County Attorney.

You state that by reason of problems arising because of present economic conditions there has been much additional work required to be done by committees of the county board.

You inquire:

> "Is there any limitation as to the amount that may be allowed for committee work and mileage? I am assuming, of course, that such committee work is necessary and duly authorized and my inquiry is as to whether there is any maximum total over which the individual commissioners, or the board as a whole, may not go."

Section 657, Mason's Minnesota Statutes of 1927, to which you refer, provides as follows:

> "The several members of the county boards of this state in counties containing less than seventy-five thousand inhabitants shall receive three dollars per day for each and every day necessarily occupied in the discharge of their official duties while acting on any committee under the direction of the board, and ten cents per mile each way for every mile necessarily traveled in attending such committee work, and shall also be entitled to mileage of ten cents per mile each way for every mile necessarily traveled for attending meetings of the board, not to exceed twelve meetings in any one year; and in addition, the chairman of the county board shall receive ten cents per mile each way for going to the county seat to sign warrants during recess of the county board."

Said section does not limit the number of committee meetings for which such per diem and mileage may be paid, and we are of the opinion that said per diem and mileage payable to individual members of the board acting as a committee under the direction of the county board is not limited to any particular number of committee meetings.

On the other hand, this office has held that the county board is without authority to appoint its entire membership as a "committee" and we are of the opinion that when the "board as a whole" meets the number of such meetings for which such per diem and mileage may be paid to said board members may not exceed twelve meetings in any one year, except in cases where the board as a whole meets to perform duties for which the statutes provide compensation in addition to that provided for under Section 657.

You also refer to Chapter 386, Laws of 1935, which requires the county board to classify and appraise lands forfeited to the state for unpaid taxes, and particularly to Section 9 thereof, which provides that said board may be paid, out of the Forfeited Tax Sale Fund, $3.00 per day as compensation for their services and mileage as now fixed by law.

You inquire:

"Are their services under this law to be classified as committee work, as contemplated by said Section 657, Mason's Minnesota Statutes of 1927, and charged against them as such? If not, how should the same be shown and reported in their statements of fees and emoluments?"

If the members of the county board, in performing their duties under Chapter 386, act on a committee under the direction of the county board, we believe that such services may be classified as committee work within the meaning of the provisions of said Section 657.

On the other hand, we are of the opinion that if the whole board meets to perform any duty required to be performed under said Chapter 386, their services should not be classified as such committee work.

Although, as above stated, we do not believe that the services performed by the whole board, under said Chapter 386, should be classified as "committee work" within the meaning of said Section 657, we are of the opinion that in such cases the members of the board are entitled to the $3.00 per diem and mileage as provided under said Chapter 386, in addition to the compensation provided for under said Section 657.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

April 20, 1938. 124a

118

COUNTIES—Board—Majority vote to transact business.

Mr. Harry E. Burns, County Attorney.

Your letter to Attorney General William S. Ervin, under date of July 13, 1937, has been referred to the undersigned for reply.

Therein you state that "at a recent meeting of the board of county commissioners, one of whom is a chairman, a matter was put to the commissioners for vote by the chairman"; and that "two voted yes on the proposition, one voted no and the other one did nothing."

You state and inquire:

"While the writer feels that the majority did not vote for the matter, under our statutes, we would like to have an expression of your opinion on the matter."

The controlling statutory provision, Section 658, Mason's Minnesota Statutes of 1927, so far as pertinent, reads as follows:

"The board shall meet at the county seat for the transaction of business on the first Tuesday after the first Monday in January, and on the second Monday in July in each year, and shall hold such extra

sessions as it deems necessary for the interests of the county. A majority shall constitute a quorum, and **no business shall be done unless voted for by a majority of the whole board,** but less than a majority may adjourn."

The rule is well established that when a statute requires the vote of a majority of the whole board or prescribed proportion of "all the members elected" to the board or governing body for the purpose of passing a resolution or transacting other similar business or uses other language evincing an intention to depart from the common law rule that the majority of a quorum present is sufficient, a majority of the members present, which is less than a majority of the whole body, is not sufficient, and a majority of the entire board or council must concur in voting upon the proposition before it. Dillon on Municipal Corporations, Fifth Edition, Section 530, page 860; McQuillin on Municipal Corporations, Second Edition, Section 626, page 437; 19 Ruling Case Law, Section 190, page 890.

The Supreme Court of Minnesota seems to have modified the above rule to the extent that where there is a vacancy in the board or council resulting from resignation or death the vacant membership need not be included in determining a majority of the prescribed proportion of the members of the council or board. See State ex rel. Peterson v. Hoppe, 194 Minn. 186. However, under the facts outlined in your letter we believe that the rule above stated is controlling in determining the number of votes required for the transaction of business by the county board pursuant to said Section 658. In other words, since said Section 658 specifically provides that "no business shall be done unless voted for by a majority of the whole board," the vote of a lesser number than so specified in the statute is insufficient.

Answering your specific inquiry, therefore, we believe that you are quite right in your conclusion that a majority of the whole board did not vote for the proposition outlined in your letter within the meaning of said Section 658.

DAVID J. ERICKSON,
Deputy Attorney General.

July 29, 1937. 125a-14

119

COUNTIES—Board—Resolutions—Designating road—Right of board to repeal such resolution.

Mr. B. M. Heinzen, County Attorney.

Confirming our telegram to you under date of September 13 and in reply to your letter of September 14, assuming that the county board had the power in the first instance to adopt the resolution of July 14, 1937, we do not believe there is any question but that the board in the exercise of its legislative function may rescind said resolution and adopt a new one so long as no vested rights are thereby interfered with. That is, the county board,

the legislative body of the county, in adopting said resolution was exercising its legislative function. In repealing said resolution it will also be acting in its legislative capacity.

Every intendment is to be indulged in and all doubts resolved in favor of the validity of the board's action. The legislative determination by the board of the facts which warrant its action in so repealing or rescinding said resolution will not be set aside or disregarded by the courts unless its discretion is clearly and palpably wrong.

The general rule as to the right of a governing body of a municipality, such as the county board, to repeal or rescind a resolution or ordinance is stated in 19 R. C. L., Section 200, pages 900-901, as follows:

> "A municipal council has the right to reconsider its actions and adopt an ordinance or **measure** that has previously been defeated or rescind one that has previously been adopted at any time before the rights of third parties have vested. * * * A municipal council which has been granted the power to enact ordinances has, **as an incident thereto** and without any express reference thereto in the statutes, power to repeal ordinances. * * * A municipal council cannot if it would enact an irrepealable ordinance of a continuing nature, or in any way diminish the **legislative powers granted to it by statute.** The fact that the repeal of an ordinance cannot ordinarily be made to affect vested rights or contractual obligations is sometimes spoken of as a restriction on the power to repeal ordinances. It seems, however, that this restriction relates merely to the effect of the repeal. It is not that a city lacks power to repeal any of its ordinances, but that to the extent that the repeal affects vested rights or contractual obligations it may be inoperative."

In McQuillin on Municipal Corporations (2nd ed.), Vol. 2, Section 643, page 477, the rule is stated as follows:

> "And there being no question of the enforcement of any contract with outside parties, it is clear that a council can rescind a resolution passed by a former council for the installation of certain public improvements, * * *."

See also Dillon on Municipal Corporations (5th ed.), Vol. 2, Section 539, page 871.

To the effect that legislative acts as distinguished from contracts do not tie the hands of succeeding legislative bodies, see Cooper, Wells & Company v. City of St. Joseph, 232 Mich. 255, 205 N. W. 86; Gale et al. v. Board of Supervisors of Oakland County (Mich. Nov. 21, 1932), 245 N. W. 363. See also the case of Stemmler v. Borough of Madison, 82 N. J. Law 596; 83 Atl. 85, Ann. Cas. 1913D 767, and note in said volume of Ann. Cas. on page 768 on implied power of a governing body to repeal an ordinance or resolution.

The rule of law seems well settled that any action taken by a county board or similar governing body in a matter where the board has discre-

tionary powers may be repealed or rescinded provided vested rights are not thereby interfered with.

We believe, therefore, that your county board in the exercise of its legislative functions may rescind or repeal said resolution and set such proceedings aside so long as no vested rights are thereby interfered with and all parties concerned restored to the same position they were before the adoption of said resolution. Of course, if any agreements have been made or condemnation proceedings completed in connection with the construction of said road, there might be some difficulty in undoing those transactions. However, as indicated, if no further proceedings were had under said resolution other than the adoption of the same and merely a preliminary survey by the county highway engineer, we are of the opinion that the board may rescind or repeal said resolution so long as no vested rights are thereby interfered with.

DAVID J. ERICKSON,
Deputy Attorney General.

October 7, 1937. 377b-2

120

COUNTIES—Bonds—Sale of.

Mr. George L. Angstman, County Attorney.

You state that the county board of your county recently issued bonds under the provisions of Chapter 120, Laws of 1933.

You further state that the bonds were sold in accordance with the provisions of Chapter 121, Laws of 1935, which act authorizes the governing body of any municipality to issue its bonds by popular subscription upon notice of sale being published "at least ten days prior to such public sale."

You direct our attention to the provisions of said Chapter 120, Laws of 1933, which provide that the sale of bonds issued thereunder shall be made "in the manner prescribed by Section 1943, Mason's Minnesota Statutes of 1927."

You inquire:

> "I would like your opinion as to whether or not this sale of these bonds made in accordance with Chapter 121 of the 1935 Laws is legal, or must there be a two-weeks published notice in accordance with Chapter 1943 of Mason's 1927 Statutes."

Section 3 of said Chapter 120, Laws of 1933, provides that upon certification by the Governor that an emergency exists sufficient to warrant the issuance of such bonds the governing body of the municipality "may then proceed to issue and sell such bonds or other evidence of indebtedness pursuant to the resolution aforesaid and in the manner prescribed by Section 1943, Mason's Minnesota Statutes, 1927."

Section 1943, Mason's Minnesota Statutes 1927, provides that before the bonds of any municipality shall be sold "at least two weeks' published notice shall be given of a meeting of the governing body to open and consider bids therefor."

Section 1 of Chapter 121, Laws of 1935, provides in part as follows:

> "The governing body of any city, village, borough, town, county, or school district * * * is hereby given the power to sell its respective bonds, certificates of indebtedness, warrants, orders, or other forms of evidence of public indebtedness, * * * which sale is otherwise permitted by law, by popular subscriptions, individual sales, according to the terms of a resolution passed by a majority vote of said governing body, * * *. At least one published notice of said public sale shall be given at least ten (10) days prior to said public sale, but a failure to duly publish said notice shall not invalidate the said public sale."

We believe that the provisions of said Chapter 121, Laws of 1935, authorizing the sale of bonds by a municipality by popular subscriptions, apply to the sale of bonds authorized under Chapter 120, Laws of 1933. Said Chapter 121, Laws of 1935, is a later enactment than said Chapter 120, Laws of 1933, and we believe that in so far as the provisions of Chapter 121, Laws of 1935, relating to the manner of the sale of such bonds conflict with the provisions of Chapter 120, Laws of 1933, the provisions of Chapter 121, Laws of 1935, are controlling.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

May 19, 1938. 37a-11

121

COUNTIES—Bridges—Culverts—Roads.

Mr. C. A. Rolloff, County Attorney.

Owing to the fact that several county attorneys inquired about the same subject, and deeming it of extreme importance, the matter was under advisement for some time before an official opinion was released. This original opinion should have been addressed to you because you were the first county attorney to raise the question. Through an oversight the opinion was written to Mr. Franklin E. Ebner, County Attorney of Crow Wing County, whose request was really second in time. For your information and guidance we enclose a copy of that opinion.

You will note that one of the provisions of Chapter 468, Laws of 1937, Section 7, provides in part that "nothing in this act shall apply to ordinary or usual repairs or replacements or any necessary emergency repairs or replacements." Where, as you state, a twenty-foot span bridge has been washed out and needs to be replaced, the question of whether an emergency

exists is one of fact to be determined by the Board of County Commissioners. The act does not seem to contemplate the necessity of an application for a permit or a hearing in relation to ordinary or usual repairs or replacements or to any necessary emergency repairs or replacements. It is conceivable that the immediate restoration of a public highway for public use could constitute an emergency and we believe that the Board of County Commissioners is authorized to act immediately in such an emergency.

FRANK H. OSTERLIND,
Assistant Attorney General.

September 6, 1938. 642a-12

122

COUNTIES—Contracts—Bids—Accepting only bid submitted.

Mr. Franklin E. Ebner, County Attorney.

You state that the county board of the County of Crow Wing advertised for bids for certain electrical material and equipment necessary in the construction of the Crow Wing County highway garage, and that only one bid was submitted in answer to said advertisement.

You further state that "the bids advertised for called for the material the architect deemed necessary and in addition thereto the use of the tools and equipment and supervision by the builder of that installation."

It also appears from your letter that the advertisement for bids was made in all of the local papers as well as in a "builder's magazine," and that the board "has no assurance that by readvertising it can get more than one bid."

You inquire if the provisions of Chapter 416, Laws of 1937 prevent the county board from accepting said bid.

This office, in construing said Chapter 416, Laws of 1937, has held that the provisions thereof requiring more than one bid as a prerequisite to the letting of a contract by a municipality, after advertisement for bids, should not be construed as applying to contracts which include as a part thereof work and labor as well as the necessary materials. In other words, said act applies only to contracts for "supplies and equipment" and when the contract also includes work or labor we do not believe that such a contract can be said to be a contract only for "supplies and equipment."

In your letter you state that in addition to the material, the bids advertised for called for the use of tools and equipment and supervision of the installation of said electrical supplies and equipment.

This being true, we do not believe that a contract for such electrical supplies, which includes as a part thereof, the supervision by the contractor of the installation is such a contract as to require the submission of more

than one bid as a prerequisite to the letting of such contract if, in the judgment of the county board, it is for the best interests of the county to accept the one bid submitted.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

July 12, 1938. 707a-1

123

COUNTIES — Contracts — Bids — Counties must accept or reject bids as received and opened.

Mr. Earl E. Huber, County Attorney.

You state that your county recently advertised for bids for certain construction work within the county; that "the notice of proposal" set forth different independent projects, each project being "one unit in itself"; that when bids were opened one bidder had submitted a bid on each and every project; that said bids were based on "the mileage and the yardage and everything as required in connection with each project," and that on each respective bid it was stated that "the total sum of the various bids added was his bid on the entire letting * * * indicating appropriately that his figures on the respective jobs were tied in on the whole letting as one unit."

You further state that when the bids were opened this particular bid as a whole was not the low bid; that at the letting of the bids the above mentioned bidder offered "to untie" his bids and not require the county to accept his bid on the entire letting, but would permit the county to accept bids on any unit which happened to be low as to that particular unit of work.

You state that the other bidders "'immediately objected" and you request our opinion as to whether the county commissioners may accept the low bids of said bidder on some of the different units of work, or whether the board is required to either accept or reject his bid as offered when the bids were opened.

It appears from the facts as stated in your letter that in his original bid said person was bidding on the combined projects as one unit of work and that he did not have a separate bid in for each of the several projects.

This being true, when the bids on the respective units of work were conditioned on the acceptance by the county of all of said units of work, we do not believe that after the bids have been opened said bidder should be permitted to change the terms and conditions of his bid as originally submitted, and we are of the opinion that such original bid is the only bid upon which the county board has authority to act.

In McQuillin on Municipal Corporations, Vol. 3, Section 1322, we find the following rule stated:

"The bid must be in such form that its acceptance will place a valid obligation on the bidder to enter into a formal contract for the work; **and after a bid has been properly submitted and opened, or after the time for receiving bids has expired, no material change in the terms of the bid can be made.**"

The Illinois Court, in City of Chicago vs. Mohr, 74 N. E. 1056, in holding that a bidder should not be permitted to make material changes in the terms and conditions of his original bid said:

"In State vs. Board of Commissioners, 11 Nebr. 484; 9 N. W. 691; Beaver vs. Trustees, 19 Oh. St. 97, and Boren vs. Commissioners, 21 Oh. St. 311, the question of the effect of permitting material changes to be made in the terms and conditions of sealed bids after the bids had been opened was considered and condemned as violative of correct principles of law, and as rendering the bids invalid. The principle declared in all of these cases is that the board or body who are empowered to open the sealed bids and award the contract had power, under the law, to accept or reject the bids as submitted and sealed, but that they had no power, after the bids were opened, to permit material amendments or changes to be made in the terms or conditions of the bids; that the only proposals or bids which the law could recognize were those which were made, sealed and filed within the time limited in the advertisements calling for bids."

In Fairbanks, Morse and Company vs. City of North Bend, 94 N. W. 537 (Nebr.), we find the following statement of the rule that a bidder may not alter his bid after it has been submitted:

"In the present case, the notice required the bids to be filed by 7 o'clock of June 8, 1899. Every bidder had a right to presume that no bids would be received after that time. The plaintiff's bid, which had been filed within that time, was never accepted as made; the bid that was accepted was that bid as materially changed, and modified by the supplemental bid filed on the 9th day of June and after the time fixed by the notice for receiving bids. Under such circumstances, the bid which was accepted can be regarded in no other light than as a new bid, and as one made after all other competitors, by the terms of the notice, had been given to understand that further bids would not be received. The bidders, consequently, were not on equal terms, and were not bidding on the same proposition, as will be seen by a comparison of the original bid and the supplemental bid with the notice."

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

May 11, 1938. 707a-10

124

COUNTIES—Contracts—Bids—Failure to comply with statute.

Mr. Thomas H. Quinn, County Attorney.

You state that a certain contractor entered into an arrangement with one of the county commissioners and the county highway engineer whereby said contractor "did a $1,300.00 job," without advertising for bids.

You inquire:

> "Providing the price charged was reasonable, do you believe that the County is bound to pay the same?"

Generally speaking, we may say that a contract for the construction or repair of roads or bridges by the county in excess of $500 without advertising for bids is void. Where a statute such as Section 991, Mason's Minnesota Statutes of 1927, provides that no contract for the construction or repair of roads, bridges or buildings, the estimated cost or value of which shall exceed five hundred dollars, shall be made by the county board without first advertising for bids or proposals, such advertisements or notice must be given, and any contract let in the absence thereof is void and no recovery can be had thereunder. However, if the person with whom such a contract was made, provided the same was entered into by such person in good faith and the contract was not ultra vires, performs his part of the contract, it is our opinion that he would be entitled to recover from the county the reasonable value of the work or labor or for the construction or repair of county roads or bridges so furnished. Under such circumstances he would in good faith furnish the municipality with certain public benefits. The county would receive the benefits thereof and should pay therefor. Warrants issued to such person by the proper county officers in payment for such benefits would be valid, enforceable obligations of the county. As said by the court in Wakely v. County of St. Louis, 184 Minn. 613, the rule as laid down in the cases is that where a municipal corporation receives money or property of another under and pursuant to a contract upon a subject within its corporate powers, and the contract was made and carried out in good faith and without purpose or intent to violate or evade the law, but is invalid because not entered into or ratified by the officers of the corporation having power to contract, **or for some other failure to comply with statutory requirements,** and money or property so received is retained by the corporation and devoted to a legitimate corporate purpose, resulting in benefits to the corporation, the one so furnishing the money or property may recover in quasi contract to the extent of the benefits received by the corporation." See also Farmer v. City of St. Paul, 65 Minn. 176; State ex rel. Morris v. Clark, 116 Minn. 500; First National Bank v. Village of Goodhue, 120 Minn. 362; Laird Norton Yards v. City of Rochester, 117 Minn. 114.

DAVID J. ERICKSON,
Deputy Attorney General.

August 17, 1937. 707a-7

125

COUNTIES—Courthouse—Remodelling—Cost of.

Mr. C. J. Donnelly, County Attorney.

You state that the board of county commissioners of Lyon County has determined that it is advisable to build an addition to the present courthouse in order to provide proper fireproof vaults for the offices of the county auditor and register of deeds and other needed office space. You further state that the county plans to make an application for a P.W.A. grant and pay the sponsor's or county's share of the cost of said improvement out of the general revenue fund of the county. You state that although there are no funds on hand in the county treasury specifically levied for courthouse purposes, the county auditor is of the opinion that there will be sufficient funds in the general revenue fund to pay the county's portion of making said improvement "and that funds will be available to take care of other expenses of the county without the issuance of bonds."

You request an opinion of this office "as to whether or not the board of county commissioners can proceed and whether they can pay their portion thereof out of the general revenue fund."

Section 643, Mason's Minnesota Statutes of 1927, provides as follows:

> "Each county shall provide at the county seat, and keep in good repair, a suitable courthouse, supplied with fireproof vaults, a suitable and sufficient jail, and other necessary buildings."

Subdivision 3 of Section 668, Mason's Minnesota Statutes of 1927, authorizes the county board "to erect, furnish, and maintain a suitable courthouse and jail."

This office has held that under the above referred to statutory provisions the county board is authorized to reconstruct or make additions to the courthouse building without issuing bonds therefor when there are sufficient funds available in the treasury or from taxes already levied and in the process of collection.

It has also been the holding of this office that taxes levied under Section 2060, Mason's Minnesota Statutes of 1927, as amended, for general revenue purposes may be used by the county board in constructing or repairing the courthouse of the county. In other words, such levy may be used for general county purposes, including the making of additions or repairs to the courthouse building.

We are, therefore, of the opinion that where there are sufficient funds in the general revenue fund of the county to pay the county's portion of the cost of building such addition to the courthouse, over and above moneys "available to take care of other expenses of the county," the county board may use such funds in the general revenue fund to pay its share of the cost of making said improvement.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

August 29, 1938. 125a-20

126

COUNTIES—Depositories—Collateral securities—Federal Housing mortgages.

Mr. Ed. J. Goff, County Attorney.

You direct attention to Chapter 49, Laws of 1935, as amended by Chapter 88, Laws of 1937, and inquire:

> "Are so-called Federal Housing mortgages, insured under title 2 Section 2 of the Act of Congress entitled 'National Housing Act' approved June 27, 1934 and acts amendatory thereto, eligible as collateral to secure the deposit of public funds under the provisions of Section 1973-1 Mason's Minnesota Statutes of 1927?"

Section 1973-1 as it read prior to its amendment by Chapter 41, Laws of 1933, authorized designated depositories of county, city, village, borough or school district funds to deposit securities in lieu of furnishing bonds and to accept bonds, certificates, 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." This section as amended by said Chapter 41, Laws of 1933, authorized such designated depositories to pledge "notes secured by first mortgages of future maturity * * * on improved real estate * * * within the county wherein said bank or trust company is located, or within counties immediately adjoining such county in the State of Minnesota."

This last quoted provision of said Chapter 41 was inserted by the 1933 legislature without expressly repealing the preceding clause hereinabove quoted. However, this office has heretofore held that the 1933 amendment above quoted was intended to modify the prohibition contained in said Section 1973-1 as it existed prior to said 1933 amendment. It will also be noted that said Section 1973-1 as amended by said Chapter 41 authorizes such municipalities to accept "legally authorized investments for savings banks." We do not believe, therefore, that there can be any question but that the legislature intended to remove the inhibition originally expressed by the language "except bonds secured by real estate," especially when considered in the broader sense of the terms of the act with reference to investments which are lawful for savings banks, being acceptable in lieu of bonds.

Chapter 49, Laws of 1935, as amended by Chapter 88, Laws of 1937, authorizes banks, savings banks, mutual savings banks, building and loan associations and savings and loan associations, trust companies, trust companies acting as fiduciaries, and other banking institutions subject to the supervision of the commissioner of banks.

> "(a) To make such loans and advances of credit and purchases of obligations representing loans and advances of credit as are insured **by the Federal Housing Administrator**, and to obtain such insurance.
>
> "(b) To make such loans secured by mortgages on real property **which the Federal Housing Administrator has insured or made a commitment to insure** and to obtain such insurance."

Section 2 of the act further provides that all of the prohibitive and restrictive general statutes of the state prescribing the nature, amount, form of security, interest rates, or time for which such loans and advances of credit are made, shall not apply to loans or advances of credit or purchases made pursuant to paragraphs (a) and (b). Subdivision (a) of said Section 2 provides that such institutions may invest in notes or bonds secured by mortgage or trust deed insured pursuant to Section 1 (b) and in securities issued by "National Morgage Associations."

Subdivision (b) of said Chapter 88 provides:

> "(b) The notes, bonds and other securities herein made eligible for investment may be used **wherever, by statute, collateral is required as security for the deposit of public or other funds**; * * *."

Answering your specific inquiry we are of the opinion that "Federal Housing Mortgages" which the Federal Housing Administrator has insured or made a commitment to insure are eligible as collateral to secure the deposit of public funds under the provisions of Section 1973-1 of Mason's Minnesota Statutes of 1927.

DAVID J. ERICKSON,
Deputy Attorney General.

May 11, 1937. 140f

127

COUNTIES—Ditches—Repair and improvement of ditch lying in more than one county—Procedure.

Mr. Warren P. Adams, County Attorney.

You state that a judicial drainage system is located partly in Jackson County and partly in Martin County; that the same is not functioning properly and many of the owners affected by the same are anxious to have it repaired. You further state that the cost of repairing the same will probably not exceed thirty per cent of the cost of the original construction, although it will run into several thousand dollars.

You inquire as to whether a petition should be filed with the Clerk of the District Court where the original proceedings establishing said ditch were instituted.

In considering the statutory provisions relating to the repair and improvement of a judicial drainage system affecting two or more counties, where the cost of the repairs or improvements exceeds $500 but does not exceed thirty per cent of the original cost, this office has held that a petition should be filed under Section 6840-54, Mason's Minnesota Statutes of 1927, with the clerk of the district court where the original petition was filed, and that notice should be given and a preliminary hearing held in the same manner as upon the original construction of the ditch.

You also inquire whether the county attorney may represent the petitioners.

Your attention is directed to Section 6840-74, Subdivision h, which provides, in part, as follows:

> "In all drainage proceedings where any county is directly interested, the county attorney thereof shall represent the county. No county attorney or his assistants or any attorney associated with him in business shall otherwise appear in any drainage proceedings for any person or party whatsoever interested therein."

This office has construed the above statutory provisions as prohibiting the county attorney from representing private individuals in county drainage proceedings irrespective of whether the county has any interest in such proceedings.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

August 10, 1938. 602j

128

COUNTIES—Ditches—Repairs to.

Mr. Russell L. Frazee, County Attorney.

You state that Renville County has an extensive county ditch system and as a part of such drainage system there are certain laterals branching off from the main ditch which laterals run "up through fields of the various farmers into low areas for the purpose of draining these areas and carrying the water down into the main ditch."

You further state that "there has been considerable demand by various individuals upon the county board of Renville County in an attempt to get the county board to build tile inlets or surface catch-basins along these laterals so as to quickly drain the water into these lateral ditches in low areas."

You inquire whether the county board has authority, "when it feels that necessity demands," to construct such tile inlets or catch-basins.

Section 6840-53, Mason's Minnesota Statutes of 1927, authorizes the county board to keep such a drainage ditch in proper repair "so as to answer its purpose."

This office has held that "proper repair" as used in the above referred to section of the statutes should be interpreted to mean a state of repair which will result in carrying away the surplus water in the drainage district, and that the authority to repair such a ditch should be construed to include repairs necessary to increase the capacity of the same so that it may answer its original purpose of draining the land affected by such drainage system.

We are, therefore, of the opinion that the county board of Yellow Medicine County has the authority "when it feels that necessity demands" to repair said drainage system by constructing such tile inlets or catch-basins, in order that the drainage system will properly drain the lands within said drainage district.

This office has laid down the following rules with respect to the payment of the cost of making such repairs:

1. In a case in which there is money in the general ditch fund standing to the credit of the ditch requiring the repairs, sufficient to pay the cost of such repairs, the board or the court may proceed on its own motion to cause such repairs to be made and paid for out of the ditch fund. If the cost does not exceed $500, the board or court may proceed without the formality of a contract.

2. Where the proceeding contemplates an assessment against property benefitted there must be a petition signed by one or more owners of land to be assessed for the improvement, together with a bond conditioned in accordance with the general requirement.

3. If the cost of the proposed improvement exceeds thirty per cent of the original cost of the ditch, then the petition must be signed by "a majority of the property owners owning fifty-one per cent of the property to be affected thereby."

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

August 9, 1938. 602j

129

COUNTIES—Gasoline tax.

Mr. A. C. Richardson, County Attorney.

You direct our attention to the provisions of Chapter 283, Laws 1929 as amended by Chapter 366, Laws 1937, relating to the use of moneys accruing from taxes imposed on the use of gasoline and particularly to Section 2 of said Chapter 366, which provides in part as follows:

"Such moneys allotted to towns shall be expended for construction and maintenance of the town roads within the respective towns under the supervision of the Town Board or an appointee of the Town Board **or may be expended under the supervision and according to plans and specifications of the County Highway Engineer if requested by the Town Board, who, in such case, shall act in a supervisory capacity** as directed by the Town Boards in the construction or maintenance of such roads within such town as shall be specified by such Town Board, * * *."

You state that under the provisions of said Chapter 366 the county board has allotted to the various townships of Mower County fifty per cent of the gasoline tax moneys apportioned to the county.

You further state that some of the town boards are now calling upon the county engineer "for the surveying and the preparation of plans and specifications for town roads upon which this gas tax money allotted to the townships will be expended."

You inquire:

(1) "If the town boards request the county highway engineer to prepare plans and specifications and do the necessary engineering work preparatory to getting out such plans and specifications, must the highway engineer do this work? In other words, is it mandatory upon the county highway engineer to prepare such plans and specifications for town roads under this act? Need he have the approval of the county board?"

We are of the opinion that the moneys so allotted to the towns as provided under said Chapter 366 may, at the option of the town board, be expended under the supervision of either the town board or an appointee of said board, or under the supervision of the County Highway Engineer, but if the town board requests the County Highway Engineer to supervise said construction "according to the plans and specifications of the County Highway Engineer," we believe that it then becomes mandatory upon the County Highway Engineer to prepare said plans and specifications. We do not believe that said Chapter 283, Laws 1929 as amended, requires the county board's approval of such plans and specifications of the County Highway Engineer. Section 2 of Chapter 366, Laws 1937, places the construction of such roads under the supervision of the town board and we do not believe that the county board has any further control over the expenditure of gasoline tax moneys after the same have been allotted to the various townships.

(2) "Is it permissible if the work is done by the county highway engineer or his assistants that the towns be charged the necessary engineering expense and the cost of preparing plans and specifications and supervising the work?"

Said Chapter 283, Laws 1929, as amended, makes no provision for payment by the townships of such engineering expenses or the cost of preparing plans and specifications. It is discretionary with the county board whether any of such moneys shall be allotted to the various townships. If the county board should determine to expend all of said moneys on county aid roads instead of allotting part of said moneys to the townships to be used in constructing and maintaining town roads, the engineering expenses and the cost of preparing plans and specifications for such county aid roads would necessarily fall on the county, and it would be the duty of the County Highway Engineer to prepare plans and specifications and supervise the construction of such county aid roads. By allotting part of said moneys to the various townships, no greater expense is imposed on the county or the

County Highway Engineer than would be the case were all of said moneys expended in constructing and maintaining county aid roads.

In the absence of a statutory provision making such expenses a charge against the various townships, we are of the opinion that said townships may not be charged with the necessary engineering expenses and the cost of preparing such plans and specifications.

(3) "If the towns can be charged for this expense, should the towns be billed directly or should the county in the first instance pay this cost and then bill the towns for this expense?"

In view of what we have said in answer to your second inquiry, it is unnecessary to answer your third question.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

June 6, 1938. 122b-5

130

COUNTIES—Hospitals—Minnesota General—Responsibility of county.

Mr. Roy A. Hendrickson, County Attorney.

You state that Kandiyohi County is operating under the township system of caring for the poor and pursuant to the provisions of Chapter 343, Laws 1937, a county welfare board has been established in said county. You further state that there has been submitted to the county board "form No. 206 4-38-XM of the U. of M. Hospitals, wherein application is made to the University Hospital by the County Board of Commissioners on behalf of a patient who is not necessarily in need of hospital treatment but is to be sent for clinical observation and treatment."

You inquire whether such clinical observation and treatment is an obligation of the "township, of the county board, or of the Kandiyohi county public welfare board."

Section 4578, Mason's Minnesota Statutes of 1927, provides, in part, as follows:

"Said Minnesota General Hospital shall be primarily and principally designed for the care of legal residents of Minnesota who are afflicted with a malady, deformity, or ailment of a nature which can probably be remedied by hospital service and treatment and who are unable, financially, to secure such care * * *."

We believe that "clinical observation and treatment" is "hospital service and treatment" within the meaning of the above quoted statutory provisions. It has been the holding of this office that the so-called poor relief statutes are not applicable and do not govern the question of a person's eligibility to receive hospital service and treatment in the Minnesota General

Hospital, and that responsibility for the payment of costs in connection with such hospital service and treatment rests with the county board and not with the county welfare board or the municipality in which a person receiving such treatment has his place of settlement.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

May 19, 1938. 1001c

131

COUNTIES—Hospitals—Minnesota General and other hospitals—Right of admission to.

Mr. H. O. Berve, County Attorney.

Your letter to Attorney General William S. Ervin, under date of February 25th, has been referred to the undersigned for attention.

Therein you state that Pennington County is operating under the town system of poor relief. You direct attention to the case of Village of Robbinsdale v. County of Hennepin, handed down by the Supreme Court on February 13, 1937, and inquire:

> **"First:** In view of the above entitled case, may the county continue to send and pay for the care of poor patients at the University Hospital? This has been done for some considerable time by all counties under the provisions of Section 4577 to 4585, as amended by Chapter 431, of the Laws of 1927.
>
> **"Second:** In view of the above case, may the county now pay for the hospitalization of poor patients under Chapter 359 of the Laws of Minnesota for 1935?
>
> **"Third:** May the county continue to pay for part or all of the expenses of various National Reemployment offices, and WPA offices, etc. Pennington County has been paying a part of the office expenses of the National Re-employment office here."

Your first two questions are answered in the affirmative and may be conveniently considered together. This office has uniformly held over a period of years that the so-called poor relief statutes do not govern or control the right of a person to be admitted to the Minnesota General Hospital under said Sections 4577 to 4585 of Mason's Statutes of 1927, as amended by Chapter 431 of the Laws of 1927.

We have also heretofore held that said Chapter 359, Laws of 1935, was evidently enacted as supplementary to said Sections 4577 to 4585; that is, said Chapter 359 seems to have been enacted for the purpose of giving any county electing to take advantage of the provisions thereof the option of sending persons in need of treatment to the hospital referred to in said act

or to the Minnesota General Hospital. We have also heretofore held that the provisions of said act are as applicable to counties operating under the town system of poor relief as to those operating under the county system; and that the same rules that govern with reference to the right of admission to the Minnesota General Hospital are also applicable with reference to the right of a person to be admitted to a hospital pursuant to the provisions of said Chapter 359, and that the same responsibility for taking care of hospitalization cases exists whether a county operates under the county or town system of poor relief. In view of the fact, therefore, that the so-called poor relief statutes do not govern or control the right of persons to be admitted, either to the Minnesota General Hospital or to hospitals provided for under said Chapter 359, we are of the opinion that your county may continue to send and pay for the care of poor patients at such hospitals pursuant to the above referred to statutory provisions.

In answer to your third question, we have heretofore held that a county board in a county operating under the town system may incur such incidental expenses if it finds that it is necessary to do so in order to render relief to needy and destitute persons in cooperation with state and federal agencies. A great many of the counties throughout the state have been and are incurring and paying such incidental expenses in connection with the carrying on of direct relief and work relief in order to derive benefits from federal and state funds. The legislative policy of the state with reference to the right of counties and other municipalities to cooperate with federal and state agencies in carrying on direct and work relief is evidenced by Chapter 125, Laws of 1935 and Chapter 101, Special Session Laws of 1935-36. The Robbinsdale case did not involve the right of a county operating under the town system to cooperate with the federal or state government in carrying on either direct or work relief for the benefit of needy and destitute people, nor the right of a county to expend funds incident to carrying on such relief projects in cooperation with such agencies.

DAVID J. ERICKSON,
Deputy Attorney General.

March 9, 1937. 1001c

132

COUNTIES—Lakes—Restoration of level of—WPA project.

Mr. A. D. Anderson, County Attorney.

You state that your county board has been requested to sponsor a Works Progress Administration project for the purpose of restoring the water level of Beaver Lake lying wholly within Steele County which will obligate the county to pay $900 toward the cost of materials.

You inquire whether the county may expend in any one year an amount exceeding $300 for such purpose by reason of the inhibitions of Section 751,

Mason's Minnesota Statutes of 1927. Section 751 relates to restoration of lakes situated in a single county by the county board.

We are informed by the Director of the Division of Drainage and Waters of the Department of Conservation of the State of Minnesota that the project referred to is one in which the Conservation Department is interested and that it will be established and developed pursuant to the provisions of Chapter 369, Laws of 1935, as amended by Chapter 96, Laws of 1937. The last sentence of Section 18 of Chapter 369, Laws 1935, as amended by Section 1 of Chapter 96, Laws of 1937, provides:

> "The boards of county commissioners may appropriate money to purchase such materials and supplies and to rent such equipment as may be necessary for the construction of dams, dykes and other works under the provisions of this act, and also on projects sponsored by the conservation department to be constructed by the several state and federal relief agencies."

We believe that the authority granted by said Section 18 is an adequate additional grant of power to your county board to appropriate money for the purposes of the act, said Chapter 369, Laws 1935, for the purchase of such materials and supplies and to rent such equipment as may be necessary for the construction of the project.

Your attention is directed to the provisions of Chapter 125, Laws of 1935, whereby every municipality is authorized to make contracts and execute instruments, sell bonds, issue certificates of indebtedness and do all acts and things necessary to carry out the powers vested in them by the act, which powers are supplemental to powers conferred by any other law. This act is an emergency act and has been extended to December 31, 1939, as provided in Chapter 328, Laws 1937.

It is, therefore, our opinion that your county has authority to raise the necessary funds to participate in the stated project.

FRANK H. OSTERLIND,
Assistant Attorney General.

November 20, 1937. 273a-23

133

COUNTIES—Officers—Attorney—Collection of fees.

Mr. Emmett Jones, County Attorney.

You ask:

> "Is it necessary for the County Attorney, under Section 933, Mason's Minnesota Statutes, 1927, to include in his Report, and turn over to the County Treasurer, any fees collected under Section 2214, Mason's Minnesota Statutes, 1927?"

It is my opinion that your questions should be, and they are, answered in the affirmative.

The fee of $5.00, provided for in said Section 2214 is "moneys received by him . . . by virtue of his office" and as such is clearly within the purview of said Section 933.

HARRY W. OEHLER,
Assistant Attorney General.

January 22, 1937. 779n

134

COUNTIES—Officers—Attorney—Expenses.

Mr. James A. Garrity, County Attorney.

You ask whether the necessary expenses incurred by a county attorney in the attendance of the annual and semiannual meetings of the County Attorneys Association constitute a legal claim against the county attorney's contingent fund.

We are of the opinion that your question should be, and it is, answered in the affirmative.

The County Attorneys Association was organized for the purpose of permitting the various county attorneys of the state to gather at regular intervals to discuss the various problems confronting them in the performance of their official duties. At such meetings appear various state officials whose duty it is to assist and advise the county attorneys. Such meetings result in definite benefits to the counties represented. The writer of this opinion has attended such meetings for the past eight years and is fully aware of the importance of such an association and the practical value thereof to the several county attorneys. The county attorney is the legal adviser of the officers of his county. Many problems arise that cannot be answered without further investigation. Many practical problems arise. To obtain information tending to the solution of such problems is one of the duties of the county attorney and the necessary expenses incurred by him constitute a legal claim against the contingent fund. The county attorney's contingent fund is set apart by the county board for the purpose of defraying the 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.**" Mason's Minnesota Statutes of 1927, Section 934. The underscored portion of the above quotation should not be given a narrow, technical meaning, but should be a broad meaning to enable the county attorney to use his discretion as to what he must or should do to further the interests of the county. This view has been sustained for many years past by a number of the district judges of this state and the necessary expenses incurred by county attorneys of the counties of such districts in

the attendance of the meetings of the County Attorneys Association have been allowed from the contingent fund. We are of the opinion that the practice followed by such judges is correct.

ROY C. FRANK,
Assistant Attorney General.

July 29, 1938. 121a-8

135

COUNTIES—Officers—Auditor—Cannot issue duplicate warrant unless bond is posted.

Mr. Arnold W. Brecht, County Attorney.

You state that approximately four years ago the auditor of your county sent a county warrant to a certain school treasurer, who in turn endorsed the warrant and mailed it to a bank for deposit. The warrant was lost and to date has not been found.

You inquire:

> "Will you please advise whether there is any authority for the issuing of a duplicate warrant without the posting of a bond as required by the sections herein quoted, and if there is, how long must the auditor wait in this case before he can issue such duplicate without the necessity of the school district issuing a bond?"

It is our opinion that before your county auditor can legally issue a new warrant a bond must be posted in conformity with the requirements stated in Mason's Minnesota Statutes of 1927, Sections 1058, 1059, 1060 and 1061. Section 1058 provides for the issuance of duplicate warrants in those cases where the original warrant becomes lost or destroyed. The duplicate warrant can only be issued under the regulations and restrictions prescribed by Sections 1059, 1060 and 1061. Section 1060 provides for the posting of an indemnifying bond in such cases. The method set forth is exclusive and must be adhered to before a duplicate warrant can be issued.

ROY C. FRANK,
Assistant Attorney General.

March 28, 1938. 18a

136

COUNTIES—Officers—Bonds—Executive secretary—County welfare board. Department of Public Institutions, State Board of Control.

You state that the Board of Control in considering the matter of qualifications and requirements to be expected from executive secretaries under

the provisions of the act relating to the establishment of county welfare boards, Chapter 343, Laws of 1937, has under consideration the advisability of requiring official fidelity bonds for the faithful performance of the duties pertaining to such offices.

You state that the executive secretaries should be bonded because they handle some cash collections and disbursements that were formerly under the jurisdiction of the county child welfare boards, the duties of which were transferred to the newly created county welfare board by the terms of the welfare board act. The executive secretary is also the disbursing officer for the county welfare board to the extent that he will certify to the county auditor as to payments that should be made to individual recipients of aid in addition to office salaries and expense items.

You further state that the appropriation bill for direct relief purposes requires that all state relief funds be disbursed by the counties through the county welfare boards and that, accordingly, such funds would be under the jurisdiction of the executive secretary.

You inquire whether the state agency may require, as a condition of employment, that the executive secretary give a bond similar to that of any other public officer in the form provided by law. The regulation proposed would provide that the amount of the bond would be determined by the county welfare board due to the variable responsibilities in different counties.

It is conceded from the facts presented that the desirability of securing the fidelity bond of the executive secretary of a county welfare board is not in question.

There is no express language in the act, Chapter 343, Laws of 1937, whereby the legislature has stated that an executive secretary of a county welfare board should give a fidelity bond as a condition to the right to hold the office. There is no express language in the act delegating to the Board of Control the right to require such a bond. Authority, if it exists at all, must be found by implication or read into the law. The subject is one which has always been within the province of the legislature for its determination. The power to create an office, mode of appointment, the term of office, the emoluments, bond and oath of office are concededly legislative. Innumerable statutes have been enacted creating public offices, designating the manner in which they shall be filled, describing the duties and powers, the tenure of office and usually requiring an oath of office and determining the amount of fidelity bond, if one is required. The legislature has in certain instances in the past delegated in express language to another designated agency or officer of the state government the right to require fidelity bonds.

The provision of the county welfare board act relating to the creation of the office of executive secretary is found in Section 4, which provides in part:

> "Said Board shall appoint an Executive Secretary and such assistants and clerical help as it may deem necessary to perform the work of the Board. The appointment of said Executive Secretary shall be made

in accordance with rules and regulations to be adopted by the State Board of Control and shall be chosen upon the basis of his experience, training and general qualifications for the work. His salary shall be fixed by the County Welfare Board * * *."

Appointment and salary are authorized expressly but bonds are not. Your question depends upon whether the language above quoted should be construed to authorize the State Board of Control, as a condition precedent to the right to hold the office, to pass a rule or regulation requiring and directing executive secretaries to give bonds and fixing the amount thereof or delegating to the county board the right to fix the amount. The clause of the section relates expressly to experience, training and general qualifications for the work. We hesitate to so construe the language of this provision. To do so in this instance may be futile for the reason that it is a familiar doctrine of law that a bond or other obligation extorted by a public officer, under color of his office, cannot be enforced.

In an early case, United States v. Tingey, 5 Pet. (U. S.) 114, 8 L. Ed. 66, the treasurer of the United States had required one Deblois, a purser in the Navy, and Tingey, his surety, to give a bond variant and wholly different from that required by law as the condition of Deblois remaining in the office of purser and receiving its emoluments. There was no pretence that the bond had been voluntarily given, or that, though in different form than prescribed by law, it had been received and executed without objection. It was demanded of the party under the peril of losing his office; it was extorted under color of office against requisitions of the statute. The court said:

"It was plainly, then, an illegal bond; for no officer of the government has a right, by color of his office, to require from any subordinate officer, as a condition of holding office, that he should execute a bond with a condition different from that prescribed by law; that would be, not to execute, but to supersede, the requisitions of law."

It is obvious, therefore, that a bond required "colore officii" as a condition precedent to the right to hold office may be illegal, unenforceable and invalid. However, this rule may be, it is also well established that even though there is no statute specially providing for the execution of a bond by the executive secretary of a county welfare board, a voluntary bond taken by authority of the proper officers or board to whom the disbursement of public money is intrusted would, undoubtedly, be a valid and binding contract.

In regard to this principle of law the court in the Tingey case said:

"* * * a question has been made and elaborately argued at the bar, how far a bond, voluntarily given to the United States, and not prescribed by law, is a valid instrument, binding upon the parties in point of law; in other words, whether the United States have, in their political capacity, a right to enter into a contract, or to take a bond, in cases not previously provided for by some law. Upon full consideration of this subject, we are of opinion, that the United States have such a capacity

to enter into contracts. It is, in our opinion, an incident to the general right of sovereignty; and the United States being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers. * * * To adopt a different principle, would be to deny the ordinary rights of sovereignty, not merely to the general government, but even to the state governments, within the proper sphere of their own powers, unless brought into operation by express legislation. A doctrine, to such an extent, is not known to this court as ever having been sanctioned by any judicial tribunal."

The court having stated the general principle held:

"* * * a voluntary bond, taken by authority of the proper officers of the treasury department, to whom the disbursement of public moneys is intrusted, to secure the fidelity in official duties of a receiver or an agent for disbursing of public moneys, is a binding contract between him and his sureties, and the United States; although such bond may not be prescribed or required by any positive law. The right to take such a bond is, in our view, an incident to the duties belonging to such a department; and the United States having a political capacity to take it, we see no objection to its validity in a moral or legal view."

The rule thus laid down was followed with approval in the case of Moses v. United States, 166 U. S. 571, 586, and suggests a solution to your problem. There could be no objection to a resolution by the Board of Control which would provide in substance that it is desirable that the executive secretary of a county welfare board voluntarily give a fidelity bond in the form provided by statute in such amount as may be agreeable to the county welfare board.

In Moses v. United States, supra, the court in defining a voluntary bond, said:

"It is a voluntary bond when it is not demanded by any particular statute or regulation based thereon, and when it is not exacted in violation of any law or valid regulation of a department."

If such a plan be adopted, it is suggested that bonds tendered to and accepted by the county welfare boards be executed substantially in the form set forth in Section 9687, with sureties thereon as provided in either Section 9677, relating to personal sureties, or with corporate surety, as provided in Section 9689; that they be approved by the respective county welfare boards and county attorneys as provided in Section 9694, Subdivision 2, and recorded in the office of the register of deeds as provided in Section 9695, Subdivision 2, and filed with the Secretary of State. All such bonds are thereafter forwarded by the Secretary of State to the Attorney General before final acceptance for deposit. The procedure for action on such bonds as may be submitted and found to be defective is covered by Section 980, et seq. The filing fee may be paid by the county, Section 979.

We also believe it would be advisable to include with the statutory bond an oath of office which is required to be given by every person elected or appointed to any public office pursuant to Section 6963, and in the form prescribed by Section 8 of Article 5 of the Constitution of the state. This latter requirement should also be made of the members of the board.

The matter should be properly presented to the legislature for consideration at its next session.

FRANK H. OSTERLIND,
Assistant Attorney General.

August 25, 1937. 104a-2

137

COUNTIES—Officers—Contracts—County welfare board—Interest in.

State Board of Control, State Office Building.

You direct attention to an opinion rendered to you under date of June 12, 1937, relating to the right of members of the county welfare board to enter into contracts with the county in which such members are interested either directly or indirectly within the purview of Sections 990 and 10305, Mason's Minnesota Statutes of 1927.

You now submit the following additional requests:

> 1. "Whether the spouse of a member of the county welfare board is under the above statutes, prohibited from giving medical care, filling relief orders, or otherwise giving service to an individual recipient of such commodity or service granted by the county welfare board and paid for by funds administered by that board."

It is impossible for us to attempt to lay down a general rule covering every situation that may arise with reference to any interest either directly or indirectly of a member of the county welfare board in county contracts. Each case must be determined as it arises upon its own peculiar facts.

Speaking generally we may say that the law prohibits a member of the county welfare board from being directly or indirectly interested in a contract with the county. It does not forbid the wife of a member of said board from being interested in a contract with the county. It is, of course, always an issue of fact whether or not, under any given circumstances, a member of the county welfare board is or is not interested in a contract with the county. As indicated, the single fact that the wife enters into a contract with the county by way of giving medical care, etc., is not necessarily proof that the husband, as a member of said board, is interested in such contract. Under some circumstances the husband would clearly be interested in the contract made by the wife. For instance, where he received a portion of the compensation paid by the county for the services furnished by the wife. Under other circumstances, for example, where the husband and wife are not living together and the wife does not contribute any por-

tion of the compensation received by her pursuant to such a contract there would seem to be no violation of the law. In the normal situation the only safe rule to follow is to avoid any situation where a violation of the law might be possible. In other words, where the husband and wife are living together it would seem advisable for the wife not to enter into any contract with the county as long as her husband is a member of the county welfare board.

You also inquire:

2. "Whether a member of a county welfare board eligible for old age assistance, aid to dependent children, aid to the blind, direct relief, or other direct benefits administered by the county welfare board may receive such grants or benefits to which he is legally entitled by law and while still a member of the county welfare board."

The above question does not relate to any specific case. As indicated in our answer to your first question, it is impossible for this office to attempt to lay down a general rule covering all situations that may arise with reference to the furnishing of aid or assistance to members of the county welfare board. Each case must be determined and passed upon on its own facts.

Speaking generally and without passing upon your second question, we may say that the same considerations of public policy that prohibit a county officer from being interested either directly or indirectly in a contract with the county would prevent such an officer from accepting a grant to himself out of county funds. Public office or agency entails a natural disability on the part of the officer, reinforced by the gravest considerations of public policy, to contract or deal personally, either directly or indirectly, with his principal concerning matters within his province as such officer or agent, without regard either to the fairness or unfairness of the transaction, or to whether the principal is or is not benefited thereby. Our Supreme Court has said that this rule exists independently of statute, and its force is not lessened nor its scope restricted by statutory declaration thereof. The purpose of the rule is to avoid conflict between the duty of the officer as a public officer and his private or personal interests.

DAVID J. ERICKSON,
Deputy Attorney General.

July 29, 1937. 125a-64

138

COUNTIES—Officers—Coroners—Charges against county by conducting autopsy and having toxicological examination made.

Mr. O. E. Lewis, County Attorney.

You state:

"A resident of this county recently died suddenly. The county coroner decided to perform an autopsy, to determine the cause of the

death. There was no indication that death was caused by violence. The coroner then had a toxicological analysis performed on a portion of the decedent's stomach, to determine whether or not there was any poison to be found.

"The person performing the toxicological analysis has submitted a bill to the county."

You ask our opinion on the following question:

"Is this a legitimate claim and has the county coroner the power to incur expenses of this nature on his own initiative?"

Mason's Minnesota Statutes of 1927, Section 946, requires the coroner to hold an inquest upon the dead bodies of such persons only as are supposed to have met their death by violence, and not when the death is believed to have been and was evidently occasioned by casualty. The coroner, the same as any other public officer possesses considerable discretion in the performance of his duties. If, in the exercise of his honest judgment, he feels that an autopsy should be performed, and in connection therewith, a toxicological analysis made of the decedent's stomach, we are of the opinion that any costs incurred in connection therewith are legitimate charges against the county of which he is coroner.

ROY C. FRANK,
Assistant Attorney General.

April 13, 1937. 103i

139

COUNTIES—Officers—Coroner—Compensation and fees—Delivery of body to mortuary.

Mr. Leeds H. Cutter, County Attorney.

You inquire:

"The county coroner is called; is he entitled to charge the county, and is the county authorized to pay for an ambulance to carry the body to the undertaker's place of business in the city of Anoka, in addition to his regular fee and mileage?"

The above question is answered in the negative. The fees of the county coroner, so far as pertinent to your inquiry, are fixed by Section 6995 of Mason's Minnesota Statutes of 1927, as follows:

"1. For viewing or examining each dead body, five dollars and mileage at ten cents per mile for necessary travel, and for each additional day required, five dollars.

"2. For holding an inquest, five dollars for each day's necessary attendance after the day on which the body was viewed, and mileage as

above, and 15 cents per folio for writing the record, including testimony of witnesses."

The above quoted statutory provisions fix the fees of the county coroner and any fees or compensation by way of reimbursement for expenses in addition to those prescribed by the statute are not lawful.

The remedy, if any, is with the legislature by change of the law. It is no part of the coroner's functions to hire an ambulance for the purpose of carrying the body to the undertaker's place of business. This relates more to expenses incident to the burial of the body to be performed by the undertaker. The coroner has no lawful right to perform such services or to charge therefor as he is a county officer and the statute makes it a criminal offense for any county officer to be interested directly or indirectly in any contract with the county.

DAVID J. ERICKSON,
Deputy Attorney General.

October 9, 1937. 103a

140

COUNTIES—Officers—Coroner—Contracts—Interest in burial of paupers.

Mr. Clarence R. Smith, County Attorney.

You state that the county coroner in your county is compensated on a fee basis "without any regular salary."

You inquire "whether or not our Beltrami County Coroner, who is an undertaker, can contract with the County for the burial of paupers so long as he is County Coroner."

Mason's Minnesota Statutes of 1927, Section 820, provides, so far as pertinent, that "in every county in this state there shall be elected at the general election in 1918 a * * * coroner * * *." Section 821 provides that the terms of office of the county's officers provided for in said Section 820 shall be for four years and until their successor is elected and qualified and shall begin on the first Monday in January next succeeding said election and said offices shall be filled by election every four years thereafter. It is apparent from the above referred to sections of the statute that the office of county coroner is an elected one. The general rule is that officers who are elected exclusively by the electors of the county are county officers.

Section 990 of Mason's Minnesota Statutes of 1927, provides that:

"**No county official,** or deputy or clerk of such official, shall be directly or indirectly interested in any contract, work, labor, or business to which the county is a party, or in which it is or may be interested, or in the furnishing of any article to, or the purchase or sale of any property, real or personal, by, the county, or of which the consideration, price, or expense is payable from the county treasury. Any

violation of the provisions of this section shall be a gross misdemeanor."

The Supreme Court in the case of State v. Byhre, 137 Minn. 195, in answer to the argument that the language of said section was only intended to apply to those officers who had official duties to perform in connection with the particular contract, said:

> "There is no room for the construction that it was intended to apply only to those officers who had official duties to perform in letting or approving the contract. The statute is plainly applicable **to all county officials**, their deputies and clerks. While the evil may be greater when the official has to do with letting the contract, we see no reason in not making the prohibition apply to all officials."

We are not unmindful of the case of County of Marshall v. Bakke, et al., 182 Minn. 10, 234 N. W. 1. It will be noted that the Supreme Court filed a supplemental opinion in the Bakke case upon an application for reargument in which it distinguished the case of State v. Byhre, supra. In this opinion, in speaking of the Byhre case, the court said:

> "The language therein used must be understood as applicable to the facts charged in the indictment there under consideration. So understood the case is neither criticized nor overruled by the decision herein."

We are of the opinion that said Section 990 as construed by the Supreme Court in the above referred to cases prohibits the county coroner, who is an undertaker, from entering into a contract with the county for the burial of paupers. The burial of deceased paupers necessarily involves certain contractual relations between the undertaker burying such persons and the county. This contractual relationship when entered into between such county official and the county comes within the above quoted statutory prohibition.

DAVID J. ERICKSON,
Deputy Attorney General.

April 29, 1937. 90b

141

COUNTIES—Officers—Highway engineer—Salary of—Increase.

Mr. B. M. Heinzen, County Attorney.

You state that under the provisions of Chapter 232, Laws of 1937, the Lincoln County highway engineer was appointed by the county board at their January meeting in 1938 for a term ending May 1, 1939, at a salary of $200 per month.

You inquire whether the county board has authority to increase the salary of said highway engineer during the term of his appointment.

Subdivision 2 of Section 2569, Mason's Minnesota Statutes of 1927, as amended by said Chapter 232, Laws of 1937, provides in part as follows:

> "The salary of the county highway engineer shall be fixed by the county board and be payable the same as other county officers are paid. His salary shall not be **reduced** during his term of office, * * *."

Applying the maxium "expressio unius est exclusio alterius" (the expression of one thing is the exclusion of another), this office, in construing similar statutory provisions prohibiting the reduction of salaries of public officers during their term of office, when an increase of salaries during the term is not expressly prohibited, has held that the salaries of such officers may be increased during their term of office.

We believe that the above referred to maxium should be applied in construing the provisions of said Chapter 232, and that the county board has the authority to increase the salary of the county highway engineer "during the term of his appointment."

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

May 9, 1938. 122b

142

COUNTIES—Officers—Mileage of members of County Welfare Board—Use of own car.

Mr. A. B. Anderson, County Attorney.

You state that the members of the newly established "Child Welfare Board for Steele County have presented bills for compensation which include mileage at the rate of five and ten cents per mile." Since you direct attention to Section 3 of Chapter 343, Laws of 1937, relating to the compensation of members of the County Welfare Board, we assume that in using the term Child Welfare Board you have reference to the County Welfare Board established pursuant to said Chapter 343.

You inquire "whether or not the (County) Welfare Board members are entitled to mileage at five cents per mile, at ten cents per mile or are entitled to reimbursement for their actual expenss in running their automobiles while in the performance of their official duties."

Section 3 of said Chapter 343, Laws of 1937, so far as pertinent, provides:

> "* * * the members of the County Welfare Board shall receive, in addition to any salaries they may receive from any other source, from the state or county or any municipality, the sum of $3 per day for time actually spent in transacting the business of the Board not exceeding, however, a maximum of twenty-five days a year. **Members shall be**

reimbursed by the county for expenses actually incurred in the performance of their official duties."

It will be noted from the above quoted language of said Section 3 that it provides for "reimbursement" by the county for expenses incurred by members of the County Welfare Board in the performance of their official duties. In other words this is a reimbursement statute and does not provide that the members of said board shall be entitled to mileage at a certain rate, such as ten cents per mile, without any qualification.

In our opinion, therefore, the above section of the statute is intended to give an allowance to each member of the County Welfare Board as reimbursement for expenses in connection with the use of his automobile in the performance of each member's official duties and is subject to the limitation contained in Laws of 1931, Chapter 331, as amended by Chapter 13, Laws of 1933, so as to limit such allowance to five cents per mile.

DAVID J. ERICKSON,
Deputy Attorney General.

October 13, 1937. 104a-8

143

COUNTIES—Officers—Physician—Appointment of.

Mr. A. C. Richardson, County Attorney.

You direct attention to Section 3174, Mason's Minnesota Statutes of 1927, relating to the appointment of a county physician by the county board, and to Chapter 343, Laws 1937, relating to providing for the establishment of a county welfare board and defining its powers and duties.

You inquire:

"as to who now has the appointment of the doctor for the poor in this county."

Although you do not so state, our information is that your county is operating under the county system of poor relief. Section 3174 provides, in part, that the county board

"shall appoint one or more practicing physicians to be physicians of the poor who shall hold office during the pleasure of the board, and receive such compensation as it may from time to time determine."

This section also provides that:

"If more than one be appointed, the order of appointment shall prescribe the district in which each shall act, and none shall be required to act outside of his district except in case of urgency."

This statute clearly vests the power of appointing the county physician in the county board.

Section 7 of said Chapter 343, to which you direct attention, provides, in part, that:

> "After its establishment the County Welfare Board shall forthwith assume the powers, duties and responsibilities of the County Child Welfare Board, if any, existing in the county, and shall perform such duties as may be required of the County Child Welfare Board or by law or by the State Board of Control with regard to the enforcement of all laws for the protection of defective, illigitimate, dependent, neglected and delinquent children."
>
> This section also provides that the county welfare board:
> "* * * shall be charged with the duties of administration of all forms of **public assistance and public welfare within the purview of the Federal Social Security Act** and which now are, or hereafter may be, imposed on the State Board of Control by law, of both children and adults, including aid to dependent children, old age assistance and aid to the blind."

It will be noted from the above language of said Section 7 that nowhere therein does it empower the county welfare board to appoint a county physician. The statute enumerates the kinds of public assistance and public welfare over which the county welfare board has jurisdiction and there is no language in said act evidencing any intent to give jurisdiction to said board over the appointment of the county physician or the handling of medical attention for the benefit of the poor. In other words, the power of employing a county physician to care for the poor is vested by said Section 3174 in the county board. We are, therefore, of the opinion that it is still the duty of the county board to appoint "one or more practicing physicians to be physicians of the poor" and who shall hold office "during the pleasure of the (county) board." It will be noted from said Section 3174 that it authorizes the board to appoint more than one practicing physician to be physicians of the poor. However, if more than one such physician is appointed by the county board the order of appointment should prescribe the district in which each such physician is to act.

DAVID J. ERICKSON,
Deputy Attorney General.

October 12, 1937. 104b-7

144

COUNTIES—Officers—Register of Deeds—Abstractor.

Mr. Paul D. Stratton, County Attorney.

You state that the register of deeds of your county "is also the abstractor and carries on that business," and that "he retains all the abstract fees."

You inquire:

"Under such a situation should the county or rather can the county legally pay for stationery and other similar supplies that are used by the register of deeds in his abstract business?"

Section 664, Mason's Minnesota Statutes of 1927, provides that the county board shall furnish all county officers with "all books, stationery, letterheads, envelopes, postage, telephone service, office equipment and supplies necessary to the discharge of their respective duties."

Under Section 900, Mason's Minnesota Statutes of 1927, it is the duty of the register of deeds, upon being paid his lawful fees therefor, to make the abstracts of title therein provided for.

Assuming that the abstracts referred to in your letter are made by the register of deeds under the provisions of said Section 900, Mason's Minnesota Statutes of 1927, we are of the opinion that your question should be answered in the affirmative.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

July 15, 1938. 125a-52

145

COUNTIES—Officers—Register of Deeds—Abstracts—Preparation of.

Mr. A. B. Anderson, County Attorney.

You state that the register of deeds in your county has made it a practice to include on all abstracts which he makes or continues "ditch liens assessed against township or other roads which run along the edge of the property being abstracted."

You inquire as to whether the register of deeds "should continue as he has been doing or not."

In answer to your inquiry your attention is directed to Section 900, Mason's Minnesota Statutes of 1927, Subdivision A, which reads as follows:

"The register, upon being paid his lawful fees therefor, shall make out under his certificate and seal, as the same appears of record or on file in his office, and deliver to any person requesting the same:

"A. A full and perfect abstract of title to any real estate together with all encumbrances, liens and instruments in any manner affecting such title."

It is impossible to advise you, without a complete and detailed statement of facts in a specific case, as to the register of deeds' duties under the above referred to section of the statute for making an abstract which includes such ditch liens. In other words, we have no way of knowing under

what statute the ditch liens were imposed and as to whether the same are such that they would in any way affect the title of the property with reference to the register of deeds' office making a particular abstract.

Speaking generally, we may say that it will be observed from the above quoted section of the statute that it is the duty of the register of deeds to make out under his certificate and seal a full and perfect abstract of title to any real estate as the same appears of record or on file in his office. It seems to us that if the ditch liens in question appear of record or on file as being liens upon the land with reference to which the abstract is being prepared that such liens should be included in said abstract.

DAVID J. ERICKSON,
Deputy Attorney General.

August 25, 1937. 373b-1

146

COUNTIES—Officers—Register of Deeds—Alteration of chattel mortgages after filing.

Mr. Lloyd I. Nelson, Rural Rehabilitation Division.

You ask the following question:

"The Regional Securities and Collection Section of the Rural Rehabilitation Division of Milwaukee, Wisconsin, has been advised that a number of Registers of Deeds in Minnesota have refused to permit alterations in filed documents.

"Pursuant to an Executive Order, the Resettlement Administration became a part of the United States Department of Agriculture and chattel mortgages filed as security for chattel loans should be amended by the following statement:

'As used herein, the Resettlement Administration is construed to mean the United States.'

"Information has reached our Regional Office that an Attorney General's ruling has been interpreted to mean that Registers of Deeds cannot permit this minor alteration.

"I should be pleased to receive your brief comment on this matter and a copy of this ruling which will enable our attorneys to draft the proper instruction for the field staff."

We are of the opinion that under the laws of this state alterations in chattel mortgages which have been filed are not permissible. We can find no statutory authority for making such alterations. Legislative authorization is necessary in order that such alterations may be made.

MATTHIAS N. ORFIELD,
Deputy Attorney General.

May 27, 1937. 373b-5

147

COUNTIES—Officers—Register of Deeds—Filing—Conditional sales contract.

Mr. J. H. Manion, County Attorney.

You inquire:

> "Under Section 8360 Mason's Statutes 1927 may a register of deeds properly record a typewritten copy of a conditional sales contract, that is, in a case where the signature on the copy is typewritten?" The answer to your question is not altogether free from doubt.

The previous opinions of this office are not entirely uniform and we are not aware of a decision by the Supreme Court of this state that definitely answers this question. However, it has been quite consistently held, since the enactment of Laws of 1917, Chapter 158 (Mason's Minnesota Statutes 1927, Section 8386, as amended), that the Register of Deeds should only accept for filing an original or duplicate original of a conditional sales contract. It will be noted that Section 1, of Chapter 158 makes no reference to filing of copies as was done in Section 1 of Chapter 364, Laws of 1915, which it amended. See opinion No. 256 of the 1920 report of the Attorney General. In our opinion your inquiry should be answered in the negative.

WILLIAM D. GUNN,
Special Assistant Attorney General.

August 9, 1938. 373b-6

148

COUNTIES—Officers—Register of Deeds—Filing deed after confession of judgment.

Mr. F. H. Stadsvold, County Attorney.

You point out that under Chapter 72, Extra Session Laws of 1935-1936, a party may make confession of judgment for delinquent taxes and inquire whether if A gives a deed to B, conveying a certain tract of land, and B confesses judgment under said Chapter 72, B thereupon may file his deed for record without paying the outstanding taxes.

In our opinion B cannot file his deed without paying the taxes.

MATTHIAS N. ORFIELD,
Deputy Attorney General.

January 15, 1937. 373h-9

149

COUNTIES—Officers—Register of Deeds—Filing—Fees—Chattel mortgages and satisfactions of.

Mr. Earl E. Huber, County Attorney.

You request our opinion as to the proper fees to be charged by a register of deeds for (1) filing chattel mortgages, (2) filing satisfactions of chattel mortgages and (3) for furnishing and certifying to abstracts of chattel mortgages.

It is our opinion that the register of deeds is entitled to a fee of twenty-five cents for filing a chattel mortgage and twenty-five cents "for a certified copy thereof," when a copy is furnished. Mason's Minnesota Statutes, 1938 Supplement, Sections 8364 and 8365.

The fee for filing satisfactions of chattel mortgages is the same as above. See same statutory provisions.

It is our opinion that a register of deeds for furnishing and certifying to abstracts of chattel mortgages is entitled to a fee of twenty-five cents for each of the first four entries on said abstract and ten cents for each subsequent entry, and twenty-five cents for his certificate.

We are enclosing herewith a copy of an opinion written by this office on July 13, 1935, which covers your last question in detail.

WILLIAM D. GUNN,
Special Assistant Attorney General.

September 30, 1938. 373b-10(c)

150

COUNTIES—Officers—Register of Deeds—Salary.

Mr. Michael F. Kinkead, County Attorney.

You state that the salary of the Register of Deeds of Ramsey County is fixed by Chapter 366, Laws of 1911, and ask if Chapter 364, Laws of 1915, relating to liens on personal property and documents concerning them, applies to said county.

It is my opinion that your question should be, and it is, answered in the affirmative.

Chapter 366, Laws 1911, applies to "counties having, or which may hereafter have, a population of not less than 200,000, and less than 275,000 inhabitants." It is a law of general operation and not a "special law" or one within the constitutional prohibitions of Article 4, Section 33, Minnesota Constitution.

As stated in Snyder Automotive Inc. vs. Boyle, 162 Minn. 261, Chapter 364, Laws of 1915 is comprehensive, and the intention is clear that town clerks and village and city recorders shall cease to function as recorders of liens on personal property and documents concerning them and be superseded by the register of deeds. The only limitation therein contained, so far as here pertinent, is found in Section 7, Chapter 364, Laws 1915, that:

> "This act shall not apply to cities of the first class, nor to counties wherein the salary of the register of deeds is fixed by special law."

HARRY W. OEHLER,
Assistant Attorney General.

March 4, 1938. 373a

151

COUNTIES—Officers—Vacancies—Removal from county.

Mr. O. E. Lewis, County Attorney.

You state that at the general election in November, 1934, one Ruth H. Peterson was elected county treasurer of Clearwater County; that thereafter in January, 1935, having duly qualified for said office, she assumed the duties of county treasurer; that on or about August 1, 1936, she married a resident of the State of North Dakota; that ever since the marriage her husband and herself have apparently maintained a home in the State of North Dakota; that "they return here occasionally for short visits with her parents"; that during the past year she has devoted approximately 15 per cent of her time in the office of county treasurer, the office in the meantime being handled entirely by a deputy.

You direct attention to paragraph 4, Section 6953 of Mason's Statutes of 1927 and inquire:

> "Under the circumstances, would the present treasurer be eligible to continue holding this office?"

Your inquiry resolves itself into the proposition of whether the county treasurer has ceased to be an inhabitant of Clearwater County.

The statute (Mason's Statutes of 1927, Sec. 6953) provides that:

> "Every office shall become vacant on the happening of either of the following events, before the expiration of the term of such office:
> * * * * * * *
> "4. His ceasing to be an inhabitant of the state, or, if the office is local, of the * * * county * * * within which the duties of his office are required to be discharged."

It is manifest from the above quoted language of Section 6953 that if the person in question "ceases to be an inhabitant of the state, or * * *

county" from which she was elected or within which the duties of the office are required to be discharged, that a vacancy exists. Whether or not she has ceased to be such inhabitant is largely a question of fact and not of law, and depends on a number of facts not stated.

One can be outside of the state or the county for intervals of time, but if such person is outside of the state for temporary purposes only, with intention of returning as soon as those purposes are accomplished, and all the time claiming to be a resident of the county, he or she may not cease to be an inhabitant of the state and lose his or her residence. One of the tests in such a case might be whether or not the officer is so situated that he cannot properly perform the duties of his office. He may be located where he is available at all times to perform his official duties when called upon, or he may be so far away for a considerable length of time that he is unable to perform his official duties.

In the latter case it may be said that the officer has ceased to be an inhabitant of the county, but this office cannot settle the question. Such a person might be entitled to vote in the county under the legal rules for determining a voting residence, and still be away so much that his office would be held to be vacant. There is or may be a legal distinction between the right to vote and the right to be elected to an office, which follows the right to vote, and the right to continue to hold an office after election. That is, a citizen might claim and hold a voting residence in a certain district, and so, under the constitution be entitled to be elected to an office therein, and still not be entitled to hold the office, by reason of his "ceasing to be an inhabitant of the * * * county * * * for which he was elected." This because he might be eligible to vote and still not be so situated as to be able to perform the duties of the office by reason of his continued absence from the county. For example, the officer in question might be employed in the State of North Dakota, and the performance of her duties require her to live in that state. She could still claim a voting residence in Clearwater County if she wished to do so and vote therein, either in person or under the absent voter's law. But if she actually continued to live in the State of North Dakota, and could not perform the duties of the office of county treasurer in your county, a vacancy would result within the purview of the above referred to statutory provision.

We believe that all that is necessary is for the county board to adopt a resolution declaring that a vacancy exists in the office of county treasurer by reason of the treasurer ceasing to be an inhabitant of the county. Upon a resolution being adopted the county board could appoint a successor to fill the vacancy under Mason's Statutes of 1927, Section 659. If the old incumbent refuses to surrender the office, quo warranto proceedings could be instituted on the relation of the new appointee. Thus the present officer and the new appointee may fight it out in court on a writ of quo warranto as to who is entitled to the office.

That a vacancy automatically exists when a person ceases to be a resident of the county in which the duties of the office are to be performed seems to be confirmed in the case of State v. Hays, 105 Minn. 399, in which the supreme court on page 400 said:

"And therefore, the only question for our determination is whether, at any time since his election in 1906, respondent, Hays, ceased to be an inhabitant of LeSueur county, and thus vacated the office **by operation of law.**"

It is true that in Subdivision 3 of the opinion the court considers this question and reaches the conclusion that in fact the incumbent in that case had not changed his place of residence. However, it seems to us that the opinion clearly indicates that if, in fact, the officer changed his residence, he would automatically have vacated the office, and there would have immediately been a vacancy which the county board could have filled.

We may further add that the resolution of the county board declaring the vacancy does not add anything as a legal proposition to the situation. As indicated, the vacancy exists by operation of law as soon as the incumbent changes his place of residence. The county board can then proceed to fill the vacancy. In the event the county board finds that there actually is a vacancy, we merely suggested the adoption of a resolution declaring the vacancy as being the proper way to put on record the reason why the county board believed a vacancy existed.

Of course, if the incumbent could later prove that she had not in fact changed her residence, the action of the county board would be null, and, as indicated, this claim, if presented could be determined in the quo warranto proceedings which we suggested could be instituted by the new appointee against the old incumbent to determine his title to the office.

DAVID J. ERICKSON,
Deputy Attorney General.

August 30, 1937. 450a-15

152

COUNTIES—Poor Relief—Change of system.

Mr. Franklin E. Ebner, County Attorney.

You refer to Section 3164, Mason's Minnesota Statutes of 1927 which relates to the question of changing the system of poor relief then in force in any county, to the town or county system. Said Section provides that "the notices of such election shall state that the question will be voted upon, and provisions for taking such vote shall be made upon the blue ballots furnished therefor, as in the case of other questions."

You also direct our attention to Chapter 271, Laws of 1937.

We assume you intended to refer to Chapter 270, Laws of 1937, which relates to the changing of the color of the so-called county ballots from blue to india tint, and you state that in your opinion the ballots to be used in voting upon the question of changing the system of poor relief in your

county should be printed on india tint paper rather than on blue paper. You request our opinion on the question.

It will be noted that said Section 3164 provides that the provisions for taking such vote shall be "as in the case of other questions." Section 1 of said Chapter 270, amending Section 280, Mason's Minnesota Statutes of 1927, provides in part as follows:

> "There shall be one ballot on india tint paper, called in this chapter the 'india tint ballot,' upon which shall be printed the names of all candidates for office, **and all questions and propositions to be submitted,** except those required to be placed on other ballots."

We believe that it was the intention of the legislature to provide that in all cases where the statutes made provision for blue ballots, the color of said ballots should be changed from blue to india tint. We are therefore of the opinion that the color of the ballots to be used at an election called pursuant to Section 3164, Mason's Minnesota Statutes of 1927, should be printed on india tint paper.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

July 5, 1938. 339p

153

COUNTIES — Real Estate — Bids — Advertising for — Bridges — Judicial ditches—Bridges over from private land—Cost of constructing.

Mr. Earl E. Huber, County Attorney.

You state that the county board contemplates the purchase of a farm for the sole purpose of using the gravel therein, which gravel is to be used for road purposes in the county; and that this farm is very valuable to the county "just for gravel purposes." You inquire:

> "Is it necessary to advertise for bids in a situation like this?"

In answer to the above question, attention is directed to Mason's Minnesota Statutes of 1927, Section 2613, which provides as follows:

> "Whenever the commission of highways, or any county or town board or common council of any village or city shall deem it necessary for the purpose of building or repairing public roads or streets within his or its jurisdiction, he or it may procure by purchase or condemnation, in the manner provided by law, any plot of ground, **not exceeding twenty acres,** containing gravel or stone, or clay, or sand or one or more of such road materials, suitable for road purposes, together with the right of way to the same of sufficient width to allow teams to pass, and on the most practicable route to the nearest public road."

The above quoted statutory provision evidences a legislative intent that a county shall not purchase any one tract of land for gravel purposes exceeding twenty acres in area at any one time. Undoubtedly, as indicated in opinion 206, attorney general's report 1920, if the county needs more than twenty acres for use immediately, or at some reasonably near time in the future, it may purchase more than one gravel pit not exceeding the prescribed area.

We have heretofore held that it is not necessary for a county to advertise for bids in purchasing a particular tract of land for gravel purposes. This office in construing Section 991, Mason's Statutes of 1927, relating to advertising for bids or proposals has heretofore held that it was not the legislative intent at the time of the enactment of said Section 991 to require advertising for bids in purchasing real estate for the use of the county. Manifestly calling for bids when only one particular piece of ground will answer the purpose and when that is owned by only one person, would be a useless procedure. The law does not require the performance of a vain thing.

You further state that bridges across county ditches "connecting privately owned farms with the highway" are in disrepair; and that these bridges were constructed and installed "not because of road work but because of a county judicial ditch." You inquire:

> "Who has the responsibility of the maintenance of the bridges, the county or the township?"

We assume from your statement of facts that the bridges or culverts in question are not on public roads. The only statutory provisions of which we are aware that might have any bearing upon the above inquiry are Sections 2604 and 2612 of Mason's Statutes of 1927. There can be no question but that the bridges contemplated by Section 2604, supra, are public bridges and it would seem to require a very unusual interpretation of said Section 2612 to hold that it applies to facts such as you present since the latter section to make it applicable the necessity of the culverts would have to be by reason of the grading of the public highway. You state that the bridges to which you refer "were constructed and installed not because of road work but because of a county judicial ditch."

There can be no question but that the separation of privately owned farms from the highway to which these farms had access before by reason of the construction of the ditch was an element of damage which should be, and likely was, taken into consideration by the viewers at the time that the ditch was constructed and ordered established. Whether it was or not, it would seem that in the ditch proceedings is where the private land owners should have secured their redress and had their rights protected.

Attention is directed to the case of State v. Holmes, 162 Minn. 173, where it is stated:

> "If not satisfied with the order of the court in fixing the benefits he (landowner) could have demanded a jury trial. The jury trial is the

only way to review the order determining the benefits. This is the exclusive remedy."

See also Huseby v. Schacherer, 160 Minn. 387.

From the facts stated in your letter it is our opinion that the land owners if they desire bridges constructed or repaired from the public highway on to their private lands would have to pay the expenses thereof themselves, unless the township or county were awarded damages by viewers for the construction of private bridges. If so, and the award or awards remained as made, such municipalities would have to expend the money collected therefor.

The delay in answering your letter was caused by the unusual volume of work attending the closing days of the recent legislative session.

DAVID J. ERICKSON,
Deputy Attorney General.

July 30, 1937. 125a-41

154

COUNTIES—Tuberculosis—Poor persons—Expenses incurred in treatment of outside of State sanitarium.

Mr. H. H. Bonniwell, Jr., County Attorney.

You state that the county board of Sibley County in 1935 authorized the treatment of a resident of the county at the Minnesota State Sanitarium at Ah-Gwah-Ching; that this person was afflicted with tuberculosis; that he was admitted to this hospital May 27, 1935, and received treatment until November 6, 1936; that this treatment cost the county about $42.00 a month; that he has now been discharged from this hospital "on condition that he receive treatments and have x-ray pictures taken monthly by a doctor at Mankato recommended by the hospital"; and that these treatments and x-rays will cost the county not to exceed $10.00 per month and would result in a saving to the county of more than $30.00 per month.

You further state that it is your belief that "the hospital whose claims we are authorized to pay considers this treatment an extension of their services."

You inquire:

"May the County Board approve of claims by the physician mentioned for treatments and x-rays?"

Section 5383, Mason's Statutes of 1927 (Section 3, Chapter 434, Laws of 1913), does not authorize a county board to pay the expenses of a tubercular patient. That is a health measure passed under the authority of the general police power, and is designed to enable the authorities to compel the removal of such a patient to a state sanitarium. However, we direct your attention to Section 726, Mason's Statutes of 1927, which provides:

"The county boards of the several counties of this state may appropriate money out of the general revenue fund of the county or the county sanatorium commissions may appropriate money out of their funds for the purpose of paying for the services of visiting nurses or other medical attention or advice in preventing the spread of tuberculosis in such county, or for the care, support, and maintenance of poor persons afflicted with tuberculosis, whether the county has the town, county or commission system of caring for the poor, * * *."

It will be noted from the above quoted language of said Section 726 that it authorizes a county board, regardless of what system of poor relief the county is operating under, to appropriate money out of county funds for the purpose of paying for medical attention or advice in preventing the spreading of tuberculosis in such county, or for the care, support and maintenance of poor persons afflicted with tuberculosis. This statute does not specify where or how the patient shall be treated. This office in construing said Section 726 has heretofore held that it is discretionary with the county board as to where or how such patient should be treated, and that the county board may at county expense provide for the treatment of a resident of a county at either a public or private sanitarium wherever located. The board should, however, in such a case, as in all cases, use its best judgment in the matter.

Answering your specific inquiry, therefore, we are of the opinion that under the circumstances outlined in your letter your county board may in the exercise of its official judgment and discretion approve such claims by a physician for treatments and x-ray pictures furnished and taken for the care of a person afflicted with tuberculosis.

DAVID J. ERICKSON,
Deputy Attorney General.

May 18, 1937. 556a-7

155

COUNTIES—Welfare Board—Claims against.

Mr. B. M. Heinzen, County Attorney.

You state:

"Since the operation of the new County Welfare Board in this county, none of the bills allowed by the County Welfare Board have been submitted to me for approval.

"I am wondering whether all bills allowed by the County Welfare Board should not be submitted to me for approval as to form and legality before they are allowed by the County Welfare Board, the same as any claim presented to the County Board of Commissioners.

"Your opinion on this question is respectively requested."

We find no statute specifically covering the question presented. We are told that in some counties such claims are passed upon by the county attorney, and that in other counties they are not.

It is the duty of the county attorney to advise all county officers and boards. If the County Welfare Board asks it, the county attorney should pass upon all claims as to the form and legality thereof. However, as we have indicated, we are not aware of a statute that imposes this duty unless a request is made by the county welfare board.

WILLIAM D. GUNN,
Special Assistant Attorney General.

November 10, 1937. 125a-64

156

COUNTIES—Welfare Boards—May pay for mental examinations.

Dr. F. Kuhlman, Director, State Board of Control.

In your letter you ask whether or not it is legal for a county to pay the State Board of Control for mental examinations made by the mental examiners of the board at the request of the County Welfare Board.

From the correspondence enclosed we find that the claims for such services are presented for payment directly to the County Welfare Boards. This being true, we advise you that a county, through its County Welfare Board, may make payment for the type of services mentioned in your question.

County Welfare Boards are established by Chapter 343, Laws of 1937. Section 7 of Chapter 343 enumerates the powers and duties of the board. This section is broad enough to permit the payment for services of the kind stated.

ROY C. FRANK,
Assistant Attorney General.

December 10, 1937. 125a-64

157

COUNTIES—Welfare Board may retain osteopaths for osteopathic services to relief clients.

Mr. Clarence T. Perkins, County Attorney.

You ask whether:

> "A county welfare board can authorize treatment of individual patients by osteopathic physicians and pay for the services out of welfare funds on the same basis as other physicians?"

We are of the opinion that a county welfare board can authorize treatment of indigent patients by osteopathic physicians. However, the treatment given and the services rendered by such osteopathic physicians must be in strict accordance with the laws of this state defining the duties and authority of an osteopath and cannot be extended to the general practice of medicine and surgery.

ROY C. FRANK,
Assistant Attorney General.

April 11, 1938. 125a-64

158

COUNTIES—Welfare Board—Powers and duties.

Mr. Ed. J. Goff, County Attorney.

You state that the county auditor of your county has requested advice "regarding the construction of certain features of Laws of 1937, Chapter 343, which provides for the establishment of county welfare boards"; and that because this law "is extremely vague in many particulars and as its operation calls for a uniform state-wide system of administering welfare work" you are requesting the opinion of this office relative to the questions presented.

You inquire:

"1. Is the Hennepin County Welfare Board a separate and distinct board?"

Section 1 of said Chapter 343 provides in part:

"There shall be established in each county of the state a County Welfare Board which shall consist of five members, to be chosen as follows":

The terms of the act indicate that its purpose is to set up in each county of the state a board for the administration of matters of public welfare; and that such board is to be a distinct and separate legal entity whose powers and duties are those expressly set out in the act and reasonably incident thereto.

In your county the act provides that "the Board of County Commissioners shall be the County Welfare Board." However, we believe that one of the purposes of the act was to set up a uniform system of administering such welfare activities throughout the state. It is our opinion, therefore, that the Hennepin County Welfare Board is a board separate and distinct from the Board of County Commissioners of Hennepin County.

"2. Is the law broad enough so that it can be construed to mean that the County Welfare Board can make and sign its own checks or

warrants, payable directly by the county treasurer? If so, by whom are such checks or warrants to be signed?

"3. Or is it to be inferred that the County Auditor shall make county warrants for disbursements under this Act in the same manner as for other county disbursements?

"4. Is the Welfare Board vested with sufficient authority to authorize the County Auditor to issue county warrants on its order? If so, is the Executive Secretary the person by whom such orders are to be made?

"5. Can there be any question as to whether the Auditor has acted legally if he does issue warrants at the direction and upon the authority of the Welfare Board or its Executive Secretary?"

Your questions Nos. 2, 3, 4 and 5 may conveniently be considered together. As you point out, said Chapter 343 is vague and indefinite in that it does not specifically furnish the answer to any of such questions.

Mason's Minnesota Statutes of 1927, Section 668 provides in part as follows:

"The county board of each county shall have power:

"1. To examine and settle all accounts of the receipts and expenses of the county, and to examine, settle, and allow all accounts, demands, and causes of action against the same, and, when so settled, to issue county orders therefor, as provided by law."

Chapter 343 vests in the County Welfare Board, acting through its executive secretary, the administration of all forms of public assistance and public welfare. As the county auditor points out in his letter to you, the word "administration" in its broadest sense includes and covers "every necessary act in connection with any and all applications and recipients, including the making of monthly payments."

Section 8 of said Chapter 343 provides that the County Welfare Board shall submit to the County Board of Commissioners an estimate of the amount needed by it to perform its duties under the act. After an agreement is reached between the County Welfare Board and the Board of County Commissioners as to such amount, it becomes the duty of the County Board to levy a tax for the amount required. The fact that your county is excepted from the provision just referred to is not material.

The broad powers of administration vested in the Board of Public Welfare seem to us to be inconsistent with the thought that the County Board of Commissioners should pass upon every individual claim to be paid by the Welfare Board. On the other hand, no specified authority is vested in the Welfare Board to make and sign its own checks or warrants, and we do not believe that the general authority vested in such Welfare Board is broad enough to authorize such a procedure. The proper practice in our opinion would be for the Welfare Board to authorize the county auditor to issue warrants on its order. This may be done by having the County Welfare

Board, acting through its executive secretary, prepare and furnish to the county auditor each month a certified list of all disbursements to be made in that month. If such a certified list is furnished the county auditor, we believe the law is broad enough so that such auditor will be authorized to issue county warrants based upon such certified list of disbursements.

We have discussed the method of making disbursements by the County Welfare Board with Mr. Langlais of the State Comptroller's office, and the procedure we have suggested meets with his approval.

> "6. Assuming that the Hennepin County Welfare Board is a separate and distinct entity from the County Board: a. Will it be necessary to publish its minutes in the same manner as the minutes of the County Board are required to be published? (See Section 662 Mason's Minnesota Statutes 1927). b. Will it be necessary to publish its expenditures in the socalled annual financial statement? (See Section 667 Mason's Minnesota Statutes 1927)."

a. As hereinabove indicated, it is our opinion that the Hennepin County Welfare Board is an entity separate and distinct from the Board of County Commissioners of Hennepin County. Mason's Minnesota Statutes of 1927, Section 662 to which you refer relates specifically to the publication of the proceedings of the County Board of Commissioners. We find no language in said Chapter 343 which indicates that such Welfare Board is required to publish the minutes of its proceedings. It is our opinion, therefore, that such a procedure is not required.

b. Mason's Minnesota Statutes of 1927, Section 667 to which you refer provides in part:

> "* * * such board shall make a full and accurate statement of the receipts and expenditures of the preceding year, which 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, and within thirty days thereafter shall cause the same to be posted at the courthouse door * * * and published for three successive weeks in some newspaper therein, * * *."

The purpose of the section of the statute just quoted is to give notice to the public of the financial condition of the county. A complete picture of such financial condition will not be furnished unless expenditures made by the County Welfare Board appear in such published financial statement. We believe, therefore, that it will be necessary to publish the expenditures of the County Welfare Board in the annual financial statement.

WILLIAM D. GUNN,
Special Assistant Attorney General.

May 22, 1937. 125a-64

159

COURTS—District—Clerk fees.

Mr. Roy A. Hendrickson, County Attorney.

You state:

"Section 192, Mason's, provides that all moneys paid over to the Clerk of Court to be paid out by him upon order of the Court shall be entitled to a commission of 1%. One-half of such commission for receiving and the other half for paying. The same to be paid by the party depositing such money."

You then ask:

"Does the above law hold in State Condemnation cases where moneys are paid over by the State to be paid out by the Clerk?"

We answer your question in the negative.

Mason's Minnesota Statutes of 1927, Section 192, as amended by Laws of 1937, Chapter 188, reads, in part, as follows:

"provided, that where the money is paid or deposited in any court by or for * * * the State of Minnesota, no fee or commission shall be paid to or for the clerk for any services performed by him in receiving or paying over any such money deposited with him."

ROY C. FRANK,
Assistant Attorney General.

May 4, 1937. 144b-18

160

COURTS—District—Clerk—Fees.

Mr. F. H. Stadsvold, County Attorney.

You state:

"The Clerk of our District Court of Polk County is paid under Chapter 229, Laws of 1919" and inquire whether it is the right of the Clerk of the District Court,

"1. To keep 25c on all warrants issued by him on delinquent personal property taxes?

"2. Is he entitled personally to the fee required for the issuance of the citation and the entry judgment on delinquent personal property taxes?

"3. Is he entitled to charge fees in paternity cases or must these fees be remitted to the county as costs?"

We answer each of these questions in the negative.

On January 26, 1926, this office rendered an opinion that where a clerk of the district court is paid under the provisions of Chapter 229, Laws 1919, 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. It has also been held that the clerk is not entitled to fees when the county recovers the fees against the opposing party in the suit.

On December 24, 1912, this office rendered an opinion that the clerk was not entitled to the fees in paternity cases since the salary of the clerk is in lieu of all fees for official services rendered by him for his county. It was further held that the words, "together with the cost of prosecution" were intended to reimburse the county in such proceedings.

In our opinion the service of the clerk in the issuing of warrants in personal property tax cases is a service for the county and the 25c when collected belongs to the county.

ROY C. SMELKER,
Assistant Attorney General.

August 25, 1937. 144b-15

161

COURTS—Municipal—Clerk—Fees—Prosecution under city ordinance.

Mr. John H. McLoone, County Attorney.

It appears that a certain person was charged with a violation of an ordinance of the City of Waseca, was found guilty in the municipal court of such city, appealed and was found not guilty in the district court of your county.

You ask whether the clerk of the district court of Waseca County is entitled to his fees from the city.

We answer your question in the affirmative.

ROY C. FRANK,
Assistant Attorney General.

April 14, 1938. 144b-15

162

COURTS—District—Clerk—Vital statistics—Birth records—Correction of—Children—Birth record of—Certified copy of—Right to furnish.

Department of Health, Division of Vital Statistics.

You direct attention to Mason's Minnesota Statutes of 1927, Section 5365-D and states that this section "does not provide that the clerk of court shall amend such birth record after receiving a report from the State Registrar, but merely states that the clerk of court shall file affidavit and enter on his records the name of the father and the fact that said child has been legitimized."

In your reply to Mr. Olson's letter you state that "The law (Section 5365-D) does not specify how the State Registrar shall amend the record nor how the Clerk of the District Court shall 'enter the fact.'" You further point out to the clerk of court that it has been the custom in your office "where records of this kind are concerned, to bracket the word 'No' when it appears in Item 7 and enter 'Yes' above it in red ink, carrying a marginal note to the effect that the child was legitimized on a certain date and attaching the legitimation blank to the original birth certificate. Since the intent of the law is that the Clerk of Court's record shall agree with the original of which it is a copy, we suggest that you proceed as we do."

We believe that you are quite right in your conclusion that the clerk of district court may follow substantially the same procedure as the State Registrar in correcting or amending such birth record. The statute provides that:

> "when the father of such illegitimate child shall execute an affidavit that he is the father of said child and that at a certain specified time he married the mother of said child and shall mail said affidavit to the state registrar then the state registrar shall amend the birth record of such child so as to indicate the child is a legitimate child and certified copies thereof may be issued without a court order."

The statute then provides that:

> "The state registrar shall report to the **local registrar** the legitimation of said child by the marriage of his parents to each other and **the local registrar shall note upon his records the fact that the child is legitimized** and record the name of the father."

The statute further provides that:

> "The state registrar shall include in his annual report to the **clerk of district court** of the county a copy of said affidavit of the father legitimizing said child and the said clerk of court shall file said affidavit and enter on his records the name of the father and the fact that such child is legitimized."

It is obvious from the above quoted language of said Section 5365 that the legislature intended at the time of the enactment of the same that the clerk of district court, upon receiving the annual report from the state registrar with a copy of such affidavit of the father so legitimizing such a child, should so amend or correct his records, as to such child, so as to show the name of the father and the fact that such child has been legitimized. In so doing the clerk of district court is merely correcting or amending his

record so as to conform to the records on file in the office of the state registrar, as well as in the office of the local registrar.

You also inquire whether "the statute gives the Clerk of Court the authority to issue certified copies of such amended records without a court order."

Mason's Minnesota Statutes of 1927, Section 5366, was originally enacted as Chapter 579, Laws 1913, as amended by Chapter 220, Laws 1917 and Chapter 273, Laws 1921. It will be noted that both Section 5365, Subdivision D, and Section 5366 were originally enacted as a part of said Chapter 597, Laws of 1913. Said Section 5366 provides so far as pertinent:

> "The state registrar, or **any local registrar,** shall furnish any applicant therefor a certified copy of the record of any birth or death recorded under the provisions of this act, **provided that the fact that any child was illegitimate,** shall not be disclosed except when ordered by a court of competent jurisdiction in accordance with Section 5365-B."

We are of the opinion that the term "any local registrar" is sufficiently broad to include the clerk of district court within the purview of said Sections 5365 and 5366.

Answering your specific inquiry, therefore, we are of the opinion that the clerk of district court may issue certified copies of such amended record without a court order. However, the clerk in furnishing such a certified copy of such amended birth record, should only include therein so much of the birth record as does not relate to the illegitimacy of the child. In other words, such certified copy may not show "the fact that any child was illegitimate." If the person making application to the clerk for such certified copy should desire a complete certified copy, the clerk should inform such person that he is not permitted to furnish the same except upon the order of a court of competent jurisdiction. Such an order may be secured by the applicant by following the procedure outlined in Section 5365-B.

DAVID J. ERICKSON,
Deputy Attorney General.

May 6, 1937. 144b-27

163

COURTS—Justice of the peace—Engaging in collection business.

Mr. Lyman A. Brink, County Attorney.

You state that the justice of the peace in your county "has made a practice of collecting for a number of people." You have set forth the contents of one of the letters written by said justice of the peace which reads as follows:

"Dear Madam:

T has just complained to me that you have not yet made final payment of your account with him.

If you wish to avoid a court action in this matter, I would advise you to send in the amount promptly. The balance is ten dollars.

Yours very truly

(signed) JES."

You inquire whether said justice of the peace is engaged in the practice of law and, also whether he should be required to qualify as a collection agency by filing the bond required to be filed by collection agencies.

We do not believe that the matter contained in the above quoted letter constitutes the practice of law within the meaning of Chapter 114, Laws of 1931.

However, a justice of the peace is not by virtue of his office a collection agent. When he undertakes to make collections he does so as a private individual and is required to qualify as a collection agency by filing a proper bond and securing a license as required by law.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

August 10, 1938. 266a-3

164

COURTS—Justice of the peace—Costs.

Mr. Hyman Edelman, Village Attorney.

You state that a Justice of the Peace has filed his report and listed fines and costs in certain cases; that as a part of said report two cases were listed which were disposed of by the Justice by dismissing the same. You further state that from the total of fines so listed in such report the Justice deducted the costs in the dismissed cases and remitted the balance to the village.

You inquire:

1. "Does a Justice of the Peace have the right to deduct claims made by him for costs from the amount required to be remitted by him, or should he remit the full amount and make a separate claim for any sums due him?"

This office has heretofore held that in cases where the costs in proceedings in a justice court are paid by the county, that the provisions of Section 766, Mason's Minnesota Statutes of 1927, requiring claims against the county to be itemized and verified, must be complied with.

Although you do not so state, our information is that the Village of Golden Valley is operating under the provisions of Chapter 145, Laws of 1885. Assuming this to be true, we believe that in proceedings in Justice Court involving violations of village ordinances, that the claims of a Justice of the Peace for his costs in cases where the proceedings have been dismissed should be submitted in the same manner as other claims against the village.

Section 38 of said Chapter 145 provides in part as follows:

> " * * * The justice of the peace shall report and pay into the village treasury quarterly, all moneys collected by them belonging to such village; which reports shall be verified by affidavit, and filed in the office of the treasurer; * * *."

Section 22 provides in part:

> "No account or demand against such village shall be paid until it has been audited and allowed, and an order drawn on the treasurer therefor. Every account shall be made out in items, and verified by affidavit indorsed or annexed that the same is just and correct and no part thereof paid. * * *"

We are, therefore, of the opinion that such Justice of the Peace should file a claim for such costs pursuant to the above quoted statutory provisions, and that such costs in cases which are dismissed should not be deducted from fines imposed in other cases.

2. "In cases of acquittal on complaints filed for violation of a village ordinance, can the justice of the peace collect costs from the municipality?"

Section 38 of said Chapter 145 provides as follows:

> "All fines, forfeitures, and penalties recovered for the violation of any ordinance, rule regulation, resolution or by-law of any such village, and all the moneys paid for licenses and permits shall be paid into the village treasury for the use of such village. The justices of the peace shall report and pay into the treasury quarterly, all moneys collected by them belonging to such village; which reports shall be verified by affidavit, and filed in the office of the treasurer; and such justice shall be entitled to duplicate receipts for such moneys, one of which such justice shall take and file with the village recorder."

Section 40 provides:

> "All fines and penalties imposed under or by virtue of the provisions of this act, shall belong to the village, and shall constitute a fund to pay the expenses incurred under the provisions of this chapter."

Pursuant to the above quoted statutory provisions, we believe that in prosecutions for the violation of village ordinances, where there are no convictions, that "the expenses incurred" in such proceedings should be paid

by the village from the funds derived from "all fines and penalties" imposed under or by virtue of the provisions of said Chapter 145.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

January 13, 1936. 199b-5

165

COURTS—Justice of the peace—Jurisdiction lost—When.

Mr. George W. Strong, Village Attorney.

In your letter you state:

> "A man was tagged by a police officer of the Village of Edina for careless driving. He appeared before a Justice of the Village sometime early in June. A hearing was had and the Justice took the matter under advisement.
>
> "The Justice made no decision until early in September, a delay of about 3 months. No appeal was taken within the statutory time allowed for appeals, but I am now informed by the attorney for the defendant that if any steps are taken to enforce payment of the fine, that the defendant will claim that the Justice has lost jurisdiction and that the State is now without power to enforce the sentence, which was, as a matter of fact, $15.00 or 15 days."

You further state that the Justice of the Peace wishes our opinion on the following questions:

> 1. "Did he lose jurisdiction by failure to decide the matter within three days from the date of hearing?"

We answer this question in the affirmative. Section 9114, Mason's Minnesota Statutes of 1927, provides that "On the return of the warrant with the accused, the justice shall proceed to hear, try, and determine the action within one day, unless continued for cause." A Justice has no authority to adjourn a criminal case from time to time simply for the purpose of delaying the actual imposing of sentence. The determination of a criminal case as set forth in Section 9114 must of course include the imposition of sentence.

Section 9127 provides that upon conviction of the accused the Justice shall render judgment and inflict punishment.

Putting these two sections together, it is clear that it is the intent of the law that a Justice shall proceed promptly to try any criminal case brought before him and upon conviction shall impose sentence immediately. The only authority which the law confers upon him to postpone the determination of such a case is the power to continue the case for cause pend-

ing the trial. This does not authorize a Justice to stay the imposition of sentence after a conviction either upon a trial or plea of guilty. As a general proposition it could hardly be said that a desire on the part of a Justice to avoid imposing sentence would furnish sufficient cause for the adjournment of a criminal case. If that were the sole purpose of the adjournment the Justice would thereby be accomplishing indirectly what the law gives him no power to do directly.

It is our opinion that a delay of three months in rendering a decision after trial is unreasonable and that the Justice lost jurisdiction by such delay. The facts do not show that the case was continued, but merely that the Justice took the matter under advisement after a hearing was had. He did not act in conformance with the statute, and his decision in the matter is void.

2. "Did the defendant, by failure to object, consent to the taking of the matter under advisement and any consequent delay?"

We answer this question in the negative. A court is presumed to know its powers and duties, and a defendant is under no obligation to remind a court thereof.

ROY C. FRANK,
Assistant Attorney General.

October 1, 1937. 266b-11

166

COURTS—Justice of peace—Jurors—Not entitled to mileage.

Mr. A. B. Anderson, County Attorney.

You state:

> "Upon being charged with a misdemeanor under the state law in Justice Court within an incorporated village in Steele County, the defendant demanded a jury trial. Pursuant to that demand a jury of twelve was selected and those twelve jurors spent one day's time in the trial of that case. The justice of the peace issued juror's certificates with a provision for ten cents per mile for the miles necessarily travelled by each juror. These certificates were presented to the County Auditor of Steele County for payment and the County Auditor questions the amount of mileage, if any, to which such jurors are entitled."

You ask "whether or not a juror serving in Justice Court is entitled to mileage for the miles necessarily travelled in attending court and, if so, at what rate per mile such jurors should be paid?"

We advise you in pursuance with previous opinions of this office that jurors in Justice Court are not allowed mileage.

Mason's Minnesota Statutes of 1927, Section 7011, provides that:

"Each juror sworn in any action pending in a justice court - - - shall receive one dollar, to be paid in the first instance in all civil actions by the party calling for such jurors."

You will note that no provision is made in said statute for the payment of mileage to jurors in Justice Court and consequently no mileage can be paid.

ROY C. FRANK,
Assistant Attorney General.

July 6, 1938. 260a-4

167

COURTS—Justice of the peace—Power to suspend sentence.

Mr. A. C. Richardson, County Attorney.

You ask whether or not a justice of the peace has the authority to suspend a sentence.

We answer your question in the affirmative. Chapter 60, Laws of 1937, amending Section 9127, Mason's Minnesota Statutes of 1927, provides that "the justice shall have power in his discretion to suspend sentence or place the defendant on probation for a period not exceeding one year, or where a fine has been imposed to order such fine to be paid in installments over a period not exceeding one year."

ROY C. FRANK,
Assistant Attorney General.

September 16, 1937. 266b-21

168

COURTS—Justice of peace—Prosecutions under ordinances.

Mr. Per M. Larson, Assistant County Attorney.

In your letter you state:

"Section 9136, Mason's Minnesota Statutes of 1927, provides in part that if a Justice within twenty days after any conviction had before him, shall make and cause to be filed with the Clerk of District Court of his County a certificate under his hand, briefly stating therein the offense charged, the conviction and judgment and the amount of fine collected, etc.

"Section 9137, Mason's Minnesota Statutes, 1927, provides in part that if such Justice within ten days after the conclusion of any criminal

case prosecuted before him, shall make a report thereof to the County Attorney, etc."

You then ask:

"Do those Sections of law apply to Justices in Villages and prosecutions under village ordinances, that is, is it mandatory upon Justices of the Peace in cases of prosecutions under Village Ordinances to comply with and do the things enumerated in the above mentioned sections of law?"

We are of the opinion that the two sections of the statute referred to by you are not applicable to prosecutions under a village ordinance.

ROY C. FRANK,
Assistant Attorney General.

December 3, 1937. 266b-17

169

COURTS—Justice of the peace—Prosecutions for violation of village ordinances.

Mr. A. O. Bjorklund, Village Attorney.

You state that in a number of cases wherein the defendants were charged with violation of the village ordinances of the Village of Morningside, a "judgment of dismissal was entered; and in others, a small fine was imposed but was suspended."

You inquire:

"Under the foregoing circumstances, is it proper for the village to pay the justice of the peace the fees prescribed by law?"

This office has held that in villages operating under Chapter 145, Laws of 1885, a justice of the peace of such village is entitled to the fees provided by law in cases where the charge against the defendant is dismissed.

Although you do not so state, our information is that the Village of Morningside is operating under the Revised Laws of 1905, as amended. The provisions of Section 1181, et seq., Mason's Minnesota Statutes of 1927, relating to prosecutions for the violation of village ordinances in a justice court are substantially the same as the provisions of Chapter 145, Laws of 1885, relating to the same subject. We are, therefore, of the opinion that a justice of the peace of a village operating under the Revised Laws of 1905, as amended, is entitled to collect the fees provided by the statutes in cases where the justice enters a dismissal of the charge against the defendant.

Section 9127, Mason's Minnesota Statutes of 1927, as amended, expressly authorizes a justice of the peace to suspend the sentence imposed on

a defendant, and we are of the opinion that such suspending of a sentence by a justice of the peace does not deprive said justice of the fees provided for by law.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

July 1, 1938. 266b-8

170

COURTS—Commissioners—Powers and duties.

Mr. John T. Galarneault, County Attorney.

You inquire:

> "Will you please advise me as to whether or not a Court Commissioner has the right under Chapter 246 of the Laws of 1935 to pass upon the leasing of lands as provided for, if such lands are tax delinquent."

Mason's Minnesota Statutes of 1927, Section 2150, as amended by Laws 246, Laws 1935, provides in part:

> "When any parcel of land is bid in for the state, until its rights be assigned or the land be redeemed, the sale shall not operate as a payment of the amount for which the same is sold, but at any time after such sale the county auditor may make and file with the clerk where the judgment is entered an affidavit stating the date of the sale, the amount for which such parcel was bid in for the state, and the amount of all subsequent delinquent taxes, that its right has not been assigned, that there has been no redemption, and that the land is rented in whole or in part, and produces rent, and giving the names of the persons paying rent. Upon presentation of such affidavit, the judge or court commissioner for the county shall indorse thereon an order directing an attachment to issue to attach the rents of such lands. * * *
>
> "Provided further, that if at any time while the sheriff is collecting such rent the lease upon said property shall expire, or, if the sheriff has once commenced to collect such rent and said property becomes vacant, the county auditor may lease said property upon five days' notice to the owner, subject to the approval of the district court. * * *"

It is also provided in said section that where any unplatted land is bid in for the state, and is cropped upon a share agreement with the owner, or by a trespasser, the owner's share of such crop may be attached in the same manner as rents and applied upon delinquent taxes; that in case there is no agreement for rent and the occupant is a trespasser, the attachment shall attach to and bind all such crops:

"provided, however, that the district court may upon application by such occupant, upon ten days' notice to the owner and the county auditor, * * * release to such occupant the excess of such crops over and above the owner's or landlord's share of the grass, hay and crops of said premises as determined by the court. * * *"

There are other provisions in said section relating to the function of the district court. The only place that the term "judge" is used is in that part of the section first quoted, which provides that the judge or court commissioner may issue an order directing the attachment of rent on lands.

Under the constitution, Section 15 of Article 6, the legislature is authorized to provide for the election of a court commissioner with judicial power and jurisdiction not exceeding the power and jurisdiction of a judge of the district court at chambers.

Under Mason's Minnesota Statutes of 1927, Section 247, it is provided that court commissioners may exercise the judicial powers of a judge of the district court at chambers.

The power of a judge at chambers is confined to such matters as granting orders to show cause, extending time to plead, letting of bail, granting injunctions, and otherwise putting the process of the court in motion. The power of a judge in vacation is not that of a court in vacation under our statutes. The judge in vacation has no power to hear and determine any matter which the court only can hear. See Dunnell's Digest, Section 4960 and cases cited therein.

It is our opinion that the only power given to a court commissioner by said Section 2150, as amended, is the power to issue an attachment for rents.

WILLIAM D. GUNN,
Special Assistant Attorney General.

August 2, 1937. 128b

171

COURTS—Justice of peace—Suspension of sentence.

Mr. Thomas A. Flynn, Village Attorney.

You ask our opinion on the following two questions:

"1. In a case where a prisoner has been fined by the justice, upon conviction by the jury or a guilty plea, and in default of payment of the fine, has been committed to the County Jail, can the Justice thereafter suspend the sentence and free the prisoner upon his good behavior?

"2. In a like case after the prisoner has been committed to the County Jail, can the justice suspend the sentence upon payment of

part of the fine (as determined by the justice on a pro rata basis by days) or upon payment of the costs (as determined by the Justice) and free the prisoner upon his good behavior?"

We answer both of your questions in the negative. Mason's Minnesota Statutes of 1927, Section 9127, as amended by Chapter 60, Laws of 1937, authorizes a justice of peace to suspend sentence or place a defendant on probation or to provide for the payment of fines in installments over a period not to exceed one year. After a sentence has been imposed and a committment issued, the justice's jurisdiction is terminated and he cannot reduce the fine or the jail sentence imposed. In other words the power of a justice of peace to suspend the sentence or provide for the payment of a fine in installments must be exercised at the time of the imposition of the sentence and, if not done so at that time, cannot be invoked at a later date.

ROY C. FRANK,
Assistant Attorney General.

April 7, 1938. 266b-21

172

COURTS—Justice of the peace—Towns—Jurisdiction of—Place of holding court.

Mr. Allan L. Johnson, Township Attorney.

You inquire:

1. "Can a justice of the peace, elected in the village of Deephaven, Hennepin County, Minnesota, legally hold court for the trial of criminal or civil proceedings in the city of Minneapolis, Hennepin County, Minnesota?"

Section 8994, Mason's Minnesota Statutes of 1927, provides as follows:

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

We assume that the village of Deephaven does not adjoin the city of Minneapolis. Assuming this to be true, you are advised that under the provisions of said Section 8994, a justice of the peace of said village is not authorized to hold his court in the city of Minneapolis.

2. "If you find that a justice from Deephaven may not legally hold court in Minneapolis, can a defendant in a criminal proceeding being

tried before such justice within Minneapolis, remedy such illegality by waiver?"

Assuming that the offense is one over which such justice of the peace has jurisdiction and the defendant makes no objection at the time of the trial to such justice holding his court in the city of Minneapolis, we believe that he waives any objection thereto.

In Holmes vs. Igo, 110 Minn. 133, the Court said:

"By acquiescing to and taking part in the proceedings outside the territory for which the justice was elected, the parties waived any objection thereto."

3. "Is it proper for the sheriff or the state highway patrol to take all defendants arrested by him or them, to one justice, no matter where the offense was committed, in view of the mandatory words of the new motor vehicle code, Section 135, paragraph C?"

Said paragraph C of Section 135, of Chapter 464, Laws of 1937, provides as follows:

"The place specified in said notice to appear must be before a magistrate within the town if there be a magistrate within said town, otherwise within the county in which the offense charged is alleged to have been committed and who has jurisdiction of said offense."

We believe that in construing the provisions of said paragraph C of said Section 135, paragraph A of said section and Section 134 should also be taken into consideration.

Said Section 134 provides as follows:

"Whenever any person is arrested for any violation of this act punishable as a misdemeanor, the arrested person **shall be immediately taken before a magistrate within the county** in which the offense charged is alleged to have been committed and who has jurisdiction of such offense and is **nearest or most accessible with reference to the place where said arrest is made,** in any of the following cases:

"1. When a person arrested demands an immediate appearance before a magistrate;

"2. When a person is arrested and charged with an offense under this act causing or contributing to an accident resulting in injury or death to any person;

"3. When the person is arrested upon a charge of negligent homicide;

"4. When the person is arrested upon a charge of driving while under the influence of intoxicating liquor or narcotic drugs;

"5. When the person is arrested upon a charge of failure to stop in the event of an accident resulting in death, personal injuries, or damage to property;

"6. In any other event when the person arrested refuses to give his written promise to appear in court as hereinafter provided."

Paragraph A of said Section 135 provides:

"Whenever a person is arrested for any violation of this act punishable as a misdemeanor, **and such person is not immediately taken before a magistrate as hereinbefore required,** the arresting officer shall prepare in duplicate written notice to appear in court containing the name and address of such person, his driver's license or chauffeur's license number, the license of his vehicle, if any, the offense charged, and the time and place when and where such person shall appear in court."

It is then provided under paragraph C of said section, above quoted, that the place specified in such notice must be before a magistrate within said town if there be a magistrate within such town.

In construing said statutory provisions we believe that under said paragraph C of Section 135, a person charged with an offense under said act is entitled, as a matter of right, to be brought "before a magistrate in the town * * * in which the offense charged is alleged to have been committed" only in cases where such person has not been taken before a magistrate "within the county * * * nearest or most accessible to the place where said arrest is made," as provided under Section 134 of said Chapter 464.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

March 29, 1938. 266b-23

173

COURTS—Justice of the peace—Vacancy—Filling of—Term.

Mr. Earl J. Maxwell, Attorney for Town of Minnetonka.

Your letter to Attorney General William S. Ervin under date of January 7, 1937, has been referred to the undersigned for attention.

Therein you state that the two justices of the peace of the town of Minnetonka resigned; that the term of one of the resigned justices would have expired in March, 1937, and the term of the other justice in March, 1938; that two new justices were appointed and qualified to fill the vacancies created by the resignation of said two justices.

You inquire:

"Would each Justice have to file for election in March of 1937 for a period of two years, or would one Justice file for a one-year term and the other Justice file for a two-year term? Can the Justices so ap-

pointed serve for the balance of the terms of the Justices they superseded without running for election in March of 1937?"

Mason's Minnesota Statutes of 1927, Section 1086, provides, in part:

"Whenever a vacancy occurs in any town office, the town board shall fill the same by appointment. The person so appointed shall hold his office until the next annual town meeting and until his successor qualifies: * * *"

While the term of office of a justice of the peace is two years by constitutional provision (Article 6, Section 8), we are aware of no reason why the legislature may not, in the absence of a constitutional prohibition, provide, as it has by said Section 1086, that a person appointed to fill a vacancy in the office of the justice of the peace, shall hold such office "until the next annual town meeting." It is our opinion, therefore, that the persons appointed to fill such vacancies in said offices do not hold over until the end of the terms of their predecessors. In other words, the person appointed to fill the vacancy in the office expiring in March, 1937, holds office under said appointment until the next annual town meeting in March, 1937, which also happens to be the time when the term of his predecessor in office expires. The person appointed to fill the vacancy in the office expiring in March, 1938, holds only until the next annual town meeting in March, 1937, pursuant to said Section 1086.

We are also of the opinion that because of the provisions of Section 8 of Article 6 of the State Constitution the justices in question should be elected for a full two year term at the next annual town meeting to be held in March, 1937. This for the reason that the said constitutional provision fixes the term of office of a justice of the peace at two years and the term so fixed may not be shortened by a legislative enactment.

DAVID J. ERICKSON,
Deputy Attorney General.

January 20, 1937. 266a-12

174

COURTS—Municipal—Appeals from convictions of violation of ordinance—When.

Mr. John C. Haave, City Attorney.

You advise us that the present charter of the city of Montevideo makes no provisions for an appeal from the municipal court of such city to the district court from a conviction of a violation of a city ordinance. A petition has now been presented to the charter commission of such city proposing an amendment to the charter authorizing an appeal in such cases. You further state that you are under the impression that the right of appeal

from such a conviction is a statutory right and exists unless expressly forbidden by the charter.

Our opinion is requested thereon:

For the purpose of appeals, prosecutions for the violation of municipal ordinances are criminal actions and as such the appeals must be taken in the manner prescribed by Mason's Minnesota Statutes of 1927, Section 9129. See City of Madison v. Martin, 109 Minn. 292, 123 N. W. 809, and Village of Crosby v. Stemich, 160 Minn. 261, 199 N. W. 918. Section 9129 provides in part as follows:

> "Any person convicted of a criminal offense by a justice may appeal to the district court . . ."

While Section 9129 refers to justice courts, the section applies to municipal courts. See the above cited cases. In the case of City of Red Wing v. Nibbe, 160 Minn. 274, 199 N. W. 918, the court held that the right of appeal from a conviction of a violation of an ordinance does not exist where the city charter specifically prohibits such appeal. The court said:

> "The right to appeal is purely statutory, and it was within the province of the legislative power that enacted the Red Wing charter to withhold that right from those convicted under its ordinances."

The inference is clear that to deny the right of appeal the charter must specifically provide that no appeal can be taken. When the charter is silent the general statutory provisions as set forth in Section 9129 apply and an appeal can be taken thereunder.

ROY C. FRANK,
Assistant Attorney General.

June 11, 1937 6h

175

COURTS — Municipal — Judge — Compensation of practicing attorney appointed to act in absence of judge.

Mr. James H. Caswell, City Attorney.

You state that the municipal court of the City of Faribault was established pursuant to the provisions of Chapter 120, Laws of 1925, as amended by Chapter 81, Laws of 1927, which act provides that said municipal court shall possess all of the powers and be subject to all of the provisions of Chapter 5 of the General Statutes of 1923 (Section 212, et seq., Mason's Minnesota Statutes) and acts amendatory and supplemental thereto, relating to municipal courts. You also state that such municipal court has one regular municipal judge, but no special municipal judge has been provided for, and when it becomes necessary, because of the absence or disability of the regular municipal judge, the Mayor appoints a practicing

attorney to act as municipal judge during such absence or disability of such regular municipal judge.

You direct our attention to Section 217, Mason's Minnesota Statutes of 1927, as amended, which provides for the compensation of the municipal judge and special municipal judge but makes no provision for the compensation of a practicing attorney who may be appointed by the Mayor to act for such municipal judge in case of the absence or disability of such municipal judge.

You inquire:

> "May the city, or is it obliged to, pay such acting municipal judge from the city treasury for services rendered as such acting municipal judge?
>
> "If not, should the compensation of such acting municipal judge be paid by the municipal judge?"

Both of your questions may conveniently be considered together. Section 217, Mason's Minnesota Statutes of 1927, as amended, provides as follows:

> "The judge of such courts shall be elected at the regular city or village elections, for the term of four years, beginning on the first Monday of the month next following their election, and until their successors qualify. When a new court is organized more than 90 days prior to a regular election, the Governor shall appoint a judge or judges thereof to serve until they are elected and qualified, and vacancy shall be filled by like appointment for the unexpired term. Provided, that in the absence or disability of the municipal judge and special municipal judge of such court, if there be one, the mayor or president of the council may designate a practicing attorney to sit in place of such municipal judge from day to day. All municipal judges and special municipal judges shall be men learned in the law and residents of the city or village. The salary of each shall be paid monthly by the city or village, and shall be fixed by resolution adopted by a four-fifths majority of the council of such city or village, and approved by the mayor or president, and shall not be diminished during his term. Provided, however, that where there shall be a municipal judge and a special municipal judge, the special municipal judge shall act only in the absence or disability of the municipal judge, and receive as compensation therefor an amount per diem to be fixed and paid by the council of such city or village; and provided, further, that any such special municipal judge shall not be prohibited from practicing in the said municipal court or in any other court, but he shall not sit in the trial of any cause or proceedings wherein he may be interested, directly or indirectly, as counsel or attorney, or otherwise. Provided that in all cities over 7,000 population and having an assessed valuation of more than $10,000,000, the city council may pay the special municipal judge a salary of $50.00 per month in lieu of compensation on a per diem basis."

Under said Section 217 provision is made for the appointment of a practicing attorney to sit in place of the municipal judge in case of his absence or disability. Such attorney, for the time being is, therefore, acting municipal judge, and a public officer. However, there is no provision made in said Section 217 for the compensation of such acting municipal judge.

We, therefore, have a situation where an office is created but no compensation is fixed for the performance of the duties thereof. The general rule seems to be that public officers are not entitled to compensation for official services rendered where there are no provisions in the law providing for compensation for such services.

In Vistaunet v. Thief River Falls, 111 Minn. 537, it was held that the plaintiff, a physician and surgeon, and the duly qualified health commissioner for the City of Thief River Falls, could not recover the value of his services in the quarantining and disinfecting of certain buildings in the city occupied by persons who were suffering from contagious and infectious diseases. In that case the Court said:

> "Where no salary for a public officer has been fixed by law, none can be recovered."

Further on, however, in said opinion the Court also said:

> "It might easily be, in such a case as the case at bar, that an ordinance had been passed fixing plaintiff's salary under which plaintiff would be entitled to recover. On proof of such ordinance, plaintiff would be entitled to judgment."

In view of what we have said above, we do not believe that a practicing attorney, who is appointed to act in the place of the municipal judge, is entitled to receive any compensation for his services as such acting judge under Section 217, and in the absence of a city ordinance providing for such compensation we do not believe that your city council is authorized to pay such practicing attorney for his services in acting for the municipal judge.

However, we are of the opinion that the city council, if it so desires, would have authority to adopt an ordinance providing for the compensation of such acting judge. Section 115 of your city charter conveys broad powers to the city council and provides as follows:

> "The Council shall have full power to enact appropriate legislation by ordinance, resolution by-laws or regulation, and do and perform any and all other acts and things which may be necessary and proper in order to the full carrying out of the general powers of the city, and the provisions of this Charter, and to exercise all powers not in conflict with the constitution of the State, this Charter, or ordinances adopted by the people of the city, and in the foregoing enumeration of specific powers shall not be held in any way to curtail or restrict any power which the Council might otherwise have under the common law."

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

January 19, 1938. 307i

176

COURTS—Municipal—Judge—Salary.

Mr. E. V. Cliff, City Attorney.

You inquire:

> "Can the common council of any city of the fourth class in fixing the salary of its municipal judge, as provided in Section 237 of Mason's Minnesota Statutes for 1927 as amended, provide for the payment into the city treasury of all fees collected by the judge of municipal court, including those paid by the county in criminal cases brought under the statute by the county attorney? Or is the judge of municipal court permitted to retain those fees? Or can the council specifically provide for so much salary and allow the judge to retain fees in certain cases?"

It does not appear from your letter whether such municipal court was organized under the provisions of the Revised Laws of 1905 (Section 215, et seq. Mason's Minnesota Statutes of 1927, as amended), or under Chapter 229, Laws of 1895, as amended.

This office has uniformly held over a period of years that the compensation of the judge of the municipal court, operating under the provisions of said Revised Laws of 1905, as amended, is governed by Section 217, Mason's Minnesota Statutes of 1927, as amended. Said section provides in part as follows:

> "All municipal judges, and special municipal judges shall be men learned in the law and residents of the city or village. The salary of each shall be paid monthly by the city or village, and shall be fixed by resolution adopted by a four-fifths majority of the council of such city or village, and approved by the mayor or president, and shall not be diminished during his term."

In an opinion of this office, addressed to you under date of January 3, 1936, we expressed the opinion that the word "salary," as used in said Section 217, is to be construed as meaning a fixed compensation payable at regular intervals and, consequently, it was not permissible for the city of Ortonville to fix the salary of the judge of such municipal court "by fixing a straight sum to cover all actions or work done by the court for the city, and permit the court to collect from the county all fees for actions brought before him by the court for work done for them."

We are, therefore, of the opinion that if your municipal court is operating under the provisions of said Revised Laws of 1905, as amended, that the council may not "provide for so much salary and allow the judge to retain fees in certain cases."

In view of the decision of our Supreme Court, in State ex rel. Child v. City of Waseca, 195 Minn. 266, we are also of the opinion that if your court is operating under the provisions of Chapter 229, Laws of 1895, as amended, that the compensation of such municipal court judge should likewise be fixed on a salary basis rather than on a fee basis.

In the above case, which involved the salary of the judge of a municipal court organized under said Chapter 229, Laws of 1895, as amended, the Court held that the salary of the judge of such court was governed by the provisions of said Section 217, Mason's Minnesota Statutes of 1927, as amended, and that said section contains "mandatory language requiring the council to fix the salary of the municipal judge on a monthly payment basis." The Court, in said opinion, also construed the provisions of Section 237, Mason's Minnesota Statutes of 1927, as amended, to which you refer in your letter. It will be noted that said Section 237 was originally enacted as Section 1 of Chapter 306, Laws of 1909. Said section provides in part as follows:

> "Whenever the common council of **any city of the third or fourth class,** where any municipal court heretofore has been or hereafter shall be organized, **shall fail to fix the salary of the municipal judge as provided by law, or the mayor shall not approve the salary fixed by the council,** such judge shall receive as his compensation, until such salary shall be so fixed and approved, the same fees as is provided for in Laws of 1895, Chapter 229, Section 32, * * *."

The language above quoted indicates that the legislature evidently intended that said Chapter 306, Laws of 1909, as amended, should apply to the municipal court of any such city, whether said court is operating under said Revised Laws of 1905, as amended, or under said Chapter 229, Laws of 1895, as amended.

Assuming, therefore, that said provisions apply to the municipal court of your city, we are nevertheless of the opinion that they do not authorize the council to provide for the compensation of such municipal court judge partly on a salary basis and partly on a fee basis. As pointed out by the Court, in the above referred to case, it is only when the council fails to take any affirmative action to fix such compensation that said section has any application. In this connection the Court said:

> "There is a statute as part of the municipal court acts which provides that, in case the city council shall fail to fix the salary of the municipal judge or the mayor fail to approve the salary fixed, the judge shall, until his salary is fixed, receive as compensation the fees provided by Chapter 229, Laws of 1895. Respondent's counsel argue that the resolution here in question amounted to failure to provide a salary for the judge, and that therefore this provision of the statute should apply. It would be sufficient to say that the resolution here in question was not a failure to fix the salary but an attempt to discontinue it."

We are, therefore, of the opinion that the council may provide that all fees which such municipal court judge is by law authorized to collect shall be paid into the city treasury and that such municipal court judge is not entitled to retain such fees as part of his compensation.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

February 1, 1938. 307i

177

COURTS—Municipal—Judge—Salary—Increase of during term.

Mr. James H. Caswell, City Attorney.

You state that the municipal judge of your city was elected to a four year term of office "two years ago." You direct attention to Section 217, Mason's Minnesota Statutes of 1927, 1936 Supplement, and inquire:

> "May the City Council of the City of Faribault increase the salary of the Judge of the Municipal Court of this city during the term of office of such judge?"

Although you do not so state our information is that the Municipal Court of the City of Faribault was established pursuant to Chapter 120, Laws of 1925, as amended by Chapter 81, Laws of 1927. Section 2 of said Chapter 120 provides that "said court shall possess all of the powers and be subject to all of the provisions set forth in that portion of Chapter five (5) of the General Statutes of Minnesota for 1923, and acts amendatory thereof and supplemental thereto, relating to municipal courts."

It will be noted that said Chapter 5, General Statutes of Minnesota for 1923, is now incorporated in Chapter 5 of Mason's Minnesota Statutes of 1927, Sections 212 to 237. Section 217 is a part of said Chapter 5. This section (217) up to 1913 made it optional with the city council whether to compensate the municipal judge by permitting him to collect and receive the court fees charged or by fixing a monthly salary for the judge and having the fees paid into the city treasury for the use of the city. However, by Chapter 104, Laws of 1913, the legislature amended said section by striking out the provision that the city council "may" fix the salary and inserting in the law the provision that the salary of the municipal judge "shall be" fixed by resolution adopted by a four-fifths majority of the members of the council and paid monthly. Chapter 276, Laws of 1927, Chapter 223, Laws of 1929, and Chapter 269, Laws of 1933 contain the same mandatory language requiring the council to fix the salary of the municipal judge on a monthly basis by a resolution adopted by a four-fifths majority of the members of the council of the city or village and approved by the mayor or president.

As you indicate in your letter, said Section 217, prior to its amendment by Chapter 276, Laws of 1927, in so far as the same relates to the salary of a municipal judge, read as follows:

> "The salary of each shall be paid monthly by the city or village, and shall be fixed by resolution adopted by a four-fifths majority of the council of such city or village, and approved by the mayor or president before the term begins, and shall not be diminished during such term."

By Chapter 276, Laws of 1927, the legislature amended said Section 217 by adding to the above quoted language of the said section after the word "be" the words "increased or" so that said clause after the amendment by said Chapter 276 read "and shall not be increased or diminished during such term." The 1929 legislature by enacting Chapter 223 amended said clause

so as to read "the salary * * * shall be fixed by resolution * * * and shall not be diminished during his term." It appears, therefore, that the legislature by the amendment of 1929 re-enacted the above quoted salary clause substantially the same as it read prior to the amendment by Chapter 276, Laws of 1927. By so doing the legislature evidently intended to give the city council power to increase the salary of the municipal judge during his term.

The 1937 legislature by enacting Chapter 154, Laws of 1937, amended the clause "and shall be fixed by resolution adopted by four-fifths majority of the council of such city or village" by striking the words "four-fifths" so that said clause as amended now reads "and shall be fixed by resolution adopted by a **majority** of the council of such city or village."

Answering your specific inquiry, therefore, we are of the opinion that the council of your city may increase the salary of the judge of municipal court during the term of such judge.

DAVID J. ERICKSON,
Deputy Attorney General.

May 11, 1937. 307i

178

COURTS—Preliminary Hearings—Reporters fee.

Mr. Thos. H. Quinn, County Attorney.

You state:

> "In a discussion with the Public Examiner on Monday we went over Section 10586 of Mason's 1927 General Statutes. That Section reads, in part, as follows: '— — — He shall reduce the testimony into writing, or cause it to be done, and, when he shall so require, have it signed by the witnesses.'
>
> "From the reading of the Statute one might take it to mean that it is up to the presiding magistrate to make a transcript of the testimony.
>
> "For over 25 years in this county, and I believe in all counties in the state, the Court Reporter has been hired to take the testimony and write up a transcript of it for each hearing. In this county, the county pays the Court Reporter."

You ask whether it is legal for the county to pay a reporter for taking such testimony and making a transcript thereof.

We answer your question in the negative.

Under the provisions of Section 10586, the examining magistrate shall reduce the testimony adduced at such hearing, either by his own efforts or

by someone else. For such services the magistrate is entitled to fifteen cents per folio. Mason's Minnesota Statutes of 1927, Section 6998 (26). If the magistrate desires to retain a reporter to take the testimony and reduce it to writing, payment for such services must, in the absence of a statute permitting the county to make payment, be paid by the magistrate. The county pays the magistrate for this work. If it should pay the reporter, double payment would result. The proper procedure is for the magistrate to insert in his statement of fees a charge of fifteen cents per folio and to pay the reporter from that amount.

ROY C. FRANK,
Assistant Attorney General.

April 20, 1937. 129

179

COURTS—Probate—Guardian may compromise claim for ward.

Mr. L. L. Roerkohl, County Attorney.

You ask if "the Judge of Probate has jurisdiction under this section to enter an order authorizing a (general) guardian to compromise and settle a claim for injuries sustained by a minor (a ward) as a result of an automobile accident, which claim has not been sued and is not therefore pending in District Court."

It is my opinion that your question should be, and it is, answered in the affirmative.

Chapter 113, Laws 1929 (Section 9172, Mason's 1936 Supplement) is not a limitation upon authority granted by said Section 135.

HARRY W. OEHLER,
Assistant Attorney General.

March 3, 1938. 346d

180

COURTS—Probate—Judge—Death of—Authority of Clerk to act after death.

Mr. J. Norman Peterson, County Attorney.

A telegram was received at this office on May 24, 1938, from Ella H. Danielson, Clerk of the Probate Court of Todd County, requesting our opinion on the question of the authority of the clerk of said court, or an "acting probate judge," to sign "orders for hearing, certified copies," and like instruments after the death of the probate judge. The statutes authorize the

Attorney General to give his opinion on county matters only upon application of the county attorney and we are, therefore, addressing our reply to said telegram to you.

Section 14 of Chapter 72, Laws 1935 (Section 8992-14, Mason's Minnesota Statutes of 1927, 1938 Supplement) provides, in part:

> "The judge may appoint a clerk, deputy clerks, and employees as provided by law, **to hold office during his pleasure,** who shall perform the duties imposed by law **and such judge.** * * * A clerk or deputy clerk may take acknowledgments, administer oaths, authenticate, exemplify, or certify copies of instruments, documents, or records of the court, and when so ordered may hear and report to the court the testimony of any witnesses and the interrogatories and objections of counsel."

Section 8992-15, Mason's Minnesota Statutes, 1938 Supplement, provides as follows:

> "The judge may authorize the clerk or any deputy clerk to issue orders for hearing petitions for general administration, for the probate of any will, for determination of descent, for sale, lease, mortgage, or conveyance of real estate, for the settlement and allowance of any account, for partial or final distribution, for commitment, orders limiting the time to file claims and fixing the time and place for the hearing thereon, and to issue notice of the entry of any order. The issuance of any such order or notice by the clerk or deputy clerk shall be prima facie evidence of his authority to issue it."

The authority of the clerk of probate court to act under the above statutory provisions is derived from the judge of said court. The clerk is acting for the judge and we are of the opinion that the authority to act for said judge ceases upon his death.

Section 8992-8, Mason's Minnesota Statutes, 1938 Supplement, provides that "whenever the **disqualification, absence, or illness** of the resident judge exists, or whenever in his opinion the interest of the public or of any person interested in any matter requires that the probate judge of another county act in the stead of the resident judge, any other judge may act upon the request of the resident judge, or in the event of his incapacity, upon the request of the presiding judge of the district court in the county wherein such matter is pending."

Said section does not authorize the appointment of the probate judge of another county to act for a deceased probate judge and we do not believe that the probate judge of another county has authority as "acting probate judge" to act in the place of such deceased probate judge.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

May 25, 1938. 348

181

COURTS—Probate—Judge—Salary.

Mr. J. H. Manion, County Attorney.

You refer to Chapter 94, Laws 1937, and state that it is provided in said law that its terms shall not apply to counties having a certain number of townships, a certain population and a certain 1935 assessed valuation. You state that Pipestone County is a county having fifteen to seventeen townships, a population of 12,000 to 12,400 inhabitants, and a 1935 assessed valuation of from $7,000,000 to $7,300,000, exclusive of monies and credits, "if the assessed valuation is based on the reduced assessed value for platted and unplatted land being used for homestead purposes."

You direct attention to Chapter 359, Laws 1933, Section 1, which provides, in part:

> "For the purpose of determining salaries of all officials based on assessed valuations and of determining tax limitations and net bonded debt limitations now established by statute or by charter, class 3b and class 3c property shall be figured at 33⅓% and 40% of the true and full value thereof respectively."

You further state that if the assessed valuation of Pipestone County is based on the above quoted provision of Chapter 359 the assessed valuation thereof, exclusive of monies and credits, will be $7,775,586.00.

You inquire:

> "In determining whether the present salary of the Judge of Probate of Pipestone County shall or shall not be increased pursuant to said Chapter 94 is the above provision of said Chapter 359 as above quoted to be followed in arriving at the 1935 assessed valuation of Pipestone County?"

Chapter 94, Laws 1937, relates to the determination of salaries of officials based upon assessed valuation. Section 1 of Chapter 359 specifically provides that in determining such salaries based upon assessed valuation Class 3b and Class 3c property shall be figured at 33⅓% and 40% of the true and full value thereof.

It is our opinion, therefore, that in determining the salary of the judge of probate of your county the assessed valuation should be determined by figuring Class 3b and Class 3c property at 33⅓% and 40% of the full and true value thereof. Your inquiry is answered in the affirmative.

WILLIAM D. GUNN,
Special Assistant Attorney General.

June 12, 1937. 104a-9

182

COURTS—Probate—Judge—Vacancy—Election to fill.

Hon. Elmer A. Benson, Governor.

Pursuant to the provisions of Chapter 297, Laws 1929, it is mandatory that a primary election be held for the purpose of determining the nominees to be contestants in any election for a probate judge. When and if there is sufficient time therefor such primary should be held at the primary had in the even numbered years.

Specifically, and referring to the present vacancy in the Probate Court of Todd County, Minnesota, it would appear that there is ample time to issue a writ to enable the prospective candidates for such office to file in contest in the state-wide primary that will be held on June 20, 1938.

HARRY W. OEHLER,
Assistant Attorney General.

May 25, 1938. 347k

183

CREDIT UNIONS—May not collect fines in addition to interest.

Mr. Robt. D. Beery, Commissioner of Banks.

You state:

> "According to Section 7, Article 5, of the by-laws, a fine may be charged on delinquent payments. This has been the practice ever since credit unions were organized in 1925."

You ask if "it is legal for credit unions to charge anything beyond the one per cent per month in connection with their loans."

It is my opinion that your question should be, and it is, answered in the negative.

Said Section 7036 provides, in part, that:

> "Contracts shall bear the same rate of interest after they become due as before, and any provision in any contract, note, or instrument providing for an increase of the rate of interest after maturity, or any increase therein after making and delivery, shall work a forfeiture of the entire interest; but this provision shall not apply to notes or contracts which bear no interest before maturity."

The provisions of said Section 7774-17, relating to fines, are not, in my opinion, sufficient to offset the effect of the positive provisions of said Section 7036.

HARRY W. OEHLER,
Assistant Attorney General.

January 7, 1938. 92a-28

184

CREDIT UNIONS—Organization of—Use of term "credit union" or words analogous thereto.

Mr. Robt. D. Beery, Commissioner of Banks.

You enclose copies of the articles of incorporation and by-laws of a co-operative building association and also request this office to rule on the question of whether the members of such co-operative group fall within that certain classification defined in the Credit Union Act, Laws of 1925, Chapter 206, Section 5, which provides:

> "Credit union organization shall be limited to groups (of both large and small membership) having a common bond of occupation, or association or to groups within a well-defined rural district."

It will be noted that membership is not limited to those having a common bond of occupation but may include groups, large or small, having a common bond of association. It seems clear that the members or shareholders of a co-operative corporation or association do have a common bond of association.

In fact, a credit union is itself defined by the act, Section 7774-1, Mason's Minnesota Statutes of 1927, as follows:

> "A credit union is a co-operative society, incorporated for the two-fold purpose of promoting thrift among its members and creating a source of credit for them at legitimate rates of interest for provident purposes."

It is our opinion that the members or shareholders of a lawfully constituted co-operative corporation are bound by a common bond of association and therefore entitled to form a credit union but the investments and activities of such union would be limited as provided in Section 7774-4, Mason's Minnesota Statutes of 1927, (a) to (f) inclusive which includes (b) loans to members for provident or productive purposes, (e) to invest in any investment legal for savings banks and (c) to make loans to a co-operative society or other organization having membership in the credit union.

The nature of permissible investments seem to be well defined.

FRANK H. OSTERLIND,
Assistant Attorney General.

June 30, 1937. 53b

185

CRIMINAL LAW—Abandonment—Prosecution does not lie when.

Mr. C. A. Johnson, County Attorney.

You state:

"Sometime ago, one Johnson, divorced, married a young child of the age of 12 years in this county. At the time of said marriage, he was the father of 5 or 6 children, which have been taken away from him and his divorced wife, by the State, and said children are now wards of the State of Minnesota. He has contributed nothing to the support of his children."

and then inquire:

"Are you of the opinion that he still could be prosecuted for the abandonment of his minor children, or does the fact that the children are now wards of the State, prevent his prosecution?"

Previous to the enactment of Chapter 94, Laws of 1931, a father could not be convicted of the abandonment of his children where the father, by the decree of a court of competent jurisdiction, had been deprived of the right of custody of the child. See State v. Sweet, 179 Minn. 32, in which case our court said:

"Within the meaning of Sec. 10135 he could not desert or wholly abandon one whom he had no right to have the care and keeping of."

After this decision the legislature enacted Chapter 94, as an amendment to Sec. 10135, and provided that "Every parent, including the duly adjudged father of an illegitimate child **and a father who in an action for divorce or separate maintenance has been judicially deprived of the actual custody of his child,** * * *" is guilty of the crime of abandonment. The amendment nullified the Sweet decision insofar as those cases are concerned where custody of a child is taken away from the father in a divorce action. However, the amendment is not broad enough to cover the situation where custody has been taken away by a court in a different kind of an action, and we therefore advise you that a prosecution for abandonment does not lie against the father under the facts stated by you.

ROY C. FRANK,
Assistant Attorney General.

March 16, 1938. 840a-1

186

CRIMINAL LAW—Fingerprints—Authority to take.

Mr. M. C. Passolt, Bureau of Criminal Apprehension.

You state:

"Several peace officers who are lax in sending fingerprints of arrested persons to the Bureau, as required by law, claim that the reading of the law, Sec. 9950 -10-11 as amended by Chapter 197 Session Laws of 1935, is not clear in the matter of authority for taking fingerprints. They seem to be under the impression that it is still necessary to have

the consent of the judge of a district court or the consent of the court commissioner to take such prints. To me the reading of the law is quite clear, and I have explained this to the officers when questioned." You ask our opinion thereon.

Mason's Minnesota Statutes of 1927, Section 9950-10, as amended by Laws of 1929, Chapter 46 and Chapter 197, Laws of 1935, makes it the duty of sheriffs and of police officers in cities of the first, second and third classes to fingerprint all persons arrested for felony, persons reasonably believed to be fugitives from justice, and of all persons in whose possession are found concealed fire-arms, dangerous weapons, burglar tools or outfits, high-power explosives, or articles, machines or appliances which are usable for unlawful purposes, and to forward such fingerprints and other data required by the bureau of criminal apprehension to said bureau within twenty-four hours.

Consent of the court is not necessary to take finger prints or other identification data under this statute. It becomes the duty of the enumerated police officers to fingerprint and obtain further identification data from the classes of persons stated as soon as such persons are arrested. No authorization other than that contained in Section 9950-10 is necessary.

ROY C. FRANK,
Assistant Attorney General.

May 14, 1937. 605a-7

187

CRIMINAL LAW—Gambling—City ordinance not broad enough to avoid gambling statutes.

Mr. V. T. Conklin, City Attorney.

You ask whether the provisions of a so-called pinball ordinance are in conflict with the state laws pertaining to gambling devices.

Section 1 of said ordinance defines a mechanical amusement device as "a machine in the form of a rectangular box set on legs, slightly sloping toward the front, with a playing field containing holes or openings, together with pins, springs, and other appliances, which upon the insertion of a coin or token enables the player to drive balls upon such playing field whereby a score is established, and which contains no automatic pay-off device for the return of money or coins."

In State v. Grimes, 49 Minn. 443, our court defined a gambling device to be

"an invention or contrivance to determine the question as to who wins or loses his money on a contest of chance."

In State v. Grimes, 74 Minn. 257, our court said:

"gambling is the risking of money or anything of value between two or more persons on a contest of chance of any kind, where one must be the loser and the other the gainer. State v. Shaw, 39 Minn. 153, 39 N. W. 305."

In Zotalis v. Cannellos, 138 Minn. 179, 164 N. W. 807, it was said:

"It has long been settled, however, that playing any game for cigars or drinks, or under an agreement that the loser should treat to cigars or drinks or other refreshments is gambling. * * * Gambling with cards, dice or any other device whatever is prohibited by statute; * * *."

Also see Santrizos v. Public Drug Co., 143 Minn. 222, 173 N. W. 563. In 3 Dunnell's Minn. Digest (2nd Ed.) Section 3943 we find the following statement:

"A gambling device may be defined as 'an invention or contrivance to determine the question as to who wins or who loses his money on a contest of chance;' or as 'any kind of apparatus, contrivance, or instrument which may be used in games of chance, and upon the manipulation or operation of which the result of the game is determined'."

Turning our attention to the ordinance in question and applying the above quoted statements to such ordinance, what do we find? We find a partial definition of an amusement device, one that permits the licensing of a gambling device. The fact that a machine does not automatically pay cash does not of itself determine whether or not it is a gambling device. For example mechanical dice machines are used as gambling devices, and very seldom for anything else. Under the ordinance provision tokens or chips, good for merchandise or cash, could be automatically paid by the machine. If such were the case, the machine would be a gambling device. Or, the merchant could offer money or merchandise for certain scores. The machine would then become a gambling device.

The ordinance should be broad enough to prohibit the payment of merchandise as well as money as a prize or return. The player cannot have any chance of reward in return for his investment in the machine unless, of course, the operation of the machine is by skill only and the return to the player thereof does not depend on chance. Whether or not a particular device is one of skill or one of chance is a question of fact upon which we cannot, and do not, pass. The ordinance does not attempt to limit the devices to be licensed to devices of skill, but is broad enough to cover devices of chance as well as those of skill.

We feel that this ordinance is in conflict with our state laws relative to gambling and gambling devices.

ROY C. FRANK,
Assistant Attorney General.

March 3, 1937. 733

188

CRIMINAL LAW—Gambling—Counties cannot license games of skill.

Mr. C. C. Mitchell, County Attorney.

You ask:

> "Assuming that the so-called 'pin-ball' machines, about which your office has rendered certain opinions, are games of skill rather than games of chance, I beg to inquire if the County Board, or a Town Board, may impose a license on such machines located in the rural areas outside of the villages?"

We answer your question in the negative. Both towns and counties have only those powers which are expressly given to them by statute and such as may be necessary to exercise those so given. Mason's Minnesota Statutes of 1927, Section 1000 limits the powers of towns as follows:

> "No towns shall possess or exercise any corporate powers except such as are expressly given by law, or are necessary to the exercise of the powers so given."

See 6 Dunnell's Minn. Digest (2nd Ed.), Section 9651 and cases cited in footnotes 29, 30 and 31. Section 1049 (Mason's 1936 Supplement) provides that the town supervisors may

> "prohibit or license and regulate the keeping of billiard, pool and pigeonhole tables, bowling alleys, and may license and regulate public dancing places . . ."

Nowhere do we find express or implied authority to license games of skill. We therefore must hold that a town has no power to license such games.

In like manner the powers of a county board are purely statutory. The board has such powers as are expressly granted by statute, and such as may be necessary in the exercise of those expressly granted. See Mason's Minnesota Statutes of 1927, Section 668, subdivision 14; 2 Dunnell's Minn. Digest (2nd Ed.), Section 2269 and cases cited in note 8. We are unable to find any law authorizing a county board to license games of skill and consequently must hold that it has no power to license such games.

ROY C. FRANK,
Assistant Attorney General.

March 3, 1937. 733j

189

CRIMINAL LAW—Information may be filed when.

Mr. Paul D. Stratton, County Attorney.

You state that a certain defendant in your county has been bound over

for trial by the District Court for the crime of first degree manslaughter. You ask our opinion on the following question:

> "In your opinion, could the defendant be tried upon information or is an indictment by grand jury necessary?"

We advise you that an information may be filed by you in this particular case. Chapter 194, Laws 1935 provides that an information may be filed in any criminal case where the punishment is less than life imprisonment.

ROY C. FRANK,
Assistant Attorney General.

March 11, 1938. 494a-1

190

CRIMINAL LAW—Justice Court jurisdiction.

Mr. F. H. Stadsvold, County Attorney.

You state:

> "Section 6248, Mason's Minnesota Statutes for 1927 as amended by Chapter 420, Session Laws of 1937, provide for unfair discrimination. Section 7 of this law provides a penalty upon conviction of a fine of not less than $50.00 for each offense, or in default of the payment of such fine by imprisonment in the County Jail for not less than three (3) months **nor more than one (1) year.**"

You then ask:

> "Does this penalty give the Justice Court final disposition of the case or is it a matter for the District Court to decide after being bound over from the Justice Court?"

We wish to advise you that a justice court does not have any jurisdiction in criminal case where the punishment exceeds three months imprisonment or a fine of over $100. Since Section 6248 provides more than three months imprisonment, a justice court would not have jurisdiction over any offense committed contrary to said section. If such an offense is committed and is brought before a justice court on complaint, the justice of peace would only have authority to conduct a preliminary hearing and if the evidence warranted to bind the defendant over to the district court for final disposition. See State ex rel. Erickson v. West, 42 Minn. 147; State v. Anderson, 47 Minn. 270 and Article 6, Section 8, Constitution of the State of Minnesota.

ROY C. FRANK,
Assistant Attorney General.

July 15, 1937. 266b-21

191

CRIMINAL LAW—Justice Court—Plea of guilty—Appeal.

Mr. P. M. Lindbloom, County Attorney.

You ask the following question:

> "Can a person found guilty before a Justice Court and who has perfected his appeal to the District Court, plead guilty in the District Court and receive a sentence de novo or must the record of conviction in the Justice Court still stand as well as the punishment imposed by the justice?"

We wish to advise you that one found guilty in a Justice Court and who has appealed to the District Court may enter a plea of guilty in the District Court and receive a sentence de novo. We assume for the purpose of this opinion that the appeal is taken upon questions of law and fact rather than upon questions of law alone.

Mason's Minnesota Statutes of 1927, Section 9131 provides that "upon an appeal on questions of law and fact, the cause shall be tried in the same manner as if commenced in the district court." The appeal where taken on questions of law and fact has the effect of superseding the judgment of the Justice Court and grants to the District Court the power of imposing a new sentence; that is, if the defendant is found guilty in the District Court the judge of the District Court is not bound to affirm the sentence imposed by the Justice Court. He may impose a sentence of his own choosing. We might add that the common practice throughout the state in these matters is to permit the defendant on an appeal to plead guilty when brought up before the District Court.

ROY C. FRANK,
Assistant Attorney General.

June 4, 1937. 341b

192

CRIMINAL LAW—Lotteries—What are.

Paul Stratton, County Attorney.

You state:

> "An automobile company proposes to have a sale for used cars. With each car they sell they will give away without additional charge a ticket containing a number. After 50 cars have been sold these fifty numbers will be placed in a box, rotated and a number drawn. The person drawing the lucky number will be entitled to trade in his used car which he has purchased for a new automobile. In other words he will get a new car for an old one without paying anything to boot. No

charge is made directly for the tickets at the time they are given out. No additional charge is made for the cars sold on account of this number being given out."

You inquire whether or not the facts stated constitute a violation of the lottery law of the State of Minnesota.

We advise you that it has been the policy of this office not to pass upon questions of fact. In other words, to determine your question would involve a determination of a question of fact and such is not within the province of this office. We do, however, cite to you a pertinent statute and decisions of the court in reference to lotteries and feel that by an application of such law to the facts confronting you, you will be able to reach a correct conclusion.

Mason's Minnesota Statutes of 1927, Section 10209, provides that:

"A lottery is a scheme for the distribution of property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance, whether it shall be called a lottery, raffle, gift enterprise, or by any other name, and is hereby declared unlawful and a public nuisance."

To determine whether or not a certain scheme or plan is a lottery, three elements must be considered, (1) that there be a prize, (2) that there be a chance to get the prize, and (3) that there be a consideration given for the chance. A case directly in point with your situation is State v. Powell, 170 Minn. 239, 212 N. W. 169. In that case the court held that a plan whereby the merchants of a city gave tickets upon the purchase of merchandise and afterwards a drawing was had on chance for cash or other prizes was a lottery. The court held in that case that there were prizes, that there was a distribution of property by chance, and that there was a consideration paid for such chance. The court said:

"The purchaser pays a consideration when he buys his merchandise. When he pays his dollar he gets in return the merchandise and a chance to get a prize. The association is the agency or instrumentality through which prizes are offered and paid."

It would appear from the facts stated by you that the three essential elements that constitute a lottery are present. The prize is the automobile to be given away, the chance to get said prize is present, and a consideration is present in the same manner as it was in the above cited case in that with each purchase of a car the purchaser secures a ticket which entitles him to a chance to obtain a free automobile.

ROY C. FRANK,
Assistant Attorney General.

March 11, 1938. 510c-9

193

CRIMINAL LAW—Sentence—Concurrent and consecutive.

Hon. H. B. Whittier, Superintendent,

Minnesota State Reformatory.

You state:

> "On April 16, 1937, we received from Mahnomen County one Louis Kegg, our 13238, on a sentence of 0-5 years for burglary third degree. This man was paroled May 5, 1938.
>
> On August 17, 1938, this man was returned to the institution by the Sheriff of Mahnomen County on another commitment for burglary third degree, the sentence reading as follows:
>
> " 'Commitment to the State Penal Institutions of the State of Minnesota for an indeterminate period, sentence to run **concurrently** with prior sentence imposed April 14th, 1937'."

You then request our opinion as to the legality of the concurrent sentence.

It is our opinion that the sentence imposed on August 17, 1938, cannot be served concurrently with the sentence imposed on April 16, 1937. Such sentences must be served consecutively.

Mason's Minnesota Statutes of 1927, Section 9932, in so far as it is applicable to this opinion, provides:

> " - - - and whenever a person while under sentence for felony commits another felony, and is sentenced to another term of imprisonment, such latter term shall not begin until the expiration of all prior terms."

See State ex rel. Keyes v. Vasaly, 177 Minn. 338, 225 N. W. 154. It appears from the facts stated that the prisoner was not discharged from his first sentence at the time of the commission of the crime for which he was sentenced on August 17, 1938, but was still on parole. He was, therefore, under sentence for one felony when he was sentenced to another term of imprisonment, and consequently he cannot serve the second sentence concurrently with the first sentence.

ROY C. FRANK,
Assistant Attorney General.

August 23, 1938. 341k-1

194

DEAD BODIES—Disposition—Delivery to friend or organization.

Mr. R. S. Wiggin, City Attorney.

You state:

> "In connection with the operation of the General Hospital of the City of Minneapolis, it occasionally happens that patients pass away.

If such a patient is a poor person and destitute, within the meaning of the relief statute, it has been and is the practice of the city, where the deceased has no known relative, to give him a decent burial at the city's expense, in accordance with Section 3186, Subsection 2, of the poor relief statute, which provides that the town or city shall care for such poor person, 'and if he dies, shall give him a decent burial.' Such burial under the relief statute we consider coming under subsection 6, Section 5393, above quoted, that is—'If by any provision of law another disposition thereof be required.'

"The question that has given the Superintendent of the General Hospital considerable concern is in a case where a person may or may not have any money or property and has no known relatives who claim the body, but other persons such as, for instance, landlords where the deceased used to live; friends who state, in effect, that they knew him well and would like to take care of the body, as well as, in some instances, fraternal organizations, of which the deceased was a member, who desire to obtain possession of the remains for burial purposes."

You inquire:

"The precise question thus presented is whether or not the official in charge of the remains has the authority to, or is justified in delivering such remains to persons claiming the same, who are not relatives of the deceased."

Mason's Minnesota Statutes of 1927, Sections 5392 and 5393 provide as follows:

"Except as otherwise provided in Sec. 5393, the bodies of all persons dying within the state, and not claimed for burial within thirty-six hours after death, shall be delivered, by the person in charge thereof, for purposes of anatomical study. The deans of the medical colleges of the state shall appoint a committee to receive such bodies, which committee shall apportion the same to the several colleges according to the numbers of their students. Any body so received shall be surrendered on demand of a relative entitled to its possession. The remains of any such body, after it has answered the purposes aforesaid, shall be decently buried in a public cemetery, and the expense of transporting and burying such body shall be borne by the college receiving the same."

"No body shall be so delivered:

"1. After it has been regularly interred;

"2. After it has been claimed for burial or cremation by any person entitled to receive it for such purpose;

"3. Without the consent of all known relatives of the person deceased;

"4. If such person, in his last sickness, requested that his remains be buried;

"5. If he died while detained as a witness, or under suspicion of crime, or

"6. If by any provision of law another disposition thereof be required."

It will be noted that it is only in case a body is not claimed within thirty-six hours after death, that the person in charge thereof is authorized to deliver it for anatomical study. Neither Section 5392 nor 5393 specifically limits the right to claim a body to a relative of the deceased. The rule has been stated to be that the person having the body in charge "holds it only as a sacred trust for the benefit of all who may, from family or friendship, have an interest in it." See Koerber v. Patek Wis.), 102 N. W. 40, 42.

If it were not for the provisions of said Sections 5392 and 5393, the person having charge of the body would be authorized to deliver it to a friend or fraternal organization for burial. We do not believe it was the purpose of the legislature, in enacting the above referred to sections, to change this rule. It is our opinion that if a body is claimed for burial or cremation by a fraternal organization, or one who through friendship with the deceased, has an interest in it, the official in charge of such body has authority to deliver it to such organization or person.

WILLIAM D. GUNN,
Special Assistant Attorney General.

March 2, 1938. 103f

195

DEBT ADJUSTMENT—Branch offices—Licenses.

Mr. Ed. J. Goff, County Attorney.

You state that inquiry has been made of your office relative to the statute regulating the business of adjusting debts, C. 347, Laws 1935, and you inquire,

(1) Whether the license granted by the Secretary of State to engage in such business is confined to one particular county;

(2) Can a person or an association operate in other counties, namely, operating branch offices, without first making application to the Secretary of State as prescribed in Section 2 of the act;

(3) How should the county attorney of a county having within its boundaries a branch office, proceed, and should said county attorney ask for an additional bond.

Laws 1935, C. 347, Section 1, provides that all persons, firms or corporations desiring to engage in the debt adjustment business, except those exempted by the act, shall be subject to the provisions of the act.

Section 2 provides that any person desiring to engage in the business shall file an application in such form as the Secretary of State may provide

and that upon filing the application it shall be referred to the County Attorney in which county such person proposes to establish its business and said county attorney shall forthwith inquire into the fitness and ability of such person or in case of a firm or corporation of the co-partners or officers.

Section 3 relates to the initial or minimum bond required.

Section 4 provides in part in the alternative that the Secretary of State upon complaint of any person aggrieved may examine the books and accounts of the licensee or may forward such complaint to the County Attorney of the county in which such business is situated and the County Attorney of such county shall make the examination and report to the Secretary of State.

Sections 5 and 6 provide for the manner in which any such debt adjustment business shall be conducted.

Section 7 provides that any violation of the provisions of the act shall constitute a misdemeanor.

A study of the act as a whole would indicate that the situs of the business should be confined to the county selected by the licensee in the original application and where he "proposes to establish its business." The County Attorney of that county, thereby designated, is charged with the duty of inquiring into the fitness and ability of the applicant to engage in the business. Although not expressly stated, it appears that a measure of discretion is involved in the issuance of such licenses and that a license could be denied for cause. Other provisions in the act, such as the reference to investigations of complaints as provided for in Section 4, would indicate that the county attorney of the county "in which such business is situated" may be requested by the Secretary of State, acting upon the written complaint of any aggrieved party, to forthwith examine into the matter. Here again the county, "in which the business is situated," is undoubtedly meant the county originally selected by the licensee in the original application, or in which county such person, "proposes to establish its business."

Every indicia of language used in the act seems to clearly indicate the singular number was intended and that only one place of business is authorized and that the esablishment of branch offices in other counties of the state were not contemplated nor authorized either expressly, or impliedly, by the terms of the act. This would not, in our opinion, preclude such a licensee from adjusting debts of persons from other counties or in behalf of creditors from other counties, any more than a bank located in a particular designated place of business would be precluded from accepting deposits or making collections from persons residing outside of the designated situs of the business.

It is our conclusion that your first question should be answered substantially in the affirmative, as qualified herein. We are not willing to state, however, that the Act precludes a person, firm or corporation from procuring a further original license pursuant to a separate application to establish a debt adjustment business in another county. This would not be a

branch of a previously licensed business. It would be a separate original business domiciled in the county applied for. The analogy of persons, firms or corporations owning separate banking businesses in different localities would seem to us to be cogent. Your second question, as qualified herein, is answered in the negative.

The answers to questions one and two preclude the necessity of a direct answer to question three except that clause 2 of Section 3 would appear to cover the subject fully as the Secretary of State is vested with power to require additional bonds as therein provided. Where, pursuant to Section 4, the county attorney is requested by the Secretary of State to investigate complaints and report to the Secretary of State it would seem proper for him to include in such report the desirability or necessity for requiring additional bonds.

FRANK H. OSTERLIND,
Assistant Attorney General.

December 15, 1937. 290v

196

DEPOSITORIES—Contracts by village with—Officer interested in.

Mr. M. A. Langemo, Village Recorder.

You ask, in effect, if your village council may designate a bank in which a member of such board is a stockholder, as a depository for village funds.

It is my opinion that your question should be, and it is, answered in the negative.

Section 10305, Mason's Minnesota Statutes of 1927, as amended by Chapter 212, Laws 1931, the amended portion thereof being underlined, provides,

> "Every public officer who shall be authorized to sell or lease any property, to make any contract in his official capacity, or to take part in making any such sale, lease, or contract, and every employee of such officer, who shall voluntarily become interested individually in such sale, lease, or contract, directly or indirectly, shall be guilty of a gross misdemeanor: **provided, however, that any village or city council, town board, or school board, of any town, village or city of the fourth class, otherwise having authority to designate depositary for village, city, town or school district funds, of any town, village, or city of the fourth class, may designate a bank in which a member of such board is interested as a depositary for village, city, town or school funds of any town, village or city of the fourth class by a two-thirds vote of such board.**"

The present Attorney General in an opinion to the Hon. Floyd B. Olson, dated March 23, 1933, held said Chapter 212, Laws 1931, as unconstitutional. Therefore, any apparent grant of a right or authority to the village council is not presently available.

A member of the common council of a village in this state cannot lawfully enter into a contract with the municipality for his own benefit, depending upon authority derived from a vote of such council, notwithstanding that such member was not present and did not participate in the resolution. Stone v. Bevans, 88 Minn. 127. Section 6712, Dunnell's Minnesota Digest, 2d Ed. is to the same effect.

". . . it is well settled that municipal officers cannot be interested in contracts of any character with the municipality, . . . Statutes and charters on this subject are merely declaratory of the common law . . . This rule covers contracts with . . . corporations in which he is a stockholder; and the policy of the charter or statutes, and of the law irrespective of charter or statute, applies equally well in such a case, on the theory that the municipal officer, . . . as a stockholder, receives a pecuniary benefit from the contract."

McQuillin Municipal Corporations 2d. Ed. Vol. 3, p. 942, par. 1354.

HARRY W. OEHLER,
Assistant Attorney General.

May 12, 1937. 140b-5

197

DITCHES—County and Judicial, repairs and cleaning. (148-A-6 148-B-5 150-C) C. 125, L. 1935, C. 328, L. 1937, Sec. 6840-53 and 54, et seq., M.M.S. 1927

Mr. Herman C. Wenzel, Commissioner of Conservation.

You state that you desire to encourage and promote drainage ditch repair and cleaning projects in conjunction with the Works Progress Administration of the federal government, for the dual purpose of furnishing employment for the needy and for benefiting and preserving agricultural lands affected by such public drainage systems, and that you desire to utilize available Federal Works Progress Administration grants for such purposes. Sponsors contributions for the construction of such projects will be appropriated from the General Revenue funds of the various counties where such repair projects will be established and such appropriated funds will ultimately be restored to the county funds by subsequent assessments against lands benefited.

Section 6840-54, Mason's Minnesota Statutes 1927, as amended, provides that on petition "by any party, parties or corporation, municipal or otherwise" filed with the County Auditor where the ditch is a County ditch, or with the Clerk of Court where the ditch is a Judicial ditch, proceedings may be initiated for cleaning and repairing such ditches. Subdivision (a) of said section provides that wherever the probable total cost of such cleaning out or repair work does not exceed 30 per cent of the original cost of construction, it shall be the duty of the County Board or Judge of the District Court

to appoint a competent engineer to examine such drainage system and report thereon.

Subdivision (b) of said section further provides that in all cases where the cost of repairing, cleaning out or improvement of any ditch "exceeds the sum of 30 per cent of the original cost of construction," then in that event no action whatever can be taken by such County Board or District Court Judge as the case may be, until a majority of the property owners owning 51 per cent of the property affected join in a petition for such work.

Under subdivision (b), the question arises whether the amount of the federal grant or contribution may be deducted from the total probable cost of the drainage project in order to ascertain the cost of the project for the purpose of determining the number of petitioners required before the project may be lawfully authorized and assessments subsequently spread.

This question is not free from doubt and more specific legislation would seem to be desirable clarifying the meaning of the present statutes relating to the subject of your inquiry. The question also arises of whether the provisions of Chapter 125, Laws 1935, which authorize municipalities to enter into contracts with federal agencies relating to the construction and financing of public works projects, simplifying the procedure for such construction and the financing thereof are applicable to projects proposed to be established for cleaning and repairing of county and judicial drainage district ditches.

Taking the latter question into consideration first, the term "municipality" in Chapter 125, Section 2, Subdivision (a), specifically includes both a "county" and a "drainage district." Section 9 requires that its provisions be liberally construed. We can see no reason why lawfully established public county or judicial ditch systems should not fall within the definition of "drainage district" under this act. The act is an emergency act and its provisions are to remain in effect until December 21, 1939, pursuant to an amendment, Laws of 1937, Chapter 328. We believe that the County Board or the District Court having jurisdiction over the respective drainage districts may accept the benefits of and exercise the powers conferred by this act pursuant to its provisions and particularly those powers enumerated in Section 3, of said Chapter 125. We believe the cleaning and repairing of a ditch system, a function authorized under Sections 6840-53, 6840-54, et seq., to be performed by the County Board and District Court would be work, a project or an undertaking within the provisions of Section 2, subdivision (g), which "any municipality is authorized or required by law to undertake, or any lawful purpose for which they are authorized or required to make an appropriation." The repairing and cleaning of a drainage ditch is authorized by law and the County Board is authorized by law to appropriate sponsors' contributions from the General Revenue Fund, even though such contributions are subsequently required to be restored by assessments levied against benefited lands. Bonds issued pursuant to the ditch statutes have also been held by our court to be general obligations of the county issuing them.

If the Works Progress Administration approves of an application to establish a project for the purpose of cleaning out and repairing a public

drainage ditch, the only cost to be ultimately assessed to the landowners would be the amount of money required to be paid by the county as sponsor's contributive share of the project costs. For the purpose of determining the number of petitioners and percentage of acreage required, we believe that under the provisions of Section 6840-54 (b), the clause "Thirty per cent of the original cost of construction" when construed in the light of "The Municipalities)mergency Act of 1935" should be construed to mean the total amount of the project costs ultimately to be assessed against the benefited lands, which is the only amount the owners thereof will be required to pay, or in other words, that after deducting the government's contribution, the project costs must not exceed 30 per cent of the original cost of construction or a petition will then be required to be signed by a majority of the owners of 51 per cent of the lands affected.

FRANK H. OSTERLIND,
Assistant Attorney General.

October 5, 1938. 148b-5

198

EDUCATION AND SCHOOLS—Agricultural lands—Definition of.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You quote from Superintendent Myron's letter to you as follows:

> "In our school district within the city limits, we have certain residential property that is not platted. This is especially true along the river which passes through town. Some of this property may have an acre or more of ground, but is used for residential purposes, only. Because this ground is not platted it has been and is being taxed on the agricultural rate which is quite an injustice to other home owners in this community."

Mr. Myron asks:

> "Is there any way in which this property could be taxed at the full rate for school purposes?"

We assume that Mr. Myron has reference to the rate of taxation on agricultural lands as set forth in Laws of 1935, Chapter 289. If the land in question is agricultural land within the meaning of Chapter 289, the only method whereby the tax on said land can be increased is by legislative action.

The term "agricultural lands" as used in Chapter 289 means lands which are used for agricultural purposes and which, before the passage of Chapter 356, Laws of 1933, were assessed at 33⅓% of their true and full value pursuant to Mason's Minnesota Statutes of 1927, Section 1993 and under the rule laid down by our Supreme Court in the case of State ex rel.

Chase v. Minn. Tax Commission, 135 Minn. 205. The fact that land is platted or unplatted is but one factor in determining whether it may or may not be classed as agricultural land. The present use is also but one factor. In determining whether or not lands situated in a city or village are agricultural lands, it is necessary to determine what the primary use of the land is. That is, is its natural use urban in character or rural in character. An unplatted strip situated in the heart of a business district would be urban in character even though used for agricultural purposes. On the other hand platted property on the outskirts of a city or village may be primarily agricultural lands. The character of the surroundings must be taken into consideration. The question resolves itself into one of fact to be determined by the circumstances surrounding each tract under consideration. For a full discussion of this matter see State ex rel. Chase v. Minn. Tax Commission, cited above; National Bank of the Republic v. Banholzer, 69 Minn. 24, 71 N. W. 919; In re Smith's Estate, 51 Minn. 316 and Mead v. Marsh, 74 Minn. 288.

If the land in question is not agricultural land within the meaning of the term as used in Chapter 289, then it should be taxed as other urban property is.

ROY C. FRANK,
Assistant Attorney General.

March 4, 1937. 426a

199

EDUCATION AND SCHOOLS—Bibles—Permission to place in schools.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You state that the Gideons are attempting to place Bibles in the rural and urban schools of Red Lake County.

He desires to be informed as to whether the laws of this state permit Bibles to be placed in schools.

We answer his question in the affirmative. The detemination of whether or not Bibles are to be placed in schools rests upon the members of the school board. If the members of the board determine that Bibles cannot be placed in the schools of the district, that decision is final. On the other hand, if the members of the board so determine, Bibles may be placed in the schools of the district and such determination is final and not subject to review. The use of the Bible in school is, of course, subject to many restrictions. This matter is not before us, but in this connection we call your attention to the case of Kaplan v. Independent School District of Virginia, 171 Minn. 142, 214 N. W. 18. This case is too lengthy for us to discuss, and we suggest that you read it.

ROY C. FRANK,
Assistant Attorney General.

August 23, 1938. 170f-1

200

EDUCATION AND SCHOOLS—Bids—Postponement of date of opening.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You state:

"The school board of Moorhead, Minnesota, has asked us to secure a written opinion from you on the following question:

"On February 4, 1937, the first advertisement for bids appeared in the local paper. This same notice appeared in issues of the newspaper on February 11 and February 18. The advertisement for bids specified that such bids would be opened on February 24.

"At the request of bidders who have found it difficult to prepare and submit bids within the time limit specified because of the magnitude of the project, the school board at Moorhead desires to know if it can legally postpone the date of opening bids without readvertising for bids for the periods specified by law for the original notice."

We answer your question in the negative.

Mason's Minnesota Statutes of 1927, Section 2846, provides that:

"No contract * * * shall be made * * * without first advertising for bids or proposals in some newspaper of the county by two (2) weeks' published notice * * *. **Such notice shall state the time and place of awarding the contract * * *.**"

Obviously if the time of letting the contract was changed from that set forth in the published notice, the statutory provision above quoted would not be complied with. Section 2847 provides that:

"Every contract made without compliance with the provisions of this act shall be void * * *."

Sections 2846 and 2847 are part of the same act, Laws of 1913, Chapter 244. Furthermore, the proposal submitted not only contemplates the postponement of the date for the letting of the contract but also contemplates extending the time for the submission of the bids. In view of the circumstances set forth we are of the opinion that if the plan advanced in your letter was followed out, compliance with Section 2846 would be lacking. The board must readvertise for bids if it wishes to extend the time for letting the contracts in question.

ROY C. FRANK,

Assistant Attorney General.

February 24, 1937. 707a-12

201

EDUCATION AND SCHOOLS—Bond issue—Balance of not sold at popular subscription may be sold by new resolution.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You state that the school board of Independent School District No. 91 of Le Sueur County desires to sell its bonds by public subscription. The resolution of the school board limits the maximum rate of interest to three per cent. When bids are submitted it is found that there are several individual bids at different rates of interest, all being below three per cent, but that the entire bond issue cannot be disposed of to such bidders.

The question arises as to whether the school board can dispose of a portion of the bonds to the individual bidders and then sell the balance of the bonds to bonding companies at the maximum rate of interest, or whether the entire issue must be sold at the highest rate bid.

For the purpose of this opinion, the complete facts not having been set forth, we must assume that all of the statutory requirements relating to the issuance of said bonds have been complied with. With such assumption in mind, we advise you that in pursuance with the resolution adopted in accordance with the provisions of Mason's Minnesota Statutes, 1936 Supplement, Section 1944-1 the bonds of the district may be sold by popular subscription. If the entire issue is not sold in that manner, the balance of the bonds cannot be sold to bonding houses, but a new resolution by the school board is necessary. Such resolution would call for the sale of the balance of the bonds under the general statutes relating to calling for bids for the sale of bonds.

ROY C. FRANK,
Assistant Attorney General.

December 10, 1937. 159a-5

202

EDUCATION AND SCHOOLS—Bonds—Majority vote sufficient to authorize—Sale of.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You state:

"On May 11 we had a special school election for the purpose of voting bonds for an addition to the present school building. The results of the election showed approval of the bond issue by a majority of 162 to 115. We were under the impression that we were proceeding under Section 1973 of Mason's Minnesota Statutes of 1927. However, our attorney advised us the day before the election that Section 1941 of Mason's Minnesota Statutes of 1927 were governing and that to carry

the vote must be a two-thirds vote in favor of bonding the school district."

Our opinion is requested on the following questions:

1. "What constitutes a majority in this case and is majority of the votes cast a sufficient number to carry the bond elections?"

The required majority is "the majority of the electors voting on the question of issuing such obligations." See Section 1938-6, Mason's Minnesota Statutes of 1927.

A majority of the votes cast is sufficient to carry the bond election referred to in Mr. Acklin's letter. Based upon opinions rendered by our predecessors in office, we have heretofore held that in such cases a two-thirds vote of the electors present and voting was necessary to authorize the issuance of school bonds, excluding funding and refunding bonds and registered bonds. These opinions were based upon the provisions of Section 1941, Mason's Minnesota Statutes of 1927, and upon the theory that Chapter 131, Laws of 1927 (Sections 1938-3 to 1938-12, inclusive, Mason's Minnesota Statutes of 1927), did not modify the requirements of Section 1941. After further study and reflections we have reached the conclusion that Chapter 131 is controlling, except where a later law has been enacted to apply to certain school districts. Chapter 131 applies to bonds issued by school districts for "the erection, furnishing and equipping of school houses." The bonds voted upon by Independent School District No. 15 are to finance the building of an addition to the school house of the district, to install heating, ventilating and plumbing plants, to equip said addition, and to remodel and repair the present school building. The purposes of the bond issue come within the authorization of Chapter 131. Section 4 of Chapter 131 (Section 1938-6, Mason's Minnesota Statutes of 1927) provides that before such bonds can be issued, a majority vote of the electors voting on the question must be obtained. Mr. Acklin refers to Section 1973, Mason's Minnesota Statutes of 1927, and states that he was under the impression that the school district was proceeding under that section. Section 1973 was repealed by Chapter 123, Laws of 1935, and, consequently, has no further application.

We, therefore, reverse the previous rulings of this office and hold that Chapter 131 supersedes Section 1941, and that a majority of the votes cast by the electors voting on the question of issuing bonds is sufficient to carry the election and to authorize the issuance of the bonds.

In view of our answer to your first question, no answers to questions two and three are necessary.

4. "Does it take a majority or a two-thirds majority of the votes cast to sell bonds to the State of Minnesota?"

A majority vote is sufficient. See Section 1964, Mason's Minnesota Statutes of 1927.

5. "Could this school district sell the bonds to the State from the results of the bond election held May 11?"

No. In order to sell bonds to the State, the ballot must contain the statement that such bonds are to be sold to the State. See Section 1963, Mason's Minnesota Statutes of 1927. The ballot used by Independent School District No. 15 does not contain the statutory requirements and, therefore, the bonds authorized cannot be sold to the State.

ROY C. FRANK,
Assistant Attorney General.

June 7, 1937. 159a-3

203

EDUCATION AND SCHOOLS—Buildings—Addition to school—Funds supplied by W.P.A. and Executive Council.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

In your letter you state that the said school district is contemplating the erection of a school addition, the cost of said addition to be entirely financed by funds supplied by the Executive Council and the Works Progress Administration.

You ask:

> "Is it necessary for the school board of the above district to hold a special election to vote on the proposition of building an addition to the present building in a case where no local funds are expended?"

We answer your question in the affirmative. Mason's Minnesota Statutes of 1927, Section 2815, provides that a school board may erect additions to the school when the board is so authorized by the electors of the district at a regular or special meeting called for that purpose. This section is controlling even though the funds to be expended in the construction of the addition are supplied by sources other than the taxpayers of the district.

ROY C. FRANK,
Assistant Attorney General.

December 3, 1937. 161b-1

204

EDUCATION AND SCHOOLS—Buildings—Erection of—Contracts.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

In your letter we are informed that the school board of Independent School District Number 32 of Wheaton, Minnesota, is contemplating the making of extensive repairs and additions to the school house, the repairs

to cost around $9,000.00. The board has retained an architect to draw the preliminary plans and specifications at an agreed fee of $600.

The school board desires to be informed as to whether or not it has the legal right to enter into a written contract with the architect for his services and for the payment of the stated fee.

We answer the board's question in the affirmative.

Before a school board can intelligently determine the repairs and additions necessary to be made, and the probable cost thereof, it is necessary that a preliminary survey be made and plans drawn. To accomplish such purpose, it is necessary that persons skilled in the particular type of work to be done be retained. We believe that a school board has sufficient authority to retain and contract with an architect to make such a survey and draw the necessary plans and specifications.

ROY C. FRANK,
Assistant Attorney General.

December 29, 1937. 161b-11

205

EDUCATION AND SCHOOLS—Building—Erection of—Vote by electors—School districts.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You state:

1. "Is there any existing statute authorizing a consolidated school district to acquire by purchase a garage building for the storage and protection of its busses, such garage building being removed and apart from the school site?"

2. "If there be no statute specifically granting such authority, is there any existing statute relating to the powers of boards of consolidated school districts from which the authority to acquire such garage by purchase may be inferred?"

3. "If the power of purchase exists, must the proposition of purchase at a named price be submitted to the voters of the district?"

Limiting this opinion to consolidated school districts, we advise you that, in our opinion, the school board of such a district may, after proper authorization by the qualified voters of the district, erect a garage for the storage of school busses on the regular school site. There is no statute directly authorizing the erection of a garage, either on a school site or on land apart from the school site, but Mason's Minnesota Statutes of 1927, Section 2761 is broad enough to sustain our opinion as stated. This section provides that the board of a consolidated school district may provide for the transportation of pupils, locate and acquire school sites and erect necessary and

suitable buildings thereon when money therefor has been voted by the electors of the district. It is our opinion that a garage for the storage of school busses can readily be considered to be a necessary building. It is only reasonable to assume that if the board can purchase busses for the transportation of pupils, it can provide necessary shelter for the busses. However, the provisions of Section 2761 must be strictly construed in so far as the site of the garage is concerned. The garage must be erected on the school site and not away from such site.

We do not know of any statute, directly or indirectly permitting the erection of a garage by a consolidated school district, apart from the school site, or permitting the purchase of a garage building away from the school site.

ROY C. FRANK,
Assistant Attorney General.

May 4, 1938. 622a

206

EDUCATION AND SCHOOLS—Buildings—May own and operate recreation building jointly with township.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

It appears that School District No. 6 of St. Louis County is planning to build a new school building to take care of the increase in the number of pupils in the district. The federal authorities have made plans for a community building to be erected in connection with the school building. The community building, together with grounds for athletic and recreational purposes will be deeded to the school district. The board of supervisors of the township wherein the community building is to be erected wish to have such building deeded jointly to the township and the school district in order that the building might be legally used as a town hall and a center for township activities.

You submit the following inquiry:

> "Can the School Board legally go into partnership with the Township Board in accepting and operating community building?"

While the facts appearing in both your letter and in Mr. Henning's letter are not clear as to whether the school building and the community building are to be two separate buildings, situated on two separate tracts of land adjacent to each other, or whether the two buildings are to be connected in such manner as to be part of one structure, situated on one tract of land, we have assumed and have so stated in our resume of the facts, that the two buildings are separate buildings, situated on separate tracts of land. We also assume that the proposed arrangement has no connection with the operation and conduct of the school building, but merely relates to the ownership, operation and conduct of the proposed recreational building.

Section 1 of Chapter 233, Laws of 1937, authorizes any city, village, borough, town, county, school district, or the governing body thereof, to operate a program of public recreation and playgrounds and to "acquire, equip and maintain land, buildings or other recreational facilities; and expend funds for the operation of such program pursuant to the provisions of this act, * * *." Section 2 of Chapter 233 provides that any such political subdivision may operate such a program independently, or in cooperation with one or more political subdivisions in such manner as the participants therein may agree. Section 2 further provides that the operation of the program may be delegated to a recreational board. To enable a school district to enter into any agreement with any other political subdivision an affirmative vote of the electors is needed. Section 2 states, in connection therewith:

> "In the case of school districts the right to enter into such agreements with any other public corporation, board or body, or the right to delegate power to a board for operating a program of recreation, shall be authorized only by a majority vote cast at an annual school election, * * *."

We therefore advise you that the school district may legally accept title to the community building jointly with the township and maintain and operate the same as a recreational center if a majority of the voters of the district at the next annual meeting of the district vote in favor thereof.

ROY C. FRANK,
Assistant Attorney General.

October 8, 1937. 622b

207

EDUCATION AND SCHOOLS—Contracts—Publication of proceedings.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You ask:

1. "In case two legal newspapers enter a bid of fifty cents per folio, would the school board be empowered to award an annual contract for such publication, the first six months to one paper, and the second six months to another?"

2. "Would the school board be empowered to award an annual contract to two papers at a rate of twenty-five cents per folio each or a total of fifty cents per folio?"

We answer both of your questions in the negative. Mason's Minnesota Statutes of 1927, Section 2797 provides that the proceedings of the board of education of an independent school district must be published once in a newspaper. The statute then states:

"Such publication shall be let annually by contract to the lowest bidder * * *."

The requirements of this statute are clear. The contract for the publication of the proceedings of the school board must be let after calling for bids, it must be let to the lowest bidder and it must be let annually. If two or more bidders submit the same bid, the duty then rests upon the school board to select the bidder to whom to give the contract. The contract cannot be split as suggested in your questions.

ROY C. FRANK,
Assistant Attorney General.

August 2, 1937. 707b-10

208

EDUCATION AND SCHOOLS—Contracts—Water supply.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You ask:

1. "Would it be legal if our school district pays the village a set amount per month (this set amount to be agreeable to both village council and our school board) for the use of the water?"

We advise you that the school board would have the authority to enter into such a contract.

2. "If payment in this manner is legal, would it also be legal to make a contract to pay so much a month for the water for a certain number of years in the future?"

The contract should be made on a yearly basis. A school board cannot enter into a contract of this nature which would bind subsequent boards. Each new board should enter into a new agreement with the village.

ROY C. FRANK,
Assistant Attorney General.

March 29, 1938. 707b-10

209

EDUCATION AND SCHOOLS—Discontinuance of high school.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You state that Vining, School District No. 103, is situated six miles from Henning, Minnesota. It is a consolidated school district. The school

board voted to discontinue the two-year high school of the district but refused to transport the pupils of said high school to a neighboring high school.

Our opinion is requested as to whether or not the school board must provide transportation for said pupils.

We answer this question in the affirmative. This office has heretofore held that where a school district maintains a high school and then closes said school it must furnish transportation of the pupils of said school to a neighboring high school, or, in other words, if the school board sees fit to discontinue the schools of its own district, it then becomes its duty to provide instruction and transportation of the pupils thereof in a nearby district. This duty is mandatory upon the board. If the district is not maintaining a high school it need not transport the students of the district to a neighboring high school. It may do so, but the duty is not mandatory upon the board.

ROY C. FRANK,
Assistant Attorney General.

October 1, 1937. 166a-10

210

EDUCATION AND SCHOOLS—Expenses of person injured at school play—Payment of.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You state: that an adult resident of the Elkton school district suffered a broken leg when a set of portable wooden bleachers on which he was sitting, while in attendance at a school play, collapsed. These bleachers were used as part of the seating for people who attended said play and other school entertainments and have been used as such for a number of years. The injured person feels that the school district should pay his medical expenses, together with the expense of hired help.

You ask the following question:

> "Can the board use public funds with which to pay these necessary doctor bills and also those of his hired help during his period of recovery?"

We answer this question in the negative. The school district is not liable for the injury sustained by said person and said person could not bring suit against the district to recover the expenses incurred by him. It is a fundamental rule of law that a municipality or school district can only expend its funds for purposes authorized by law or for which the municipality or school district is legally liable. Since the district is not

legally liable in the present instance, it cannot voluntarily pay out its funds for the purposes expressed in your letter.

ROY C. FRANK,
Assistant Attorney General.

August 11, 1937. 844f-3

211

EDUCATION AND SCHOOLS—Funds—Apportionment of.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You ask whether Chapter 290, Laws of 1935 could be amended to provide that school districts in cities of the first class could be eligible to receive the apportionment provided for in said chapter only when a certain per capita or per pupil appropriation is made by the local district.

We answer Mr. Amidon's question in the negative. Section 2 of Article 8 of the Constitution of the State of Minnesota provides that the funds from which the apportionment in question is made shall be distributed in proportion to the number of scholars and on no other basis.

ROY C. FRANK,
Assistant Attorney General.

January 5, 1937. 8b

212

EDUCATION AND SCHOOLS—Funds—Deposit of—F.D.I.C.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You inquire:

> "Whether in the case where the school district held collateral in lieu of bond assigned by a duly designated depository which also carried Federal Deposit Insurance in the sum of $5,000 the insurance is concurrent with the collateral security and whether it would be available for indemnity should the bank close."

We advise you that a depository need not furnish collateral for deposits to the extent that such deposits are insured under the provisions of Section 12 B of the Federal Reserve Act. See Laws of 1935, Chapter 317. The maximum amount would be $5000. All deposits over $5000 must be secured by collateral. In case of the depository closing the first $5000 or any portion thereof on deposit would be paid by the insurance under the Federal Reserve Act. All sums in excess of $5000 would be paid out of the collateral. In other words, the collateral would not cover the same deposits covered by insurance. This opinion is in conformity with that rendered by Mr. Birdzell,

General Counsel of the Federal Deposit Insurance Corporation. Although approached from a different angle Mr. Birdzell states that the total deposits of the district would be added together, the collateral applied to this amount and the balance, not exceeding $5000, would be protected by federal insurance. Since the collateral would only secure deposits in excess of $5000 it could only be applied on such amount and the result reached by Mr. Birdzell is the same as that reached by us.

ROY C. FRANK,
Assistant Attorney General.

August 4, 1937. 140c-3

213

EDUCATION AND SCHOOLS—Funds—Taxes—Surplus.

Department of Education.

It appears that in September, 1935, said Independent School District of St. Louis Park authorized the issuance of bonds in the sum of $130,000 to pay part of the cost of constructing a new senior high school building; that this building was to be constructed as a PWA project and the Federal Government agreed to allot towards the cost of same $107,000; that due to increased cost of labor and material since the authorization of said bond issue the Public Works' Administration increased the amount of the federal allotment to the sum of $122,400; that the actual grant from the Federal Government was not made until September, 1937; that "in spite of some retrenchment in the amount of building originally proposed, we now find that the funds made available by the bond issue and the original amount of PWA funds applied for fall approximately $20,000 short of the required amount to complete the building;" and that the school district will have available for paying cost of said building $130,000 from said bond issue, $122,400 from said federal grant, and approximately $20,000 which will become available as a result of a tax levy made for the year 1938 for general school purposes.

You inquire "whether, in view of the increased cost of building materials and advances in wages to labor, we are privileged to use this $20,000 secured through levy notwithstanding that this sum was not originally levied for this purpose, but for other purposes which may be foregone until the subsequent year."

We assume that the $20,000 item to which you refer will become available from taxes levied for the year 1938 for general school purposes. In other words, we take it that this sum of $20,000 will be in the nature of a surplus from taxes levied for the year 1938 and that this sum will not be derived from a levy made for special purposes pursuant to authorization by the voters.

Assuming this to be true we are of the opinion that if the school board in the exercise of its judgment and discretion finds that it will be to the

best interests of the school district to use this sum of $20,000 for paying part of the cost of constructing said school that it may do so. In other words, if the proceeds of the bonds and the funds derived from the grant made by the Federal Public Works' Administration, together with other school funds available or which become available within the time needed from taxes levied and in process of collection, are sufficient to complete said building, the contract or contracts for the construction of said building may be awarded.

Section 2070, Mason's Minnesota Statutes of 1927, applies to school districts as well as other municipalities of the state. While the decisions of our Supreme Court construing this section are somewhat hard to reconcile, it is the understanding of this office that this statute is not violated provided the contract price does not exceed the amount of money on hand, in the course of tax collection, and the amounts which may have been levied and are in process of collection.

It is true that a school district is without power or authority to borrow money except through a bond issue and is not authorized to issue its warrants except where there is money for the payment thereof and where taxes have been levied and are in the process of collection. However, this is not the situation outlined in your communication. Under the facts submitted the 1938 tax levy has actually been made and certified to the county auditor. In our opinion, therefore, the district is authorized to issue warrants in anticipation of the collection of such taxes.

DAVID J. ERICKSON,
Deputy Attorney General.

November 16, 1937. 159b-2

214

EDUCATION AND SCHOOLS—Funds—Unexpended—Use.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You ask our opinion on the following questions:

1. "Is it permissible for a local governing body under Chapter 233 to levy a special tax for a municipal band without submitting such levy to the voters as provided in Chapter 82?"

2. "May such a local governing body levy a special tax for other recreational purposes without a vote of the people under Chapter 233?"

It appears that these two questions involve the powers of a city, village, borough or township and not those of a school district. Consequently, we cannot render an opinion thereon to the Department of Education, but only to the municipality or municipalities interested therein. Opinions to your department must necessarily be limited to school matters.

3. "May unexpended balances, not otherwise obligated, be used by the school district for the maintenance of a recreational program?"

We answer this question in the affirmative. The school board cannot, of course, operate a recreational program in connection with another political subdivision of the state, or donate money to a recreation board, unless authorized to cooperate with such a subdivision by the voters of the school district as provided for in Section 2 of Chapter 233. Having been so authorized, or if the board operates a recreational program of its own accord, we see no objection to the board using unexpended balances for such purposes. The funds used must be entirely free of any claim for use for other purposes, however, either present or future.

ROY C. FRANK,
Assistant Attorney General.

June 1, 1937. 159b-11

215

EDUCATION AND SCHOOLS—Officers—Attorney—Employment of.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You ask the following question:

> "Does the school board of Eveleth have the authority to employ an attorney and to designate his salary on a month-to-month basis, to act as advisor to the board of education?"

We answer your question in the affirmative. For a number of years this office has held that a school board could not employ an attorney on a month to month basis or on a yearly basis but that such employment must be limited to a specific piece of work. However, our supreme court in the case of Lindquist v. Abbott, 196 Minn. 233, which decision was filed on January 24, 1936, held that a school district had the same right as a city or village in this particular matter and that a school district had the authority to retain an attorney on a month-to-month or yearly basis. The school board would necessarily have the right to retain such an attorney.

ROY C. FRANK,
Assistant Attorney General.

August 25, 1937. 779a-3

216

EDUCATION AND SCHOOLS—Officers—Treasurer—Term.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

In your letter you ask:

> "Can a treasurer of an independent school district be chosen for more than one year or must there be an election of the treasurer each year?"

We advise you that a treasurer of an independent school district must be chosen for a term of one year only. See Mason's Minnesota Statutes of 1927, Section 2807, which section reads in part as follows:

> "Within ten days after the election of the first school board in independent districts, and annually thereafter * * *, the board shall meet and organize by choosing a * * * treasurer, who shall hold their offices for one year, and until their successors are elected and qualified."

ROY C. FRANK,
Assistant Attorney General.

November 8, 1937. 451a-22

217

EDUCATION AND SCHOOLS—Proceedings of board need not be in detail.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You state that the school board of Independent District No. 3 of Stevens County has refunded its bonded debt by the issuance of refunding bonds. The proceedings in such matters are voluminous and include certain resolutions, call for bids and a copy of the proposed bonds.

He then inquires:

> Whether such proceedings must be published in their entirety, as a part of the board's proceedings, or whether they may be condensed and published in abstract form?

Mason's Minnesota Statutes of 1927, Section 2797 imposes a mandatory duty upon the school board of an independent district to cause the official proceedings of the board to be published in a newspaper in the district, or if there be no newspaper in the district in the county wherein the district is situated. In construing this statute, this office in an opinion rendered on September 16, 1929, said:

> "The statute merely prescribes that the school board publish the official proceedings of the board. It does not undertake to specify in detail just what must be so published. In the absence of a statute particularizing what must be published, I am of the opinion that the matter is left to the sound discretion of the school board, providing the publication is sufficiently full to fairly set forth the proceedings."

We adhere to the above rule and advise you that the school board may, in its discretion, publish the proceedings of the bond issue in abstract form, providing that such form is sufficient to inform the people of the district of the proceedings.

ROY C. FRANK,
Assistant Attorney General.

August 24, 1938. 161a-20

218

EDUCATION AND SCHOOLS—Pupils—Attendance—Compulsory—Exceptions.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You state that the mother of an eight year old girl refuses to permit her child to attend school. The mother claims that the girl is physically unfit to attend school. The Welfare Board agent has established that such claim is untrue. The mother further states that she is better able to teach the girl than the teachers in the public schools can.

Mr. Detamore asks how far he can legally go to compel the parents of the girl to send her to a school.

Mason's Minnesota Statutes of 1927, Section 3080, provides that:

> "Every child between eight and sixteen years of age shall attend a public school, or a private school, in each year during the entire time the public schools of the district in which the child resides are in session; * * *."

Section 3080 provides exceptions to the above quoted requirement. These exceptions are as follows:

1. That the child's physical or mental condition prevents his attendance in school.

2. That the child has completed the eighth grade.

3. That the child is attending religious instruction.

4. That there is no school within reasonable distance.

5. That weather conditions make attendance impossible.

6. That the help of any child over 14 years of age is needed in any permitted occupation in or about the home of his parent or guardian. In such cases the child may be excused between April 1 and November 1 in any year.

If the absence of the child in question does not come within any of the above exceptions, the superintendent of schools should notify the parents of the child. If the parents neglect or refuse to comply with such notification, the superintendent should then notify the county attorney. It then becomes the duty of the county attorney to prosecute the parents. Mason's Minnesota Statutes of 1927, Section 3082. The failure to send a child to school where the child is required by law to attend constitutes a misdemeanor and shall be punished by a fine of not more than fifty dollars or by imprisonment in the county jail for not more than thirty days, Mason's Minnesota Statutes of 1927, Section 3083.

ROY C. FRANK,
Assistant Attorney General.

November 23, 1937. 169b

219

EDUCATION AND SCHOOLS—Pupils—Attendance—Compulsory—High school when.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

In your letter you state:

"Section 3080 of Mason's Minnesota Statutes, 1927, provides that:

'Every child between eight and sixteen years of age shall attend a public school or a private school * * * * *

'Such child may be excused from attendance upon application of his parent, guardian, or other person having control of such child, to any member of the school board, truant officer, principal, or city superintendent, for the whole or any part of such period, by the school board of the district in which the child resides, upon its being shown to the satisfaction of such board: * * * * *

'2. That such child has already completed the studies ordinarily required in the eighth grade.'

The case in question refers to a pupil who has completed the eighth grade and whose district provides transportation to a nearby high school."

You ask our opinion as to whether or not such child can be compelled to attend high school.

(a) "if parents have not requested that he be excused from attendance?"

(b) "if his parents have requested that he be excused from attendance?"

We advise you that a child between the ages of eight and sixteen years of age who has completed the studies ordinarily required in the eighth grade may be compelled to attend high school regardless of whether or not the parents of said child have requested that the child be excused from school attendance. Section 3080, referred to in your letter, does not make it compulsory on the part of the school board to excuse such a child from school attendance. Said section merely gives the board the discretionary authority to waive attendance in such cases.

ROY C. FRANK,
Assistant Attorney General.

November 29, 1937. 169b

220

EDUCATION AND SCHOOLS—Pupils—Dependent children.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You state:

"For some years past a number of pupils from School District No. 19, because of lack of room and of distance from school, have been

transported to District No. 5 and tuition paid by said District No. 19 to District No. 5. Lately, the Ramsey County Child Welfare Board has placed dependent children from the city of St. Paul as boarders in some of the homes in this part of District No. 19."

He then inquires:

"As these children are of school age, is District No. 19 obliged to pay tuition and transportation for these dependent St. Paul children?" We answer this question in the affirmative.

This office has ruled on several occasions that a dependent child under the guardianship of the State Board of Control and placed in a boarding home has a right to attend school in the district where such boarding home is located, and where the child is residing, free of charge. While Mr. Belland does not state that the children in question are wards of the State Board of Control, we must assume that the children have been committed to the guardianship of the Ramsey County Child Welfare Board. The rule of law is the same in either instance. Since the district in which the children in question does not maintain a school, these children are entitled to transportation and the payment of their tuition on the same basis as the other children of the district.

ROY C. FRANK,
Assistant Attorney General.

October 28, 1937. 169g

221

EDUCATION AND SCHOOLS—Pupils—Tutors for backward pupil.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You state:

"There is one child who is both physically and mentally unfit for work in school. He is about nine years old. He attended the first grade most of one year and part of another but he was such a disturbance that I have not permitted him to attend since.

"At present he is receiving instruction by a former teacher who is making some progress with him. The question is regarding payment of this teacher who is not employed by the school."

Our opinion is requested on the following question:

"Is it proper that payment be made from school funds?"

We answer the question in the negative. The law does not contemplate the furnishing of a private tutor, at the expense of a school district, for a backward pupil.

ROY C. FRANK,
Assistant Attorney General.

April 20, 1937. 159b-10

222

EDUCATION AND SCHOOLS—School supplies—Sale of.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

In your letter you ask our opinion on the following question:

> "Does the school board of an independent district have the authority to sell stationery and other miscellaneous school supplies to school children?"

We are of the opinion that the school board has the right to purchase school supplies and to resell them to the students of the school at cost, or at a price sufficient to cover the cost of the merchandise plus the overhead of handling the same. We do not feel, however, that the board would have the authority to sell such supplies for the purpose of making a profit.

ROY C. FRANK,
Assistant Attorney General.

March 20, 1937. 161b-11

223

EDUCATION AND SCHOOLS—Soldiers Preference Act has no application thereto.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

Your question reads as follows:

> "Will you kindly advise me as soon as possible whether or not jobs such as bus mechanics, janitors, etc., come under the soldiers preference act?"

We wish to advise you that the Soldiers Preference Act does not apply to school districts and consequently the positions enumerated in the question submitted would not come under the provisions of said act. See Holmquist v. Independent School District of Virginia, 181 Minn. 23, 231 N. W. 406, in which case our Supreme Court said:

> "A careful reading of the statute strongly impresses us with the view taken by the trial court that the inclusion of school districts was not intended; and the omission of them evidences an intention not to include them."

In that case the court held that a school district was not subject to the provisions of the Soldiers Preference Act, and that an honorably discharged soldier has no preference in employment as a janitor.

ROY C. FRANK,
Assistant Attorney General.

September 10, 1937. 85f

224

EDUCATION AND SCHOOLS—Taxes—Board may levy.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

We herewith acknowledge receipt of your letter in which you enclose a copy of Superintendent Keohane's letter to the Department of Education.

You ask:

1. "Is it permissible to spread a tax equally over all lands and property (agricultural and non-agricultural) in the district to offset these expenditures?"

We answer Mr. Keohane's question in the affirmative.

Mason's Minnesota Statutes, 1936 Supplement, Section 3014-6, provides that the maximum rate of taxation of agricultural lands in school districts maintaining a graded elementary or high school for maintenance purposes shall not exceed 10 per cent of the average rate for school maintenance on similar lands in common school districts of the same county where the county has 20 or more common school districts. It appears from Mr. Keohane's letter that the maximum tax is now being levied on agricultural lands in the Campbell district for maintenance purposes. However, Section 3014-6 does not apply to capital outlay expenditures and does not prevent the board from levying an additional tax on the agricultural lands of the district for the purpose of obtaining funds to pay for capital outlay.

2. "If it is legal to do so, is it necessary that we take this up before the voters of the district or may the school board levy for the same?"

It is our opinion that the school board may levy the requisite amount without having first secured the consent of the voters of the district. See Mason's Minnesota Statutes of 1927, Section 2826, which section reads, in part, as follows:

"In addition to the duties hereinbefore imposed, the school board of each independent school district shall:

1. * * * *

2. Provide by levy of tax necessary funds for the conduct of schools, the payment of indebtedness, and all proper expenses of the district."

Also see State v. Lakeside Land Co., 71 Minn. 283, 73 N. W. 970.

ROY C. FRANK,
Assistant Attorney General.

November 29, 1937. 519m

225

EDUCATION AND SCHOOLS—Teachers—Contracts—Pupils—Activities of during recess.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You desire our opinion on the following questions:

1. "If school boards put a clause in a teacher's contract stating that a certain amount must be paid the board if the teacher breaks the contract, can they actually force collection if this is done?"

Assuming that the amount inserted in the contract is reasonable and is based on the amount of damages that might reasonably be sustained by the school district should the teacher refuse to perform her obligations under the contract, we are of the opinion that such a provision in the contract between the school district and a teacher would be valid and recovery could be made thereon. The amount determined would be in the nature of liquidated damages rather than a penalty.

2. "Can school officials forbid students to drive their own cars during the noon hour when school is not in session, providing they are old enough and have a driver's license?"

The law is well settled that a school board may make rules and regulations to govern the conduct of the pupils of the school after school hours, and to punish a violation thereof by suspension from attendance upon school. State v. District Board, (Wis.) 116 N. W. 232; Deskins v. Gose, 85 Mo. 485, 55 Am. Rep. 387; Hutton v. State, 23 Tex. App. 386, 5 S. W. 122, 59 Am. Rep. 776; Wayland v. Hughes, 43 Wash. 441, 86 Pac. 642, 7 L.R.A. (H. S.) 352; Kinzer v. Directors, 129 Iowa 441, 105 N. W. 686, 3 L.R.A. (N. S.) 496; Jones v. Cody, 132 Mich. 13, 92 N. W. 495, 62 L.R.A. 160. However, as stated in State v. District Board, supra, the conduct and actions of the pupils sought to be regulated must have "a direct and immediate tendency to influence the conduct of other pupils while in the schoolroom." Whether or not the use of automobiles by students during noon hours has a direct influence on the discipline and conduct of the schools is a question that cannot be answered by us since it is one of fact. If, as a matter of fact, the use of automobiles by students during noon hours has a detrimental effect upon the discipline and conduct of the school, the board would have the authority to promulgate the rule set forth in the question asked. Otherwise it would not.

ROY C. FRANK,
Assistant Attorney General.

October 5, 1937. 172c-2

226

EDUCATION AND SCHOOLS—Teachers—Age of is not a cause for discharge or reduction in salary.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You ask our opinion on two questions, which questions are set forth and answered by us as follows:

1. "Whether the Board of Education (of Minneapolis) has legal authority to specify a compulsory retirement age for teachers?"

We answer this question in the negative. Mason's Minnesota Statutes of 1927, Section 2935-5 provides, for teachers who have ended their probationary period of teaching, as follows:

> "After the completion of such probationary period, without discharge, such teachers as are thereupon re-employed shall continue in service and hold their respective position during good behavior and efficient and competent service and shall not be discharged or demoted except for one or more of the causes as specified in Section 6, and after a hearing as specified and provided in Section 7."

Section 6, above referred to, is Section 2935-6, Mason's Minnesota Statutes of 1927, and sets forth the reasons for a teacher's discharge or demotion in the following language:

> "Causes for the discharge or demotion of a teacher either during or after the probationary period shall be:
>
> (a) Immoral character, conduct unbecoming a teacher or insubordination.
>
> (b) Failure without justifiable cause to teach without first securing the written release of the school board or commissioner having the care, management or control of the school in which the teacher is employed.
>
> (c) Inefficiency in teaching or in the management of a school.
>
> (d) Affliction with active tuberculosis or other communicable disease shall be considered as cause for removal or suspension while the teacher is suffering from such disability.
>
> (e) On account of discontinuance of position or lack of pupils."

Age is not set forth as a ground of removal or demotion. Consequently, the board of education is without authority to adopt a rule or regulation to the effect that a teacher who reaches a certain age must retire from her position. If the age of a teacher interferes with his or her ability to teach, subdivision (c) of Section 2935-6 may be invoked by the board. If the teacher is fully competent to perform his or her duties, age is not sufficient cause for compulsory retirement.

2. "Whether the Board of Education has legal authority to reduce salaries after teachers attain a certain age?"

We are of the opinion that the board of education of Minneapolis has the authority to reduce the salaries of the teachers of the Minneapolis schools after said teachers attain a certain age if said reduction is reasonable both in amount and in circumstances. By that we mean that the facts must reasonably show that such reduction is justified. We do not feel that the board has the entire right to reduce the salaries of said teachers in a manner that would indicate that the sole purpose of such reduction would be to compel said teachers to resign and thereby defeat the purpose of the

teachers' tenure act. The teachers' tenure act does not prohibit such salary reductions. See Sutton v. Board of Education of the city of Duluth, 197 Minn. 125.

ROY C. FRANK,
Assistant Attorney General.

September 27, 1937. 172d

227

EDUCATION AND SCHOOLS—Teachers—Contracts—Illegal hiring of teacher.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

It appears from your letter that common school district No. 3, Freeborn County, maintains an ungraded elementary school. The teacher retained by the board does not hold an elementary certificate of any kind and her qualifications are such that she cannot obtain such a certificate at the present time. As a result thereof the teacher cannot be considered to be a "qualified teacher."

You inquire:

> 1. "Does the fact that this school has employed a teacher who is not qualified within the meaning of the law remove it from the category of public schools even though tax money is expended for the salary of said instructor and even though no local taxpayer has taken action to prevent expenditure of public funds for this purpose?"

We are of the opinion that the school in question should be considered as a public school. Article 8, Section 1 of the Constitution of the State of Minnesota imposes the duty upon the legislature of the state "to establish a general and uniform system of public schools" within the state. In compliance with this mandate, the legislature, among other things, has set up certain requirements for teachers and has provided that only qualified teachers can be retained by school boards. Section 2900-1, Mason's Minnesota Statutes of 1927 (1936 Supplement) defines "teachers" as follows:

> " 'Teachers,' within the meaning of this act, shall mean and include any and all persons employed in a public school to give instruction or supervision of teaching."

This section necessarily implies that the employment must be legal and not an unauthorized employment. Section 2900-2 defines a qualified teacher as "one holding a certificate from the State Board of Education, * * *, to perform the particular service for which he is employed in a public school." This section then states:

> "Contracts for teaching or supervision of teaching can be made only with qualified teachers."

This requirement has been incorporated in the laws of Minnesota since Minnesota became a state. As far back as 1867 in the case of Jenness v. School District, 12 Minn. 337 (448), our Supreme Court held that a school board had no power to hire a teacher who did not possess the required certificate, and that any contract entered into by and between a school board and an uncertified teacher was void and could not be enforced. In School District vs. Thelander, 32 Minn. 476, our court held that the payment of an unlicensed teacher constituted an unlawful diversion of the public school funds and subjects the members of the school board to a charge of malfeasance in office and makes them personally responsible for the refundment of any moneys so paid out. The board members would also be subject to the provisions of Mason's Minnesota Statutes of 1927, Section 9970, which section provides that any public officer guilty of malfeasance in office shall be guilty of a gross misdemeanor. While it is clear that the school board has violated the laws of this state by employing a teacher not holding a teacher's certificate, that fact in itself does not place the school itself outside of the category of a public school. Mason's Minnesota Statutes of 1927, Section 2741 provides that:

> "All schools supported in whole or in part by state school funds shall be styled public schools * * *."

An infraction of the school laws by a school board cannot, of itself, deprive a school of its public character. There can be no question but that the school in question is supported in whole or in part by state school funds and is essentially a public school. A question may be raised as to whether or not the forfeiture by the district of aid for a year would deprive the school of its classification of a public school. We do not feel that it would. Basically the school is one that would normally be entitled to aid from the state school funds. The fact that it might lose state aid for a certain period would not change its classification.

2. "Is the district in which this teacher is teaching entitled to apportionment?"

As stated in your letter, the school in question is ordinarily classed as an ungraded elementary school. Such a school is defined by Mason's Minnesota Statutes of 1927, (1936 Supplement) Section 3026 (2), as follows:

> "(2) An ungraded elementary school shall be a school giving instruction in the elementary course and employing one or more teachers, but not having the rank of a graded elementary school."

The word "teachers" as used in said statute refers to qualified teachers holding a proper certificate. Since the teacher employed by the district in question is not a qualified teacher, the school cannot be considered to come within the definition of an ungraded elementary school. In fact the school does not come within the definition of the various classifications of schools. As a result the district is not entitled to receive apportionment aid.

ROY C. FRANK,
Assistant Attorney General.

October 6, 1937. 8b

228

EDUCATION AND SCHOOLS—Teachers—Contracts—Illness.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You state that a certain teacher, hired under the continuing contract law, became ill a week before Christmas and has been unable to teach since that time. It is very likely that she will not be able to return at all this school year, and possibly will not be able to return to her teaching duties next fall.

Our opinion is requested on the following question:

> "Does the inability of this teacher to fulfill her contract automatically cancel it, or is she still under contract with the board?"

We assume that the contract entered into by and between the teacher and the school board is silent in this matter. With this assumption in mind we advise you that the contract is in force and will be so until it is terminated either by "a majority vote of the full membership of the school board or by the written resignation of the teacher before April 1st," under the provisions of Chapter 161, Laws of 1937, or for cause under Section 2815, Mason's Minnesota Statutes of 1927.

The fact that the teacher is sick and unable to teach, does not of itself in the absence of specific provisions in the contract to that effect, automatically cancel the contract.

ROY C. FRANK,
Assistant Attorney General.

March 21, 1938. 172c

229

EDUCATION AND SCHOOLS—Teachers—Contracts—Marriage restrictions.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You ask "if the following provisions may be inserted in a teacher's contract without violating the provisions of the continuing contract law?"

> "Marriage of a woman under contract will constitute a breach of contract and will cause its termination, at the discretion of the board."
>
> "The salary provision as stated above may be modified to take effect at the beginning of any school year, provided notice is given prior to April 1 of the preceding school year."

The law referred to is Chapter 161, Laws of 1937. The pertinent provisions thereof read as follows:

> "Such contract shall specify the wages per year, and shall remain in full force and effect except as modified by mutual consent of the

school board and the teacher until terminated by a majority vote of the full membership of the school board or by the written resignation of the teacher before April 1st."

We are of the opinion that the contract may legally contain the clause relative to marriage but not the clause relative to modification of salary.

This opinion has no application to teachers who are under the teachers' tenure act as defined by Mason's Minnesota Statutes of 1927, Sections 2935-1 to 2935-14 inclusive, and acts amendatory thereof, but is limited to contracts under the provisions of Chapter 161, Laws 1937.

ROY C. FRANK,
Assistant Attorney General.

December 10, 1937. 172c-3

230

EDUCATION AND SCHOOLS—Teachers—Contracts—Termination of.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You refer to Chapter 161, Laws of 1937, said chapter incorporating the teachers' continuing contract law, and after quoting certain provisions thereof, inquire:

1. "Does this clause or any other section of the law give a teacher the right to demand written charges and/or a hearing, if by a majority vote of the board her contract is terminated prior to April 1st, effective at the end of the school year?"

We answer this question in the negative.

Under the provisions of Chapter 161, a school board has the unqualified right to terminate the contract of a teacher without assigning any reason therefor, provided that such termination is by the majority vote of the full membership of the board and is made before April 1. Upon such action of the board, the contract terminates at the end of the school year.

2. "If a teacher's contract is terminated 'for cause' during the school year or at any time other than as covered in the proceeding question, does the teacher have the right to receive written charges and/or a hearing by the board?"

Mason's Minnesota Statutes of 1927, Section 2903, as amended by Laws of 1937, Chapter 161, after providing for continuing contracts, states:

"Provided further that this act shall not affect the powers of a school board to discharge a teacher for cause under and pursuant to Mason's Minnesota Statutes of 1927, Section 2815."

Section 2815 provides that a school board shall:

"5. Employ and contract with necessary, qualified teachers, and discharge the same for cause."

It will be noted that neither Section 2903 as amended, nor Section 2815 prescribes a procedure for the removal of a teacher for cause. Since the statute does not provide for a procedure in such cases, the general rule of law must be applied. Such rule is stated in the case of State ex rel. Early v. Wunderlich, 144 Minn. 368, 175 N. W. 677, in the following language:

> "Where the law provides that an appointee shall hold his position during efficiency and good behavior, or that he shall be removed only for cause, he is entitled to a trial and an opportunity to controvert the evidence against him, and cannot be removed until he has been accorded that right. This is a well established general rule, but does not apply where the law points out a different procedure."

If the teacher is sufficiently informed of the charges against him or her, we do not feel that written charges must be served. However, the teacher must be given a hearing and an opportunity of refuting the preferred charges.

ROY C. FRANK,
Assistant Attorney General.

August 24, 1938. 161b-14

231

EDUCATION AND SCHOOLS—Teachers—Contracts—Termination of.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You advise us that the teacher of said school district has a contract dated July 14, 1937, thus coming under the continuing contract law. There are only one or two children in the district who will attend school this coming school year. The school board wishes to close the school and transport the pupils.

You then inquire:

1. "Can the teacher's contract be terminated under these conditions?"

Mason's Minnesota Statutes of 1927, Section 2903, as amended by Laws of 1937, Chapter 161, provides that a teacher's contract, exclusive of those in any school district in a city of the first class,

> "shall remain in full force and effect except as modified by mutual consent of the school board and the teacher until terminated by a majority vote of the full membership of the school board or by the written resignation of the teacher before April 1st."

Said section further provides that the above quoted provision "shall not affect the powers of a school board to discharge a teacher for cause under and pursuant to Mason's Minnesota Statutes of 1927, Section 2815." Subsection 5 of Section 2815 provides that a school board may "employ and contract with necessary, qualified teachers, and discharge the same for cause." The question then arises as to whether or not a school board may close the school of the district and thereby have sufficient cause to discharge the teacher. We are of the opinion that the closing of the school is not cause for termination of a teacher's contract under Section 2815. The word "cause" as used in said section implies misconduct, inefficiency or inability to teach on the part of the teacher. We therefore answer your question in the negative.

2. "Can the school board, if it wishes to do so, pay the teacher a reasonable adjustment?"

Since the teacher's contract is enforceable, there are two things that the board can do: one, to keep the school open and utilize the teacher's services, and, two, to close the school and make a reasonable adjustment with the teacher in settlement of her contractual rights. The board has the legal authority to make such a settlement.

ROY C. FRANK,
Assistant Attorney General.

August 11, 1938. 172c

232

EDUCATION AND SCHOOLS—Teachers—Contracts—Termination of.

Hon. A. B. Caldwell, Deputy Commissioner of Education.

You state:

"House File 404, the continuing contract law for teachers (Chapter 161, Laws of 1937), contains the following clause:

'Such contract shall * * * and shall remain in full force and effect except as modified by mutual consent of the school board and the teacher until terminated by a majority vote of the full membership of the school board or by the written resignation of the teacher before April 1st.'

"It was the intent of the framers of this law to require the school board to give a teacher an official notice of termination of contract before April 1. Since this requirement was made, it was decided that the teacher likewise should submit her resignation before April 1 if she did not expect to return the following year."

Our opinion is requested as to whether or not the words "before April 1st" refer to the phrase "a majority vote of the full membership of the school board" as well as to the words "written resignation of the teacher."

We answer your question in the affirmative. While the grammatical construction of the sentence quoted in your letter is poor, the evident intent is to impose the same obligation on the school board as on the teacher.

ROY C. FRANK,
Assistant Attorney General.

April 16, 1937. 172c-4

233

ELECTIONS—Candidates—Incumbent of one office candidate for another.

Mr. J. H. Manion, County Attorney.

You inquire:

> "Is our assumption that a county commissioner can run for the office of Judge of Probate without resigning until after election correct?"

The above question is answered in the affirmative. It is not necessary that a member of the county board resign before the election or before becoming a candidate for the office of Judge of Probate. If such commissioner should be elected probate judge, and qualify for said office, he would automatically upon such qualification vacate the office of commissioner previously held by him. It is not necessary in the event of his election that he resign as commissioner before qualifying for probate judge. He cannot serve in both capacities at the same time, and when he assumes the office of probate judge, he forfeits the office of county commissioner. See Hoffman v. Downs, 145 Minn. 465.

DAVID J. ERICKSON,
Deputy Attorney General.

July 16, 1937. 184c-1

234

ELECTIONS—Candidates—Requirement that officer own property not valid.

Mr. Glen W. Swenson, Village Attorney.

You inquire whether or not a contemplated village ordinance requiring that to be eligible for election to the Village Council an individual must own real estate, is constitutional. You state that you have advised the council that in your opinion such an ordinance would not be valid. You inquire whether or not your opinion is correct.

Article 1, Section 17 of the Minnesota Constitution provides in part as follows:

"No religious test or amount of property shall ever be required as a qualification for any office of public trust under the state. No religious test or amount of property shall ever be required as a qualification of any voter at any election in this state; * * *."

Article 7, Section 7 of the State Constitution also provides:

"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."

In view of the two foregoing constitutional provisions we are of the opinion that such proposed ordinance would be violative of the constitutional provisions referred to.

JOSEPH M. DONAHUE,
Special Assistant Attorney General.

June 14, 1938. 184i

235

ELECTIONS—Candidates—Nomination by petition—Party office—Time of filing—Designation of political principle—Certificate of nomination—Oath—Notary public.

Mr. Russell L. Frazee, County Attorney.

You state that one Albert S. Falk of Wheaton, Minnesota, has filed a certificate of nomination as a candidate for representative in Congress from the Seventh Congressional District; that the original petition was filed in the office of the county auditor of Traverse County at Wheaton, Minnesota, on the 8th day of October, 1938; that a certified copy of said certificate has been filed with the county auditor of Renville County; and that said certificate of nomination specifies that the name of said candidate be placed upon the ballot "in this fashion, 'Albert S. Falk, nominated by petition, Pensions for Everybody'."

You further state that "the candidate, Albert S. Falk, has acted as notary and acknowledged himself, all of the signatures on the petition which nominates him as candidate for congress of the Seventh Congressional District."

You further state that it has been customary in Renville County for the last few years to close the offices in the court house at twelve o'clock noon on Saturday, and that you understand that "the election laws provide that such a petition as is above described and as Albert S. Falk has prepared, must be presented and filed with the county auditor at least thirty days before the election."

You inquire:

1. "Does that mean that the petition must be left with the auditor in his office and filed, or in this case would Falk be meeting the requirements as to the law as to filing the petition with the county auditor thirty days before the general election, by leaving the petition with the county auditor at his residence after the auditor's office had closed for the week end?"

This office has heretofore held that the filing officer, such as the county auditor, is not required to receive or file in his office an affidavit of candidacy after the close of office hours. He may, however, if he so desires, keep his office open for the purpose of receiving filing affidavits up to midnight of the last day for filing such affidavits of candidacy or certificates of nomination. In this connection see Johnson v. Holm, 198 Minn. 192, 269 N. W. 405.

The time within which such a certificate of nomination must be filed to be placed on the now so-called India tint ballot is governed by Section 348, Mason's Minnesota Statutes of 1927, as reenacted in Chapter 270, Laws of 1937, rather than by Section 508. Prior to the enactment of said Chapter 270, Laws of 1937, we had held that Section 508 was controlling. This because of the fact that prior to the enactment of said Chapter 270, Section 508 was a later enactment. See opinion 386, Attorney General's Biennial Report for 1934. However, as indicated, Section 348 as amended by said Chapter 270, Laws of 1937, is now the last enactment by the legislature and in our opinion said Section 348 as so amended by the 1937 legislature is now controlling. It will be noted that said Section 348, as so amended, expressly provides that certificates of nomination shall be filed with "the secretary of state, of the names to be placed on the white ballots, on or before the fifth Saturday preceding the day of election; **with the county auditor, to be placed upon the India tint ballots, on or before the third Tuesday preceding the day of election.**"

It is manifest, therefore, that such a certificate of nomination may be filed any time on or before October 18th.

You also inquire (2) "as to whether or not the candidate himself can act as notary and take acknowledgments to the signatures of the petitioners on a petition which is prepared and circulated on his own behalf."

In accordance with the provisions of Section 332, Mason's Minnesota Statutes of 1927, every person who signs such a certificate of nomination must do so before a notary public or justice of the peace or other officer authorized by law to administer oaths, each signer being required to swear or affirm in the usual manner to the form of oath prescribed by the statute. We do not find that this office has ever passed upon the question as to whether such a certificate of nomination is insufficient or invalid for the reason that it was sworn to before the person nominated in such a certificate and who was alone the interested party, nor do we find that our Supreme Court has ever passed upon the validity of such a certificate.

Although the case of Young v. Young, 18 Minn. 90, is not directly in

point, the Supreme Court in construing the statute relating to the powers of a notary public to administer oaths, said:

> "The attorney was a notary public, and therefore, under Section 4, c. 26, Gen. St., which confers upon 'each notary public' power 'to administer all oaths required or authorized by law to be administered in this state,' was empowered to administer the oath in this instance, notwithstanding rule 5, Dist. Ct. Rules."

Undoubtedly, it is unwise and contrary to public policy for an officer, such as a notary public, to take an acknowledgment to any instrument to which he is a party, or in which he is interested directly or indirectly. In any event, he should be disinterested and entirely impartial as between the parties. The propriety of the rule that oaths and affidavits should be taken before officers who are disinterested and unbiased is too manifest to require discussion. In the time available we have not been able to find any case either in this state or in other jurisdictions holding ineffective a certificate of nomination like the one in question or similar in character, sworn to before a party interested in the same. As indicated, such a practice is, to say the least, of doubtful propriety. However, the better rule and the weight of authority in other jurisdictions seems to be that where there is no imputation or charge of improper conduct, bad faith, or undue advantage, the mere fact that the acknowledgment or oath was taken before an interested officer will not vitiate the ceremony or render it void if it is otherwise free from objections or criticism. See American Jurisprudence, Vol. I, Section 52, page 335. In 2 Corpus Juris Secundum, page 935, the rule is stated that "the act of the officer so interested has been held to be voidable merely, and not void."

We are of the opinion that while such an oath taken before a notary or other officer who is interested in the instrument is contrary to public policy, and by no means to be encouraged, and while such a practice should be discountenanced and discontinued, still such an oath or acknowledgment is not absolutely invalid and void because of such interest, without more. In other words, where there is no imputation or charge of improper conduct or bad faith or undue advantage arising out of such interest, the mere fact that the oath was taken before such officer would not vitiate the instrument or render it void when it was otherwise free from objection and criticism. That is, in accordance with the above referred to principles we are of the opinion that the better rule is that such an oath before a party interested is voidable, but not ipso facto void; and while such an oath will not per se be declared void, still it is open to attack, and the courts will lend a ready ear to evidence of undue advantage, fraud or oppression arising out of the fact of such interest in the officer so taking such oath or acknowledgment.

On the facts presented, therefore, we are of the opinion that the certificate in question is entitled to be filed with the county auditors of the various counties in said Congressional district.

You also inquire (3) "as to whether or not the county auditor must print on the ballot the slogan mentioned in the first paragraph above, namely 'Pensions for Everybody'."

The statute, Section 330, Mason's Minnesota Statutes of 1927, provides that the certificate of nomination by voters or petition, as it is usually called, "shall contain the name of the person nominated, the office for which he is nominated, the party or political principle he represents, expressed in not more than three words."

The Supreme Court in the case of State v. Grift, 106 Minn. 29, has held that a certificate of nomination by voters which does not comply with the provisions as to the party or political principle which the candidate represents is void and should be ignored by the county auditor, and does not entitle the proposed candidate to a place on the general election ballot, and that the statute in this respect is mandatory. However, it will be noted that in this case the certificate in question did not give either the party or political principle of the nominee and for that reason held that the certificate there involved was void. It will be noted that the certificate filed by candidate Falk does state in three words the political principle for which he stands. The Court in the Grift case, supra, further said:

> "It is too obvious to justify any extended argument that the legislature intended that a person should be represented as somebody or as standing for something in the certificate of nomination."

It cannot be said that the certificate in question does not indicate that the candidate named therein "stands for something," since the certificate sets forth that the candidate stands for "Pensions for Everybody."

We also direct attention to the case of Quealy v. Warweg, 106 Minn. 145, in which the Supreme Court construed said Section 330 (Section 214, Revised Laws 1905) and held that:

> "The statute must be liberally construed so as to effectuate legislative intention and to fully secure to the people their right to express their choice. A technical construction of the language used would be objectionable on general principles, and tend to subvert the purposes sought to be attained. That purpose was evidently to secure a designation of a party or political principle which would be sufficient inter alia to prevent the candidate from unfairly posing to one person as of his party and to other persons as to their respective parties. All that the statute requires in this regard is a declaration of political principle. Independence in politics is a familiar and recognized principle."

Adhering to the rule laid down by the Supreme Court in this case, we are of the opinion that the candidate nominated by said certificate is entitled to have placed upon the India tint ballot the three words "Pensions for Everybody."

It is not the province of this office to determine the purpose or propriety of such declaration of political principle. This was a matter for the determination of the petitioners who signed said certificate of nomination.

DAVID J. ERICKSON,
Deputy Attorney General.

October 14, 1938. 911j

236

ELECTIONS—Canvassing board—Candidates acting on.

Mr. H. A. Irwin, County Attorney.

You inquire:

1. "May a person who has filed his name as a candidate for either county auditor or clerk of court, serve upon such canvassing board, if no one else has filed for the same office or only one person has filed so that the names do not appear on the primary ballot under Section 294? In other words, is one of the officials named a proper member of the canvassing board, if his name does not appear on the primary ballot, but he will be a candidate at the ensuing general election?"

2. "In case three of the members are disqualified by their candidacy under the foregoing ruling, how will the board be completed so as to have sufficient members to act?"

We do not find that the first question you ask has ever been presented to this office. Its answer is not entirely free from doubt. However, on principle the problem is similar to the one where the question arises whether a candidate for an office is eligible to act as a member of the election board at a primary election when there is no contest for the office he seeks at such primary election. This office has uniformly held that under such circumstances such a candidate is not eligible to be a member of the election board. See Opinion No. 153, 1932 Report of the Attorney General. It is our opinion that a person who has filed as a candidate for county auditor or clerk of court may not be a member of the canvassing board at the primary election, even if his name does not appear on the primary election ballot.

Section 312, Mason's Minnesota Statutes of 1927, provides in part:

"But no candidates for a nomination shall serve on said board, and the places of any so disqualified shall be filled by such judge by the appointment of qualified voters not holders of any public office."

In answer to your second question you are advised that it is our opinion that vacancies in such primary election canvassing board should be filled by the judge of the district court.

WILLIAM D. GUNN,
Special Assistant Attorney General.

February 23, 1938. 183c

237

ELECTIONS—Cities—Filing—Last day—How determined.

Mr. Irving L. Eckholdt, City Attorney.

In your letter to Attorney General William S. Ervin, under date of January 20, 1937, you state that your charter provides that the regular city election shall be held on the second Tuesday of March of each year.

You also direct attention to Section 1672 of the election laws which provides for a primary election two weeks prior to the "charter election," and to Section 1673 which provides that the last day for filing affidavits of candidacy shall be not less than ten days before the primary election; and that "this will bring the charter election on March 9, the primary election on February 23 and the last day for filing will fall on February 12, which is a holiday."

You further state that February 12, Lincoln's Birthday, is a holiday, and you direct attention to Subdivision 6 of Section 10933, Mason's Minnesota Statutes of 1927, which provides that "no public business shall be transacted on those days, except in cases of necessity, nor shall any civil process be served thereon."

You inquire "whether or not the city clerk should remain open on February 12 and receive filings of candidates for the primary election."

This office has heretofore held that when the last day of filing, as computed under the rules of law, falls on a legal holiday, the last day for filing affidavits of candidacy is the preceding secular day. We have also heretofore held that the filing of an affidavit of candidacy with the properly constituted officer constitutes the transaction of public business. It follows that the clerk is not required to keep open on February 12, a legal holiday, and that an affidavit of a person desiring to be a candidate at the city primary election should not be accepted by the clerk on that day.

Section 1673, to which you direct attention, requires affidavits of candidacy to be filed with the city clerk at least ten days before the primary election. In computing this period, the day of the primary election should be counted as the tenth day and the day of filing should be excluded. See State v. Erickson, 152 Minn. 349. Applying this rule to your situation, you are advised that February 13 is the last day for filing affidavits of candidacy with the city clerk.

DAVID J. ERICKSON,
Deputy Attorney General.

January 27, 1937. 911a-1

238

ELECTIONS—Cities—Hours of opening and closing polls—Affidavits of candidacy—Time of filing.

Mr. E. V. Cliff, City Attorney.

You state that the City of Ortonville is operating under a home rule charter.

You inquire "as to the time the polls should remain open where the charter is silent, whether it is governed by Section 401-1 or Section 1809."

We find from an examination of your city charter that Section 9 of Chapter 2 provides that:

"All City elections shall be held and conducted in the same manner and under the same penalties as required by the general laws of the state regarding elections, and like notice shall be given."

Chapter 317, Laws of 1923 (Sections 1805 to 1811, Mason's Minnesota Statutes of 1927), provides in Section 1 that the act shall be applicable to city elections in cities of the fourth class unless otherwise provided by the law under which such city is organized or by the home rule charter of such city. Since the portion of your city charter above quoted makes the general laws of the state govern elections held under your charter, we are of the opinion that Chapter 198, Laws of 1929 (Section 401-1, Mason's Minnesota Statutes, 1936 Supplement), is applicable as to the time polls shall remain open. This act provides that the polls should open at 6:30 a. m. and close at 8 p. m.

You also state that your charter "seems to be silent as to the time necessary for candidates to file prior to the election in order to have their names placed on the ballot."

Your second inquiry resolves itself into the proposition of whether candidates for election to city offices in your city should file their affidavits of candidacy in accordance with the provisions of Chapter 317, Laws of 1923 (Sections 1805 to 1811, Mason's Minnesota Statutes of 1927), since your charter is silent as to the time within which candidates for city offices must file prior to the election.

Section 1806, Mason's Minnesota Statutes of 1927, was originally enacted as a part of Chapter 317, Laws of 1923. The first section thereof, being now Section 1805, Mason's Minnesota Statutes of 1927, provides that election of all officers in cities of the fourth class shall be conducted as prescribed in said act, unless otherwise provided by the law under which the city is organized or by the home rule charter thereof.

It is our opinion, therefore, that since your home rule charter contains no provision relative to the time within which candidates must file their affidavits of candidacy prior to your city election that Section 1806 is controlling. This section provides that "not less than fifteen days preceding the city election, any eligible person desirous of having his name placed upon the official election ballot as a candidate for an office to be voted for at such election by the voters of such city, shall file an affidavit with the city clerk."

DAVID J. ERICKSON,
Deputy Attorney General.

October 8, 1937. 641

239

ELECTIONS—Corrupt Practices Act—Paid advertisement in newspaper—"Personal campaign committee."

Mr. Warren P. Adams, County Attorney.

You inquire as follows:

"I should like your advice as to whether in case where a candidate has selected a personal campaign committee, it is necessary to insert in newspaper advertising the name of the secretary of the committee or whether it is sufficient to merely state that the advertising is prepared and circulated by the personal campaign committee, such as in my case, "prepared and circulated by Adams for County Attorney, Personal Campaign Committee, Jackson, Minnesota."

Section 539, Mason's Minnesota Statutes of 1927, as amended, provides as follows:

"No publisher of a newspaper, periodical or magazine shall insert either in the advertising columns of such newspaper, magazine or periodical, or elsewhere therein any matter paid or to be paid for which is intended or tends to influence directly or indirectly any voting at any primary or general election **unless at the head of said matter is printed in pica capital letters the words 'Paid Advertisement', and unless there is also a statement at the head of said matter of the amount paid or to be paid therefor, the name and address of the candidate in whose behalf the matter is inserted and of any other person, if any, authorizing the publication and the name of the author."**

In the case of Dart v. Erickson, 188 Minn. 313, a certain "volunteer committee" supporting a person whose election to the office of Judge of Probate was being contested, inserted a publication in a newspaper and in hand bills which stated on its face that it was "prepared and paid for by volunteer committee in behalf of "said contestee." In holding that such a statement did not comply with the provisions of Section 539, the Court said:

"That was not a compliance with the statute, G. S. 1923 (1 Mason, 1927) Section 539, which requires 'at the head' of any such matter 'in pica capital letters the words "Paid Advertisement," ' and also a statement 'of the amount paid or to be paid therefor, the name and address of the candidate in whose behalf the matter is inserted and of any other person, if any, authorizing the publication and the name of the author thereof'."

After considering certain other issues involved in the case, the Court further stated:

"All this does not get us away from the fact that there was a violation of the statute in that the publication was not labeled as required by Sections 539 and 544 with the names of its authors and the amount they were paying for its publication."

We believe the above case is controlling and it is our opinion that a statement that such an advertisement is "prepared and circulated" by the "Personal Campaign Committee" of a candidate does not comply with the above referred to statutory provisions. We believe that such an advertisement should also contain the name and address of the person or persons on such committee who have authorized the publication of the same.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

October 1, 1938. 627c-5

240

ELECTIONS—County canvassing board—Justices of the peace appointed as members of.

Mr. John J. Benton, County Attorney.

You state that the county auditor of Itasca County is a candidate for reelection and direct our attention to Section 312 and Section 474, Mason's Minnesota Statutes of 1927, wherein the county auditor is made a member of the county canvassing boards provided for under said statutory provisions. You also refer to former opinions of this office wherein it has been held that under said Section 474 the members of the county canvassing boards provided for therein who are candidates for reelection are not disqualified from acting as members of such boards.

You inquire if it is proper for the county auditor "not only to act on the canvassing board, but also is it proper for him to appoint the two justices of the peace as is provided for in Section 474?"

We note that you state it is your understanding that the above section "applies only to primary elections."

It has been the holding of this office that Section 312, Mason's Minnesota Statutes of 1927 applies to the county canvassing board which canvasses the votes cast at the primary election and that the canvassing board provided for under Section 474, Mason's Minnesota Statutes of 1927, canvasses the votes cast at the November general election.

Said Section 474 provides, in part, as follows:

> "The auditor, the chairman of the county board and two justices of the peace selected by the auditor from opposing political parties when possible, shall constitute the county canvassing board, any three of whom being present and sworn shall have power to act. * * *."

It will be observed that said Section 474 does not make any provision for the appointment of justices of the peace as members of said canvassing board by anyone other than the county auditor, and we are of the opinion that the legislature not having provided any other method of appointment of such justices of the peace as members of said board in cases where the auditor is a candidate for reelection, said justices of the peace are to be appointed as members of said canvassing board by the county auditor regardless of the fact that the auditor may be a candidate for reelection.

DWIGHT N. JOHNSON,

Special Assistant Attorney General.

November 2, 1938. 183c

241

ELECTIONS—County canvassing board—Meeting of—Compensation and mileage.

Mr. C. J. Benson, County Attorney.

You refer to Section 493, Mason's Minnesota Statutes of 1927, which provides, in part, as follows:

> "The compensation for services performed under this chapter shall be as follows:
> * * *
>
> "4. To auditors, chairmen of county boards, justices of the peace, and others acting in their places, three dollars for each eight hours of service as members of any canvassing board, and ten cents for each mile of necessary travel."

You further state that certain members of the county canvassing board "living in the other end of the county" made a trip to the county seat each day and submitted a bill "for one round trip each day with mileage at the rate of ten cents per mile."

You inquire:

> "I would appreciate your opinion as to whether or not these men are entitled to charge ten cents a mile for each round trip, or simply ten cents a mile to come down to the county seat and ten cents a mile to return when the work is completed."

We do not believe that the legislature intended that the members of the county canvassing board should be required to serve more than eight hours per day in the performance of their duties, and we are of the opinion that when their services are required for more than one day they are entitled to the per diem allowed under said Section 493 and ten cents per mile for each mile of necessary travel in going to and returning from the meetings of such board. The mileage provided for under said Section 493 is as much a part of the compensation of the members of said canvassing board as is the $3.00 per diem.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

August 2, 1938. 183c

242

ELECTIONS — County officers — Vacancy — Nomination by petition after primary.

Mr. E. D. Libera, County Attorney.

You state that on August 5, Mr. Theodore Schumacher, Register of Deeds of Winona County died; that a successor was duly appointed by the

Board of County Commissioners to fill the balance of Mr. Schumacher's term, which would have expired the first Monday in January, 1939; that said Mr. Schumacher was the only candidate who had filed for that office at the June primaries; that in view of the fact that there were no other candidates for said office at the primary election, candidates are now filing Certificates of Nomination by petition pursuant to Section 344, Mason's Minnesota Statutes, 1927; and that you have ruled that such a petition must be signed by at least five hundred qualified voters as provided by Section 329, Mason's Minnesota Statutes, 1927, since there were more than five thousand votes cast in your county at the last General Election. We agree with your conclusion that such a petition must be signed by five hundred qualified voters pursuant to the provision of said Section 329.

We also agree with your conclusion that no primary election should be held to fill said vacancy, and that the names of all candidates who file proper Certificates of Nomination are entitled to have their names placed on the General Election ballot. This is in conformity with opinions number 135 and 144 of the selected opinions of the Attorney General relating to elections, 1928 edition.

We also agree with your conclusion that the petition candidate who receives the highest number of votes for said county office at the coming General Election will be entitled to be duly declared elected to said office. See Section 476, Mason's Minnesota Statutes, 1927.

The last day for filing such Certificates of Nomination by petition is Tuesday, October 18, 1938. This is in conformity with both Sections 348 and 508 of Mason's Minnesota Statutes, 1927.

As you indicate, Section 508 expressly excepts "Nominations to fill a vacancy in a nomination previously made, or to nominate a candidate for an office in which a vacancy has occurred and for which no person is a candidate." This is the situation existing in your county. Mr. Schumacher was the only candidate for the office of Register of Deeds at the recent primary. He died subsequent to the primary, thereby creating a vacancy in the nominations for said office within the above quoted exception to said Section 508.

The opinion of this office referred to in the notes to said Section 348, Mason's Minnesota Statutes, 1927, 1938 Supplement, to which you direct attention, did not relate to a situation where a vacancy had occurred.

DAVID J. ERICKSON,
Deputy Attorney General.

August 30, 1938. 373a

243

ELECTIONS—Holiday—May not be held on.

Mr. Irving L. Eckholdt, City Attorney.

You state that the City of Rochester is a city of the second class, having a home rule charter and that under this charter the regular city elec-

tion is held on the second Tuesday in March; that following the authority conferred by Section 1671, Mason's Minnesota Statutes of 1927, the City of Rochester passed a proper resolution adopting the primary election therein provided for, which resolution is still in full force and effect; that Section 1672 of Mason's Minnesota Statutes of 1927 provides for the holding of a primary election two weeks preceding the regular city election; that this sets a date for the holding of the primary election on February 22, 1938 which, being Washington's birthday, is a legal holiday.

You also call our attention to the provisions of Section 10933, subdivision 6 thereof, which provides in part as follows:

> "Holidays—The word 'holiday' shall include * * * Washington's birthday, February 22; * * *. No public business shall be transacted on those days, except in cases of necessity, nor shall any civil process be served thereon."

You inquire as to whether or not it would be legal to hold your primary election on February 22, Washington's birthday.

This office has heretofore held that a school election, in a district operating under a special law governing certain school districts, should not be held on a legal holiday. Although we do not find that our Supreme Court has ever passed upon the question of whether or not the holding of such an election constitutes the transaction of "public business" within the meaning of said Section 10933, Subdivision 6, your attention is directed to the case of Carr v. Wakonda Independent Consolidated School District No. 1, 182 N. W. 626 (S. D.). The South Dakota statutes contain substantially the same provisions as does Section 10933, Subdivision 6, and provides as follows:

> "Aside from Sundays, the observance of which is provided for in Title 4, no public business except in case of necessity, shall be transacted on any one of said days, and no legal process in civil cases shall be served on any of said days."

Although the issue in the above referred to case was whether or not the publication of notice of the election was the transaction of "public business" within the meaning of said statutory provision, the South Dakota Court said:

> "It is not, and could not successfully be, contended that the publication of a notice of election constitutes a service of legal process. The question then arises whether the publication of this notice is the transaction of public business within the meaning of that section. In so far as the school district was concerned, there was no transaction of business by it on those days. Its business was transacted when it gave the notice to the publisher for publication, and the publication amounted merely to the giving of notice that on the day of election certain public business would be transacted."

We are, therefore, of the opinion that the primary election in the City of Rochester may not properly be held on February 22, a legal holiday.

When you called at our office Monday afternoon, in connection with the question you have submitted, you requested that we also express our opinion as to when the election should be held if it could not be held on a legal holiday.

Section 1672 provides that **"on a day two weeks preceding** the municipal charter election held for the purpose of electing city officers an election of nominees to be designated "city primary election" shall be held in such city. One week's published and posted notice thereof shall be given by the city clerk."

We believe that when the day for holding such election falls on a legal holiday that the election should be held the preceding day in order that the provisions of said Section 1672 may be complied with. We do not believe that the holding of a primary election on the day following such legal holiday would be the holding of such a primary election "on a day two weeks preceding" the municipal charter election.

This office has uniformly held that when the last day of filing for an elective office falls on a legal holiday, the last day for filing is the preceding day. Therefore, as above indicated, we believe that under the provisions of said Chapter 1672 the same rule should be applied to a situation where the primary election day falls on a legal holiday.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

January 11, 1938. 64

244

ELECTIONS—Judges and clerks—Compensation of town supervisor acting as.

Mr. Charles A. Fortier, Attorney for Town of Parker.

You direct attention to Mason's Minnesota Statutes of 1927, Sections 1089, 358 and 1037 and inquire:

> "May a member of the Town Board be paid for his services as a member of the Election Board either in general or town elections if such payment will increase the yearly compensation received by such member to more than the maximum amounts provided for in said Section 1089?"

The above question is answered in the affirmative. This office has heretofore held that a town supervisor is entitled to the maximum annual compensation allowed him by law in addition to whatever per diem he receives as judge of election. This for the reason that the compensation allowed for services of members of the town board as judges of election are not allowed for services rendered as members of the town board, but rather as pay for extra services in acting as judges of election.

DAVID J. ERICKSON,
Deputy Attorney General.

February 24, 1937. 183k

245

ELECTIONS—Penal provisions—Applicable mis-conduct of election officials in township elections.

Mr. Thomas J. Naylor, County Attorney.

You state that several residents of the Town of Balkan have been in your office repeatedly insisting that officials of the Town of Balkan and others, be prosecuted for their activities in connection with past town elections. That such people claim that the town officials and candidates for town offices have threatened to black list certain voters in the town and that among other things the judge of election tore the corner off folded ballots on election day, sometimes tearing off the wrong corner leaving a hole in the center of the ballot; that some ballots were marked by the election official pressing his thumb nail into the corner of the ballot and that these marks will show on the ballots now held; that some voters were challenged and that a number of those votes so challenged were kept out of the ballot boxes after such challenged voters had been allowed to vote and were inspected and counted separately, enabling the officials to determine how such challenged voter had voted and that this was done notwithstanding the fact that the votes of some challenged voters were placed in the ballot thus differentiating between some challenged voters.

You also state that during the past several town elections it has been necessary to have deputy sheriffs present each election day and that considerable trouble has been experienced in the past and that on the last election day there were fist fights and one voter claims to have been assaulted, knocked down and as a result thereof suffered a serious rupture.

You also state that you have read and considered the case of Anderson v. Firle, 174 Minn. 333, and have shown this case to the complainants, wherein it is stated that the Corrupt Practices Act does not apply to town elections and that you have had to advise them that there is no law under which these matters in connection with the election can be prosecuted, but that the matter is very serious and that you are fearful that general knowledge of the lack of such law will lead those in the community to feel that it is rather an open house and that the strongest aggressive body can forcibly run things to suit themselves without fear of prosecution. You inquire if we can cite any statutory law which may be resorted to in an attempt to curb such activities.

The writer has made a careful search of the statutes relative to prosecutions for such matters and redirects your attention to the case of Anderson v. Firle, supra. You will note that said case attempts to differentiate between the Corrupt Practices Act and the Penal Provisions immediately following the Corrupt Practices Act.

The present Corrupt Practices Act is found in Sections 538 to 579 inclusive, Mason's Minnesota Statutes 1927, and was enacted into law by the legislature by Laws 1912, Chapter 3. It repeals Sections 348 to 358 inclusive, Revised Laws 1905, which was the old Corrupt Practices Act.

The Penal Provisions of the Revised Laws of 1905 were separately stated by the Revision Committee and were not changed by the legislature of 1912, thereby leaving them stand in practically the same form as we now have them in Mason's Minnesota Statutes, Sections 580 to 601 inclusive.

By reason of the foregoing, it is our opinion that the Penal Provisions of the statute might well be used in prosecuting officials of election even at town elections notwithstanding the case of Anderson v. Firle, supra. As a matter of fact the court intimated in the above cited case that such penal provisions might properly be used in such instances. However, the court said that it was not necessary to decide that question for the purposes of the decision in the case. We quote from said Anderson v. Firle, page 335:

> "The revision commission did not place all of L. 1895, p. 664, c. 277, under the title CORRUPT PRACTICES, but a great many provisions not specially applicable to the use of the Australian ballot system were placed under the title PENAL PROVISIONS. Whether the latter, such as those against bribery and the like, can be invoked to secure the purity of all elections, including town and school elections, is not now necessary to decide, for the acts of which appellant was found guilty violated the provisions found under the title CORRUPT PRACTICES in G.S. 1923, Sections 538-579, being L. 1912, Sp. Sess. p. 23, c. 3."

Furthermore, it seems incredible to the writer that at least the Penal Provisions of the election laws would not apply to town elections. If such provisions were not applicable bribery, fraud, and illegal practices by election officials and candidates might be openly practiced without any restraint whatsoever and the system of town elections, the oldest and most democratic form of expression by the voters, would be turned over to such vices without regard to law, order, honesty, or purity of elections.

JOSEPH M. DONAHUE,
Special Assistant Attorney General.

May 20, 1938. 627h

246

ELECTIONS—Registration—Permanent—Appeal from order of Registration Commissioner to District Court—Order of Commissioner suspended pending appeal.

Mr. Louis P. Sheehan, Assistant Corporation Counsel.

You submit certain inquiries relative to the construction of said Section 389 which will be restated and answered in the order submitted.

> (1) "Does a decision of the Commissioner sustaining a challenge nullify the registration in question despite an appeal from the Commissioner's action, to the District Court, or is the effect of such determination suspended pending the appeal?"

Although you do not so state, our information is that the written notice of the challenge filed with the Registration Commissioner recites that a certain "candidate for the legislature in the 37th legislative district south, in said city and state, and his right to be such candidate will depend upon the determination of his right to be a legally registered voter." It also appears that the person so challenged holds a certificate of nomination for the office of state representative in the state legislature, which certificate was issued by a duly constituted canvassing board at the recent primary election. As a result of these facts the preliminary question arises as to whether the Commissioner of Registration of the City of St. Paul has any jurisdiction, if the evidence presented before him is strong enough, to cancel the registration of the person in question until the court has passed thereon, and as to whether the status of such candidate for the legislature will be affected thereby.

Section 389, Mason's Minnesota Statutes, 1927, provides as follows:

> "Any person may challenge a registration at any time by filing a written challenge with the Commissioner of Registration. Persons so challenging shall appear before the Commissioner of Registration thereafter to prove their challenge, and the person so challenged shall have notice given of the challenge and the Commissioner shall decide the right to the entry of the evidence. Either party may appeal to the District Court of the county in which the challenge is made and a date for the hearing shall be fixed and the decisions of such Court shall be final."

It will be noted from the above quoted language of said Section 389 that the challenge authorized by the permanent registration act is merely for the purpose of effecting the voter's right of registration, and not for the purpose of determining whether such person so challenged has the qualifications entitling him to hold a public office. In other words, the permanent registration law is merely a procedure to ascertain who are entitled to vote for the purpose of receiving or rejecting the vote when tendered at an election. While a person must have the qualifications of an elector to hold a public office, there is no requirement of law that such person in order to be eligible for a public office should be registered at all. If the person in question has the qualifications of an elector he is entitled to hold public office and to go before the people as a candidate therefor, although by reason of his failure to properly register or to have his name on the registration rolls he might not be entitled to vote as an elector at such election. As indicated, therefore, the challenge authorized by the permanent registration act is merely for the purpose of affecting his registration, and in no way determines the eligibility or qualifications of an elector to hold a public office.

This is particularly true with reference to the eligibility or qualifications of a candidate for the office of representative or state senator in the state legislature. By Section 3, Article 4 of the state constitution it is provided: "Each house (of the legislature) shall be the judge of the election, returns, and eligibility of its own members." The Supreme Court of this state, on September 30, 1938, in State ex rel. Will McGrath v. Al P. Erick-

son as County Auditor of Hennepin County, in construing the above quoted constitutional provision held that "when it comes to inquire concerning the eligibility of one who has obtained a proper certificate of nomination at a primary election for a state senator * * * the courts must yield the determination thereof to the senate of the state upon receiving the votes cast in his favor at the general election." The court in so holding further said that, "This is in line with our decision in State ex rel. v. Selvig, 170 Minn. 406, 212 N. W. 604." Manifestly, if the Supreme Court of this state has no jurisdiction to determine the eligibility of a candidate for the office of representative in the state legislature, who holds a certificate of nomination for such office issued by a duly constituted canvassing board of a primary election duly held and canvassed, it must be apparent that the Commissioner of Registration of the City of St. Paul, has no power or jurisdiction to determine such eligibility since the same is governed and controlled by said Section 3, Article 4 of the state constitution.

As to whether the Commissioner's action sustaining a challenge is final pending an appeal, in our opinion the action or order of the Commissioner is suspended pending such an appeal to the district court. It will be noted that there is no express language in said section of the statute authorizing the Commissioner to nullify a registration. The statute merely provides that the Commissioner "shall decide the right of the entry of the evidence." The language of the statute does not even by inference indicate any intention on the part of the legislature that the decision or order of the Commissioner when made should be final pending an appeal. The fact that the sentence following the above quoted excerpt expressly provides that "either party may appeal to the District Court of the county in which the challenge is made * * * **and the decisions of such Court shall be final**" evidences an intent on the part of the legislature that the only order in the matter which should be final is the one issued by the District Court. The rule is well established in this state that election laws should be liberally construed so as to secure to the people their right to express freely their choice at an election; and that no man should be disfranchised upon a doubtful construction of the statutes. The right of franchise is an esteemed privilage of a citizen which should not be taken away or denied unless the statute regulating its exercise, clearly indicates that the voter, who has not complied with its essential prerequisites, must be barred. See Dunnell's Digest, Section 2915. It would be necessary to resort to inference in order to hold that the above quoted statutory provision confers powers upon the Commissioner of Registration to make his order final pending an appeal. As indicated, no such strained construction should be resorted to in a case such as this involving the right of franchise, since we are required to follow the rule laid down by the courts that a citizen should not be denied his right to vote upon doubtful grounds.

It should also be borne in mind that there is no more reason why a person claiming to be an elector by naturalization should be debarred from registration if he has lost his certificate, or that of his parent, through whom such naturalization may have been derived, from establishing such fact by his own oath, the same as a person native born. A person may

swear that he is native born, and he is not required, also, to prove this fact by someone else before he can be registered. Why, then, if he wishes to show that he is an elector by naturalization, must he be corroborated by someone other than himself. The courts have said that this distinction between native born and naturalized electors is an unfair one, and entirely unnecessary in order to prevent fraud; and that "its tendency will be to disfranchise honest men and induce dishonest men to perjure themselves." See Attorney General v. Common Council of the City of Detroit, 78 Mich. 545; 44 N. W. 388. The legislature would have no power to enact a statute making such a distinction between a naturalized voter and one native born. This being true, the Commissioner of Registration would have less power to make such a distinction. The imposing of such a disability upon voters would result in the disfranchisement of thousands of naturalized citizens in this state. As indicated, it is a matter of common knowledge that a person claiming to be a voter because native born may prove that fact by his own oath. A rule or regulation, whether by statute or pursuant to an order or rule of the Commissioner of Registration, requiring a greater degree of proof from a naturalized voter than from one native born would be discriminatory, unreasonable and void.

(2) "Within what time must an appeal be taken in order that the same may be effectual from the determination of the Commissioner to the District Court?"

In the absence of any provision in said Section 389 as to the time within which an appeal must be taken from the order of the Commissioner, it is the duty of the Commissioner to provide in his order a reasonable time for the taking of such an appeal, and to give the challenged person reasonable notice thereof. What is a reasonable time in a given case may depend upon the surrounding facts and circumstances.

(3) "What procedure must be followed in order to perfect such an appeal?"

The notice of appeal should be filed with the Commissioner of Registration within the time specified in his order or decision. A return should then be made by the Commissioner to the office of the clerk of District Court. If the party appealing desires to have a transcript of all the proceedings before the Commissioner certified to the District Court, we believe that it is the duty of the Commissioner to make and certify such a transcript of the proceedings and then transmit the same to the clerk of District Court.

(4) "In the event of an appeal in such case, will the matter be tried de novo in the District Court?"

As hereinabove indicated, the statute, Section 389, expressly confers jurisdiction upon the District Court to hear and determine such an appeal, and provides that "the decisions of such Court shall be final." It is true that the legislature, in said section of the statute, has not designated the manner in which such a contest shall be heard in the District Court, but when jurisdiction over a subject-matter is conferred upon a court and the details of the procedure are not provided for, the general rule seems to be

that the court will establish and adopt such procedure as is necessary to render the grant of jurisdiction effective. We believe that such a case should be determined in the District Court upon the merits; that is, that the contest upon such an appeal should be tried de novo. However, as indicated, since the statute confers jurisdiction of the subject matter upon the District Court, and the details of the procedure are not provided for, the court will establish and adopt such procedure as is necessary to render the grant of jurisdiction effective.

DAVID J. ERICKSON,
Deputy Attorney General.

October 6, 1938. 183r

247

ELECTIONS—Registration—Places of registration—Establishment of.

Mr. Harry E. Weinberg, City Attorney.

You direct attention to Section 4 of Chapter 305, Laws of 1923 (Section 383, Minnesota Election Laws, 1938 Edition, Compiled and Annotated by the Attorney General), relating to registration of voters. You also direct attention to Section 383-1 of said election laws relating to registration in cities of the second and third classes.

You inquire:

> "Has the registration commissioner of the City of Duluth (City Clerk) the authority and power to provide that places of registration shall be established throughout any portion or the whole of the city, one such registration place in each precinct in any part or the whole of said city, in the usual polling places, such registration places as established by him in such polling places to remain open for one or two registration days from six o'clock, A.M. to nine o'clock P.M., such registration days to be fixed by the city clerk, in order to afford voters an opportunity to register in their precincts instead of traveling to the City Hall where the office of the Commissioner of Registration is located."

It will be noted from said Section 383 that the commissioner of registration is expressly authorized to "appoint such deputies and clerks, provide printed forms and blanks, together with such other supplies and equipment as are necessary to properly carry out the provisions of this act," and said section also provides that "he (the commissioner) shall prescribe such reasonable rules and regulations as to **office hours and places and manner of registration as may be necessary.**"

It will be noted from the above quoted language of said Section 383 that it not only confers the power upon the commissioner of registration to provide reasonable rules and regulations as to office hours and places and manner of registration as may be necessary, but expressly makes it

the duty of the commissioner to establish such registration places as may be necessary in order to give voters a reasonable opportunity to register.

This office in construing said Section 383 has heretofore held that:

"It is his (commissioner's) duty to exercise his judgment in the matter and to provide such facilities within the means available, as will give every voter a reasonable opportunity to register. The act contemplates that the commissioner's office shall be the main place of registration, to be kept open for receiving registrations continuously on all days except Sundays, holidays, election days, and the fifteen-day periods preceding election days when registration is suspended. **Additional places of registration, open at such times as the circumstances may require, may be provided whenever needed.** The usual practice has been to provide such additional places to take care of initial registrations when the system is first established in a city, and also preceding any election when an unusual rush of registrations is expected.

"* * * the act charges the commissioner with the general duty of providing such facilities for registration as are necessary. Hence if a situation arose where, in order to give voters a reasonable opportunity to register, it was necessary to keep the commissioner's office or other places of registration open at times in addition to those already referred to, it would be the commissioner's duty to make arrangements therefor, if within the means available."

See Opinion No. 155, Attorney General's Biennial Report for 1932. We adhere to this opinion.

Your question is, therefore, answered in the affirmative.

DAVID J. ERICKSON,
Deputy Attorney General.

October 12, 1938. 183r

248

ELECTRICIANS—Engineers not permitted to do electrical work unless licensed.

State Board of Electricity, State Office Building.

You inquire:

1. "Are engineers, who have no electrical license, permitted to do any electrical work either in construction or maintenance?"

2. "Would an engineer holding an electrician's license be permitted to do electrical work on property other than that belonging to the company?"

We find no provision in the Laws of 1937, Chapter 314, which exempts engineers having no electrical license from the provisions of the act, un-

less such engineers are employed by a public service corporation or a public utility as defined in Section 6 of said Chapter 314. It is our opinion that unless an engineer not having an electrician's license is employed in an activity otherwise exempt from the provisions of said Chapter 314, he is not permitted to do electrical work as defined in the act unless he is licensed.

If an engineer has an electrician's license, we are not aware of any reasons why he may not do electrical work "on property other than that belonging to the company." We assume that the company referred to is the one by which he is employed.

WILLIAM D. GUNN,
Special Assistant Attorney General.

September 20, 1938. 188c

249

ELECTRICIANS—Town telephone systems—Employment of by town.

Mr. A. W. Spellacy, Township Attorney.

You state that the township of Greenway, Itasca County, owns and maintains a township telephone line; and that the necessary work in connection with the maintenance of that line, including the installation and renewal of telephones, construction of new lines, etc., is under the supervision of a telephone lineman.

You inquire if it is necessary for the township to employ a master electrician or journeyman electrician under Mason's Minnesota Statutes of 1927, Section 5872, as amended by Chapter 314, Laws of 1937.

In answer to your inquiry we direct your attention to Mason's Minnesota Statutes of 1927, Section 5877, as amended by Section 6, Chapter 314, Laws 1937. This section reads as follows:

> "Employees of public service corporations or municipal utilities distributing or selling electrical energy for light, heat or power, for operating street railway systems, or telephone or telegraph systems, shall not be required to hold licenses while doing electrical work on or in connection with property owned, leased or operated by any such municipality or corporation. Provided, however, that the rules and regulations of the railroad and warehouse commission, the State Fire Marshal, and of the Industrial Commission of Minnesota and all local municipal ordinances governing such work shall be observed."

From the statements submitted in your letter it seems clear that the employe of the town doing electrical work in connection with the town telephone system is doing such work "on or in connection with property owned, leased or operated by any such municipality or corporation."

It is our opinion, therefore, that it is not necessary for the town to employ a master electrician or journeyman electrician to do such work.

WILLIAM D. GUNN,
Special Assistant Attorney General.

April 6, 1938. 434a-8

250

EMBALMERS AND FUNERAL DIRECTORS—Cooperative association operating main establishment and several branches should have a director and/or embalmer and assistants or apprentices—Funeral may be conducted in emergency where licensed operator is ill.

Mr. Chas. Ommodt, Commissioner,

Department of Agriculture, Dairy and Food.

You state that there are a number of cooperative burial associations organized and existing under and by virtue of the laws of this state and that another one now in the process of formation desires to establish an organization which will embrace in its territory several villages, townships or localities, one of which will be the principal place of business and at which the principal undertaking establishment will be maintained and where a licensed embalmer or funeral director will be employed. Other places of business will be provided in other villages to which bodies may be taken and prepared for burial by the licensed embalmer employed by the association and the body will then be laid out in such building where relatives and friends may come to view the remains.

You inquire whether the person left in charge of the building for the purpose of admitting relatives and friends would be required to be a licensed embalmer and/or funeral director, apprentice funeral director, apprentice embalmer or assistant funeral director, under Chapter 417, Laws 1937.

The last paragraph of Section 6 of the act provides:

> "Nothing in this act shall be construed as repealing any of the laws of this State in regard to organizing and/or incorporating of Cooperative Associations."

All the places of business established by the cooperative burial association above referred to will be owned by it and managed by its governing board, who is required to provide for adequate personnel. You state they propose to employ a licensed embalmer and/or funeral director and we desire to call your attention to the fact that Section 3 of the act, amending Section 5819, in the third new paragraph added thereto, provides:

> "The board may license as assistant funeral directors, with or without examination, one or more assistants of funeral directors who

are licensed under the provisions of this act, upon payment of an assistant funeral director's license fee of one ($1.00) dollar. * * * Such assistant funeral directors shall be licensed and registered as assistants of designated licensed funeral directors."

The provisions of this act would indicate that the licensed funeral director, whom you propose to employ, may have one or more assistants by applying to the State Board of Health. We believe that it will not be necessary to have a licensed man continuously in charge of each branch owned by the cooperative association and who may only be in charge of the building in which the business of the association is housed. It is obvious that funeral directors are entitled to other employees than those required to be licensed, such as janitors, caretakers, drivers, servants and others. We do not believe that the viewing of a body falls within the provisions of either embalming or supervising funerals as provided in Section 1, amending Section 5817, as follows:

"No person shall embalm any dead human body or practice embalming, direct or supervise funerals in the State of Minnesota without being licensed by the State Board of Health, except as hereinafter provided."

You further state that you desire to be informed whether a cooperative burial association may conduct a funeral when its licensed director or assistant director employed by the association may be prevented from physically performing his duties by reason of illness or other unforeseen or unavoidable cause.

We believe that in the event of an emergency of this kind the funeral should not be postponed but should be held notwithstanding the illness of the director and that a funeral so conducted would be under his direction even though he were unable to be physically present. A further solution has been stated above wherein we suggested that one or more assistant funeral directors may be licensed.

Enclosed herewith are copies of two opinions previously written by this office on June 30, 1937 and August 30, 1937, pertaining to the subject, which may be of interest to you.

FRANK H. OSTERLIND,
Assistant Attorney General.

January 5, 1938. 950

251

EMBALMERS AND FUNERAL DIRECTORS—License—The word "person" does not include corporations.

Hon. Geo. L. Siegel, State Senate.

You inquire with reference to Embalmers License Bill:

1. "Would the bill, if enacted, prevent corporations from operating their funeral chapels as at present without securing a license under the act for such operation?"

2. "Can corporations be licensed under the Act?"

The embalmers' license law, Section 5817, provides:

"No **person** shall embalm any dead human body * * * without being licensed * * *. All **persons** shall be said to practice embalming, * * * who * * * hold himself out to do any of the above acts by advertising or any other means."

Section 5819 provides:

"No **person** shall be granted any such license unless he shall, in addition to other qualifications, be at least twenty-one (21) years of age, of good moral character, and shall have for at least one year had practical experience in embalming."

Section 5822 provides:

"Any **person** who shall embalm a dead human body, or who shall hold himself out as an embalmer thereof without being licensed as herein provided shall be guilty of a misdemeanor, * * *."

The bill retains this language substantially as quoted and seeks to apply it to funeral directors.

Section 10933 (11) provides that the word "person" may extend and be applied to corporations. In practically all of our statutes where the question arises or might arise as to the meaning of the word "person" the statute says that "person" includes corporations. In Section 5649 the statute says the word "person," except when used in reference to issuing of licenses, includes corporations.

In view of the practice of the legislature of defining the word "person" to include corporations and in view of the definition in said Section 5649, it is my opinion that the word "person" used in the statute relating to embalming and as used in this bill refers only to a natural person. This view is further supported by the language of the law which, in its nature, could not apply to any but natural persons.

I will, therefore, answer your first question in the negative and, for the same reasons, answer your second question in the negative.

ROY C. SMELKER,
Assistant Attorney General.

February 23, 1937. 950

252

FAIR TRADE—Giving away coupons as violation of.

Hon. Elmer A. Benson, Governor, State of Minnesota.

You state:

> "A question has arisen with reference to the interpretation of Section 3 of the Minnesota Fair Trade Act, Chapter 117, Laws 1937. The question is,
>
> > 'Is it legal under the law for a retailer to put a coupon on an article which is registered under fair trade which coupon is creditable for 5c on other merchandise when returned to the store?'
>
> "This particular question has reference to a practice started a few days ago by a retailer who attaches a coupon on his films which films are under fair trade. This coupon entitles the purchaser to return the film and is good for five cents towards the cost of developing."

The Fair Trade Act, Chapter 117, Laws 1937, provides in part that "Certain contracts relating to the sale of a commodity shall not be deemed in violation of any of the laws of this state because they provide that the buyer will not resell such commodity at less than a minimum price stipulated in such contracts."

In the case submitted by you we assume the existence of a valid contract between the seller and the retailer, providing that the films referred to may not be resold for less than a stipulated price. A definite answer to your question depends upon the terms of that contract. A sale below a stipulated resale price is not so much a violation of the law as it is a violation of the terms of the contract entered into between the owner of the name under which the product is sold and the retailer.

Section 3 of said Chapter 117 provides as follows:

> "For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this Act (except to the extent authorized by the said contract):
>
> "(a) The offering or giving of any article of value in connection with the sale of such commodity;
>
> "(b) The offering or the making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale; or
>
> "(c) The sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such resale price restriction, for which the remedies prescribed by Section 6 of this Act shall be available."

The language above quoted definitely prohibits the practice of giving coupons with the sale of an article covered by fair trade contract if the giving of such coupons results in an evasion of the resale price restrictions contained in such contract.

We answer your question as follows: Assuming the existence of a valid contract under said Chapter 117 providing for a resale price of the films, and that the practice of the retailer in giving away such coupons when the value of the coupons is deducted from the retailer's selling price results in a sale of the films below the resale price stipulated in the contract, it is our opinion that the practice of giving such coupons is a violation of the provisions of Section 3 of said Chapter 117.

WILLIAM D. GUNN,
Special Assistant Attorney General.

July 11, 1938. 681f-3

253

FEEBLEMINDED—Change of venue where commitment is made to the State Board of Control.

State Board of Control, Department of Public Institutions.

You enclose a letter from Hon. Paul Ahles, Judge of Probate of Stearns County, in which he states that there is some doubt in his mind whether or not a change of venue may be had from one county to another in a feebleminded proceeding wherein the State Board of Control is given the custody of the person.

It is our opinion that such change of venue may be had. Section 136 of the Probate Code provides for a transfer of venue where it is for the best interest of the ward or his estate. Section 183, relating to restoration of feebleminded and epileptics, provides that the State Board of control may petition the court of commitment or the court to which the venue has been transferred for the restoration to capacity of a feebleminded or epileptic patient. From the foregoing, therefore, we are of the opinion that the legislature intended that such transfer of venue could be made in such a proceeding.

JOSEPH M. DONAHUE,
Special Assistant Attorney General.

August 11, 1938. 679a

254

FEES—Auto transportation—Increase of.

Minnesota Railroad & Warehouse Commission, State Office Building.

You ask:

"1. Are such increased fees due from an auto transportation company, subject to Chapter 185, Laws 1925, for any part of the year 1937?

"2. Are such increased fees due upon vehicles operating under permits issued pursuant to Chapter 170, Laws 1933, and prior to said amendment?"

In my opinion the foregoing questions, and each of them, should be, and they are, answered in the negative.

You further ask:

"3. Are such increased fees due upon vehicles not now operating under permits issued pursuant to Chapter 170, Laws 1933, and prior to said amendment?"

In my opinion the foregoing question should be, and it is, answered in the affirmative.

The said act being effective from and after its passage, and Section 2 thereof providing that the applicant at the time of filing the petition for said permit shall pay into the treasury of the State of Minnesota a fee in the sum of $7.50 where but one vehicle is to be operated, and when more than one vehicle is to be operated under the permit an additional fee of $7.50, seems to justify the answer to the last question.

HARRY W. OEHLER,
Assistant Attorney General.

June 3, 1937. 371a-8

255

HEALTH—Vital statistics—Probative value of birth records.

Dr. A. J. Chesley, M.D., Department of Health.

Our opinion is requested as to what probative value is given to birth certificates based on delayed registrations of births occurring prior to the enactment of the Vital Statistics law, and also as to those delayed registrations where the birth occurred after the enactment of the law.

The first attempt on the part of this state to create a record of births was Chapter 25, Laws of 1870. The Secretary of State was made ex officio commissioner of statistics and the clerks of each city and town in the state were to receive, obtain and register certain facts concerning births and deaths occurring therein and report them annually to the clerk of the district court in each county, who in turn reported them to the Commissioner of Statistics. It appears that it was mandatory that these facts be gathered, as the act contains specific penalties for failure to report births and deaths to the clerk of the city or town in which the same occurred.

By virtue of the provisions of Laws of 1887, Chapter 114, the duty to gather vital statistics was imposed upon the State Department of Health. Laws of 1913, Chapter 579, the present law, provides that the State Board

of Health shall have general supervision and charge of the registration of births and provides for definite methods of registration.

It is our opinion that certificates of birth recorded under any of the laws enumerated are competent evidence and that certified copies thereof shall be prima facie evidence of the contents thereof and are admissible in evidence as public records. We are of the further opinion that there is no method whereby unregistered births occurring before the enactment of Chapter 579, Laws of 1913, can now be registered and the record thereof be prima facie evidence of the facts therein contained. Such births would have to be proven by other evidence. It is our further opinion that unregistered births occurring subsequent to the enactment of Chapter 579, Laws of 1913, may be registered under the provisions of such chapter, and the record thereof will have the full benefit of the law in the same manner as though the registration had not been delayed. See Hyde v. Kloos, 134 Minn. 165, 158 N. W. 920.

ROY C. FRANK,
Assistant Attorney General.

July 11, 1938. 2251

256

HIGHWAYS—Cartways—Establishment of—Petition for.

Mr. H. H. Bonniwell, Jr., County Attorney.

You state that a petition has been filed with the board of county commissioners asking for the establishment of a cartway under Subdivision 1 of Section 2585, Mason's Minnesota Statutes of 1927; that this petition was signed by five voters, freeholders of the town; that "the board has made an order fixing a time and place when and where it will act on this petition;" and that "in the meantime a remonstrance has been filed with the board, signed by a number of voters, freeholders of the town, including three of those who signed the petition for the cartway, asking that the board deny the petition and refuse to establish the cartway."

You also direct attention to two former opinions of this office, one under date of November 23, 1932, and the other dated April 27, 1928. You state that the opinion of April 27, 1928, to Mr. Kolsrud "would seem to be just the contrary of what is claimed for it in this quotation from the opinion to me of November 23, 1932."

You request an opinion "clarifying the situation."

Upon the filing of such a petition for the establishment of a cartway with the town board, it becomes a part of the permanent records in the office of the town clerk in which it is filed and may not physically be withdrawn. However, an instrument filed by the parties signing the original petition and filed in the same office requesting the dismissal or withdrawal of the original instrument so filed, will have the effect of dismissing any further action with reference to the original instrument filed. In this re-

spect the situation in the office of the town clerk is the same as if a complaint beginning an action were filed with the clerk and thereafter a dismissal was filed with him. The dismissal would stop all further action on the original complaint which, however, would remain in the possession of the clerk.

We are further of the opinion that since the statute requires five voters, freeholders of such town, to file such a petition, and three of the original signers have filed objections to the granting of the petition and requested the dismissal or withdrawal of the original instrument, the board is without jurisdiction to proceed with the establishment of said cartway since the statute requires "not less than five voters, freeholders of such town."

DAVID J. ERICKSON,
Deputy Attorney General.

June 3, 1937. 377b-1

257

HIGHWAYS—Roads—Cartways—Establishment of by town board.

Mr. Franklin E. Ebner, County Attorney.

You state that a high bank lies between a certain person's land and a public highway adjoining said land; that said bank is so close to the highway that it is impossible to make a "successful grade to the highway over his own property."

You inquire whether the town board may establish a cartway over land owned by another person in order to provide said first party with access to such highway.

Subdivision 2 of Section 2585, Mason's Minnesota Statutes of 1927, provides, in part, as follows:

> "Town board shall, on petition of the owner of a tract of land not less than five acres in area who has no access thereto except over lands of others establish a cartway not more than two rods wide connecting his land with a public road, * * *."

Even though a person's land adjoins a public highway we believe that the town board may establish a cartway over another person's land if, because of natural obstacles, said first party does not have "access" to such highway.

Whether or not a person has access from his own land to a public highway involves questions of fact for the determination of the town board.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

June 23, 1938. 377b-1

258

HIGHWAYS—County roads—Construction—Graveling.

Mr. H. H. Bonniwell, Jr., County Attorney.

You state that many years ago the county board of your county "laid out and constructed a graveled road and completed the graveling of it;" that "the county board has now granted a petition to alter this road by vacating a portion of it and constructing a new piece of road to bridge the gap caused by such vacation and still have one continuous road;" that the petition requests "the 'alteration' of a highway, describing it, describing the alteration desired, describing the road as altered and concludes as follows: 'And your petitioners pray that you will proceed to alter or change said road and cause the same to be opened according to law.'"

You inquire:

> "does this petition, if granted, require the county board to gravel the road as a part of the construction, or does it fall within the exception stated in your opinion of August 11, 1932, above referred to?"

Mason's Minnesota Statutes of 1927, Section 2582, Subdivision 9, provides:

> "If the petition be granted, the board shall provide for the laying out and construction of such road, in the case of the establishment of a new road or the alteration of an existing road or roads, and carrying into effect the vacation of an existing road or roads, when such action is petitioned for."

As stated in opinion No. 182 of the Attorney General Report for 1932, to which you direct attention:

> "If the petition requested that a gravel road be established, laid out and constructed along the route designated in such petition, and the petition was granted by the county board, then it would seem obvious that such road would not be deemed constructed, within the meaning of Subdivision 9, until gravel had been applied thereon.
>
> "On the other hand, if the petition does not specify the type of road proposed to be constructed, and the county board determines to lay out and construct a dirt road, then it would seem obvious that when such dirt road had been completed it would have been 'constructed', within the meaning of Subdivision 9, supra."

It seems to us that under the facts recited in your letter, the petition for the alteration of the road in question, and construction of "a new piece of road to bridge the gap caused by such vacation" contemplated the construction of a graveled road along the route designated in such petition. The road as originally laid out and constructed was a graveled road. We are of the opinion therefore, that the petition in question if granted, re-

quires the county board to gravel the "new piece of road to bridge the gap caused by such vacation" as a part of the construction of the same.

DAVID J. ERICKSON,
Deputy Attorney General.

July 27, 1937. 380a-1

259

HIGHWAYS—County aid roads—Designation of streets as within platted portion of village—Expenditure of gasoline tax moneys.

Mr. B. M. Heinzen, County Attorney.

You inquire:

> "May the County Board of Commissioners of Lincoln County designate as a county aid road any streets within the platted portion of the village of Ivanhoe, and may the County Board of Commissioners of this county use part of the gasoline tax apportioned to this county to oil the streets in the village of Ivanhoe?"

We assume you have reference to county aid roads authorized to be established pursuant to the provisions of Chapter 283, Laws of 1929, as amended. Section 5 of said Chapter 283, as amended, provides in part as follows:

> "The county board of each county is hereby authorized to designate as a county aid road **any county or town road therein and any portion of a county line or town line road with the construction and maintenance of which such county or any town therein is charged.** * * *."

Section 6 of said Chapter 283, as amended, reads in part as follows:

> "The moneys apportioned to each county under the provisions hereof shall be used solely in construction, improvement and maintenance of county aid roads therein * * *."

This office has held that under the above statutory provisions, a county board is not authorized to designate as a county aid road, streets or highways within the platted portion of a village, and may not expend the moneys so apportioned to the county in constructing or improving such streets or highways.

If it were not for the amendments to said Section 6 and Section 7 of said Chapter 283, as amended, made by the legislature at the last regular session of the legislature, it would not be necessary to consider the question further.

However, by Chapter 111, Laws of 1937, the following provision was added to said Section 6 of said Chapter 283, as amended:

> "Provided, that in any county having an assessed valuation of less than $750,000.00 the county board, by unanimous vote and with the approval thereof by the village council of any village of said county,

may designate as a county aid road any street, streets, or parts of streets within the platted or unplatted portion of any such village, and may appropriate such sums of money for improving the same as they may, on motion, determine. Provided, further, that the county board by a majority vote may rescind said designation."

We assume, however, that your county has an assessed valuation of more than $750,000 and that the above quoted provision, contained in said Section 6, as amended, does not apply to your county so as to authorize the county board to designate a road in the platted portion of a village as a county aid road. By Chapter 366, Laws of 1937, Section 7 of said Chapter 283, as amended, was further amended to read as follows:

"Of the moneys so apportioned to each county and not used to pay interest or principal on county road or bridge bonds or warrants as provided in Section 6 of this Act **fifty per cent thereof** shall be devoted to the **construction and** maintenance of county aid roads **by the county board** and shall be expended by the county board in the various towns of the county substantially according to the mileage, traffic needs and conditions of county aid roads within each town within the county. **Provided, however, that moneys so apportioned may also be expended on state aid roads when and if necessary or desired to match or supplement federal funds allotted to the counties for the construction, reconstruction, maintenance or improvement of state aid roads.**

The town board of any town may appropriate to the county, moneys out of its road and bridge fund, **or from its share of the gas tax moneys distributed to such town as hereinafter provided,** and any moneys so appropriated shall be expended by the county in the **construction and** maintenance of county aid roads within such town."

The underlined portions of the above quoted section indicate the new matter inserted by the legislature when it enacted said Chapter 366, Laws 1937.

Under the above section it is provided that fifty per cent of such moneys shall be devoted to the construction and maintenance of county aid roads by the county board, and shall be expended by the county board **"in the various towns of the county,"** except that when necessary or desired to match or supplement federal funds allotted to the county for the construction or improvement of state aid roads, such moneys may also be expended on such state aid roads.

Under Section 8 of said Chapter 283, as amended, it is provided that "the remainder of the money so apportioned to each county may be distributed to the **towns** of said county."

We do not believe that under the above amendments to said Chapter 283, Laws of 1929, the county board of your county is authorized to designate the streets in the platted portion of a village as county aid roads, or that any part of said gasoline tax moneys apportioned to the county may be used to oil or otherwise improve the streets therein unless said street or

streets have been designated as a state aid road under Section 2560, Mason's Minnesota Statutes of 1927, and then only in the event that such moneys are used to match or supplement federal funds allotted to the county for the "construction, reconstruction, maintenance or improvement of state aid roads."

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

March 17, 1938. 377b-4

260

HIGHWAYS—Drainage ditches—Culverts—Bridges—Construction of across drainage and/or road ditches.

United States Department of Agriculture, Resettlement Administration.

You state that the Resettlement Administration is constructing new farm buildings on lands which have been purchased in Marshall, Pennington, Red Lake and Polk Counties; that some of these farms are located "on township roads"; that it is illegal for the Construction Division of the Resettlement Administration "to expend funds for services that must be performed by local governmental units; but that where the local municipality has no legal responsibility with reference to the construction of culverts, etc., it is proper for the Resettlement Administration to install such culverts and charge the cost against the farms.

You further state that two types of cases have arisen; the first where drainage ditches have been constructed along township roads and such roads have been built "along the top of the ditch bank" and that frequently along such drainage ditches large culverts or small bridges are required to provide access to the property or farms abutting on such ditches; and that the second group consists of "road ditches along township roads."

As to the first type of road which had been constructed "along the top of the ditch bank," we assume that such road or roads were constructed subsequent to the construction of such drainage ditch, and that the culverts or bridges across such ditch are not made necessary as a result of ditches constructed in the ordinary course of grading township roads.

Mason's Minnesota Statutes of 1927, Section 2604, relating to the division of costs in the construction or replacement of bridges over public drainage ditches, refers to public bridges, and for that reason is inapplicable to the situation outlined in your first group.

Section 2612, Mason's Minnesota Statutes of 1927, is the only statutory provision of which we are aware relating to culverts and approaches. This section reads as follows:

> "The town boards as to town roads, and the county boards, as to county and state aid roads, are hereby required to install one substantial culvert for an abutting owner in cases where, by reason of grading a

public highway, the same is rendered necessary for a suitable approach upon said highways over driveways from abutting lands."

A number of reasons occur why this section is not applicable to the situation above outlined. The culverts and bridges in the situation outlined are not made necessary by the "grading of the public highway." In other words, such drainage ditch is not a road ditch within the language of said Section 2612. We are, therefore, of the opinion that if the culverts or bridges referred to in your first question were not made necessary as a result of the construction of the roads "along the top of the ditch bank," the duty of constructing such culverts or bridges rests upon the property owner rather than the township.

As to your second question relating to "road ditches along township roads," we assume that such ditches were made necessary as a result of the construction of such roads or by reason of the grading of such roads. We are, therefore, of the opinion that the duty of installing culverts or bridges over such road drainage ditches rests upon the town board as to town roads and county board where such roads are county or state aid roads.

DAVID J. ERICKSON,
Deputy Attorney General.

August 24, 1937. 148a-8

261

HIGHWAYS—County aid roads—Apportionment of gasoline tax.

Mr. A. C. Richardson, County Attorney.

You request us, in substance, to rule on the meaning and construction of the language of Chapter 366, Laws 1937, which purports to amend Sections 2720-94 and 2720-95 of Mason's Minnesota Statutes of 1927. The description in the title is erroneous inasmuch as the sections referred to do not appear in Mason's Minnesota Statutes of 1927, but are, in fact, sections of the 1936 Supplement to Mason's Minnesota Statutes of 1927. Sections numbered 7 and 8, which are referred to in annotations to Sections 2720-94 and 2720-95, were part of a complete and original act, Laws 1929, Chapter 283, composed of sixteen sections approved April 22, 1929.

An emergency act was passed in 1933, Chapter 325, consisting of three sections by which Sections 6 and 7 of the complete act were amended. These two sections were important provisions of the complete act. A new third section was enacted in the emergency act which stated specifically that the emergency act, said Chapter 325, Laws 1933, should be in force and effect for two years from the time of approval, Chapter 20, Laws of 1933. Thereafter the legislature extended the life of the emergency act, said Chapter 325, for an additional term of two years from and after April 20, 1935, by Chapter 39, Laws 1935, and again by a separate act of the legislature extended the act for two years from and after April 20, 1937, by Chapter 168, Laws 1937. This emergency provision does not, in fact, repeal existing statutes, but merely suspends them, stating:

"Every law now in force inconsistent herewith is hereby suspended for a period of 2 years * * *."

Without considering the question of whether the various amendments to Sections 6, 7 and 8, which have been passed by the legislature since the enactment of the emergency act, Laws 1933, Chapter 325, are amendments to Sections 6, 7 and 8 of the complete act, Laws 1929, Chapter 283, or are amendments of and supplementary to the emergency act, nevertheless, Chapter 111, Laws 1937 and Chapter 366, relating to Sections 6, 7 and 8 are the latest expressions of the legislature. It is clear that Chapter 111 is an amendment of Section 6 of the emergency act. This is not true of both sections of Chapter 366 where no proper reference is made in the title to the preceding provisions of the emergency act. Chapter 366, Laws 1937, was, however, passed subsequent in order of time (April 23, 1937) to the last extensions of the emergency act, Chapter 168, Laws 1937, (April 5, 1937), and in so far as it is in conflict with either the provisions of Section 6 of the amended emergency act (Chapter 111, Laws 1937, March 25, 1937) or with the latest provisions extending the time of the emergency act (Chapter 168, Laws 1937, April 5, 1937) we believe it must be construed to control. State v. Juvenile Court, 188 Minn. 125, 128, 246 N. W. 544; Dunnell's Digest, 1934, Section 8984.

The last amendment to said Section 6, Chapter 111, Laws 1937, discloses that the moneys apportioned to each county under the provisions of the act shall be used **solely** "in the construction, improvement and maintenance of county aid roads thereon" and that those moneys shall be expended by the county board on such county aid roads as it shall determine and in the manner provided and that all county aid roads shall be constructed under the supervision and according to the plans and specifications made by the county highway engineer, and approved by the county board.

Chapter 366, Laws 1937, Section 1, provides, in part, that "of the moneys so apportioned to each county and not used to pay interest or principal on county road or bridge bonds or warrants as provided in Section 6 of this Act, **fifty per cent** thereof shall be devoted to the construction and maintenance of county aid roads by the county board and shall be expended by the county board," and contains other provisions whereby moneys so apportioned may be expended on state aid roads under certain conditions. The language relating to payment of interest or principal on county road and bridge bonds and warrants is apparently meaningless as Section 6 as now amended by Chapter 111, Laws 1937, contains no reference to the payment of principal or interest on county road and bridge bonds or warrants.

Section 2 of said Chapter 366 which is in fact a repeal of Section 8 of the original act, Laws 1933, Chapter 283, provides that "the remainder of the moneys so apportioned to each county **may** be distributed to the towns of said county." If such distribution be made by the direction of the county board it shall apportion such amounts to the several towns throughout their county, basing such apportionment upon the mileage of the county and town roads, the traffic needs and conditions, and the cost of construction and maintenance of roads in the respective towns in said county, and further provides that such moneys allotted to towns shall be expended for construc-

tion and maintenance of the town roads within the respective towns under the supervision of the town board or an appointee of the town board or may be expended under the supervision and according to plans and specifications of the county highway engineer if requested by the town board. The act further provides that in the event the remainder of the moneys so apportioned to each county **is not distributed** to the towns of such county the county board shall use and devote the remainder in construction, improvement and maintenance of county aid roads.

An act similar to the one in question with an adequate title was prepared in the office of the Attorney General during the last session of the legislature and the word "may" appearing in the second line of the second section was originally the word "shall."

A comparison of H. F. No. 9 as originally introduced in the House of Representatives discloses that the language used in Section 2 of the bill was in substance:

> "The remainder of the moneys so apportioned to each county **shall** be distributed to the towns of said county."
>
> This language was deliberately changed apparently by legislative amendments so that the language now reads:
>
> "The remainder of the moneys so apportioned to each county **may** be distributed to the towns of said county * * *."
>
> and to it was also added the following provisos which were not in the original bill:
>
> "* * * provided, however, that none of said moneys so allotted shall be expended for the purchase of road equipment or machinery. Provided further, that in the event the remainder of the moneys so apportioned to each county is not distributed to the towns of any such county, the county board shall use and devote such remainder in the construction, improvement and maintenance of county aid roads in any such county in accordance with the provisions of Sections 6 and 7, Chapter 283, Laws 1929 as amended." (Senate Journal, 39th day, p. 13.)

The only construction which may reasonably be placed upon the sections amended and involved in this opinion is that in so far as Chapter 366, Sections 1 and 2, is in conflict with Chapter 111, Laws 1937, amending Section 6, the latter act, said Chapter 366, must control and that in Section 2 of Chapter 366 the word "may" has been advisedly used and it is within the discretion of the county board to distribute to the towns of the county any amount not to exceed the remainder of the moneys left after complying with Section 1 of the act and that such amount not exceeding the maximum limits whatever it may be is entirely within the discretion of the county board.

It should be noted that the county board should make such distribution to the township on the basis of the mileage of county and town roads and traffic needs and conditions.

FRANK H. OSTERLIND,
Assistant Attorney General.

August 18, 1937. 377b-4

262

HIGHWAYS—County aid roads—Apportionment of moneys.

Mr. Kenneth H. Dell, County Attorney.

You refer to an act passed during the last session of the legislature which permits the county board to allot a part of the gas tax funds to the various townships in the county for the construction and maintenance of town roads.

You inquire:

> "1. Would a township which has more county roads within the same and which has less township roads than another township receive a less amount of such money than a township which has less county roads within the same?"

We assume you have reference to the provisions of Chapter 366, Laws of 1937 relating to the use of moneys accruing from taxes imposed on the use of gasoline. Assuming this to be true we direct your attention to Section 2 of Chapter 366 which provides in part as follows:

> "The expenditure of the moneys so appropriated to each county may be distributed to the towns of said county, other than unorganized townships, in the manner hereinafter set forth but subject to the provisions of Section 2571, Mason's Minnesota Statutes of 1927, if such distribution be made by the direction of the county board then, on or before February 1, and August 1 of each year, the County Board in each of the counties of this state shall meet for the purpose of apportioning fifty per cent of the amount of such moneys as shall be represented in the state warrant issued by the state auditor to such county and shall apportion said amount to the several towns throughout their county, basing such apportionment upon the mileage of the county and town roads, the traffic needs and conditions and the cost of construction and maintenance of roads in the respective towns in said county; * * *."

Said section further provides:

> "Such moneys allotted to towns shall be expended for construction and maintenance of the town roads within the respective towns * * *."

Although said section provides that the moneys allotted to the townships shall be expended for construction and maintenance of town roads within such town, we do not believe that the County Board is necessarily required to allot less money to a particular town because of the fact that such town has more county roads and less town roads than another town. Of course, the County Board, in making such allotment of moneys, may take into consideration the fact that a particular town has more town roads to construct or maintain than another town. The language of the act, however, seems to require that the County Board also take into consideration "the traffic needs and conditions, and the cost of construction and maintenance of roads in the respective towns in said county" as well as the amount of mileage on county and town roads therein.

We are, therefore, of the opinion that County Boards should base such apportionment of moneys "upon the mileage of the county and town roads, the traffic needs and conditions and the cost of construction and maintenance of roads in the respective towns in said county," and that it is not mandatory that a "township which has more county roads within the same and which has less township roads than another township" should receive "a less amount of such money than a township which has less county roads within the same."

You also inquire:

"2. Should a township receive a greater amount of such money where the costs of construction is greater than a township where the cost of construction is less?"

We believe that what we have said in answer to your first inquiry applies equally as well to your second question. In other words, we believe that the county board in making such an allotment of moneys may take into consideration the fact that the cost of construction is greater in a particular township than it is in other townships. However, as stated in answer to your first question, we believe that the county board should also take into consideration the traffic needs and conditions, and the mileage of the county and town roads within the township as well as the cost of construction.

You inquire further:

"3. Is the county compelled to allot the money to the various townships or may they do so if they desire? In other words, is the word "may" to be construed as "shall"?

This office has heretofore held that it is within the discretion of the county board to distribute to the various towns in the county the remainder of the moneys left after complying with the provisions of Section 1 of said Chapter 366, Laws of 1937.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

December 27, 1937. 377b-10h

263

HIGHWAYS—State aid roads—Improvement of.

Mr. F. Martin Senn, City Attorney.

You state that the City of Waseca recently oiled and improved a "state aid road" a portion of which lies within the limits of the City of Waseca. You further state that after said improvement was completed the county commissioners of Waseca County submitted a bill to the city council covering the cost of improving "that portion of it within the city limits over and above the amount contributed by the state for the improvement of the same."

You also state that there was no agreement between the county and the city relative to the making of said improvement.

You inquire as follows:

"Can the City be held for the payment of the cost of the improvement of such road wherever situated?"

Section 2550, Mason's Minnesota Statutes of 1927, provides, in part, as follows:

"All state aid roads shall be constructed, improved and maintained by the county under rules and regulations to be made and promulgated by the commissioner of highways, * * *."

Subdivision 4 of Section 2560, Mason's Minnesota Statutes of 1927, provides, in part:

"Any street or road within the corporate limits of any borough, village or city of the fourth class designated as a state aid road as hereinbefore provided may be improved by the county as other state aid roads are improved, * * *."

Section 2562, Mason's Minnesota Statutes of 1927, Subdivision 1, provides as follows:

"It shall be the duty of the county board of each county in which state aid roads have heretofore or may hereafter be designated to provide for the proper maintenance of the same in accordance with the rules and regulations of the commissioner of highways."

We have been unable to find any statutory provisions requiring a city of the fourth class to contribute to the cost of improving a state aid road, and under the above quoted statutes we do not believe that the City of Waseca is liable for any part of the cost of such improvement made by the county board.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

August 8, 1938. 377b-8

264

HIGHWAYS—Town roads—Bridges—Construction and repair of.

Mr. John H. McLoone, County Attorney.

You inquire:

"As between a township and the county who has to repair or construct a bridge located on township roads where said bridge is over ten (10) feet in length, and who has to construct and repair a bridge over ten feet in length on newly located township roads?"

Section 2542, Mason's Minnesota Statutes of 1927, which is a part of the so-called "General Highway Act" provides in part as follows:

> "The roads of this state shall for the purpose of this act be designated and referred to as 'Trunk Highways,' 'State Aid Roads,' 'County Roads' and 'Town Roads,' and shall be laid out, constructed, improved, repaired and maintained by the authorities hereinafter set forth, as herein provided."

Section 2552 provides as follows:

> "All town roads shall be located, constructed, repaired and maintained by town boards, provided that the county boards may aid in the construction, repair and maintenance of such roads."

Section 2543 defines the words "road" and "highway" as follows:

> "The words, 'road' or 'highway,' whenever used in this act shall mean, unless otherwise specified, the several kinds of highways as defined in Section 1 of this act, and also cartway, street, alley, avenue, boulevard, **together with all bridges or other structures thereon which form a part of the same.**"

We are of the opinion that under the above referred to statutory provisions the duty to construct or repair bridges located on town roads rests with the town rather than with the county. The only statutory provisions which we have been able to find relating to the construction and repair of bridges of more than ten feet in length are those contained in Section 2606, Mason's Minnesota Statutes of 1927. It will be noted, however, that said section relates to the repair and maintenance of such bridges on county roads.

Although as already stated the duty to construct and repair bridges on town roads rests with the township rather than the county, your attention is directed to the provisions of Section 2565, Mason's Minnesota Statutes of 1927, as amended by Chapter 179, Laws of 1929, authorizing the county board of any county to appropriate from its road and bridge fund to any town, village, borough or city of the third or fourth class in said county such sums of money as are available and which it deems advisable to aid such towns, villages, boroughs or cities of the third or fourth class in the construction and maintenance of roads, streets, or bridges therein.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

June 3, 1938. 377b-10(h)

265

HIGHWAYS—Town roads—Establishment of on section line.

Mr. Milton F. Juhnke, County Attorney.

You state that about thirty years ago the town board of a certain township established a town road four rods wide along a section line; that since

the establishment of said road the same has been used as a public highway although the center of the road has not been maintained exactly on the section line, as originally established, for the reason that it has been more convenient to maintain said road by diverting the center of the same slightly to one side of the center of said section line; that by reason of part of said road being maintained slightly "off center" the abutting land owner "took advantage of the slight swing in the road by using such unused portion of the road for his benefit and has done so for a period of more than six years."

You further state that the town board now wishes to regrade said road along the center line as originally established, whereas the abutting land owner "now claims that said part of such road as he has been using as aforesaid has been vacated and claims title thereto and insists that the town board pay him for removing the fence thereon and for the acreage which he has so been using."

You inquire:

> "Please advise whether or not the Town Board may under such facts straighten its originally established road without having to re-establish and pay damages to such abutting land owner."

Adhering to former opinions of this office, we are of the opinion that the right of way originally established along said section line remains public property for highway purposes unless the public title thereto has been divested by the acquisition of ownership thereof by a private party by adverse possession. However, title to any portion of such right of way, derived by reason of adverse possession, must have been acquired prior to the enactment of Chapter 65, Laws 1899 (Section 9186, Mason's Minnesota Statutes of 1927). In other words, such adverse possession must have commenced during or prior to the year 1884 which, from the statement of facts contained in your letter, does not appear to have been the case.

In Hrdlicka v. Haberman, 140 Minn. 124, our Supreme Court, in considering the question said:

> "We think that where there is a slight departure from the true line, as here, it should not be held that the laid out road was abandoned and an entirely different road acquired by user, for the consequences are disastrous to the public in this that, at the time in question, a road acquired by user was not four rods wide, but only of such a width as necessity required. We therefore conclude that the public is not precluded from asserting the road to be where the supervisors fixed it in the order laying it out, unless plaintiff by adverse and hostile user acquired title to some part thereof prior to the enactment of Chapter 65, Page 65, Laws 1899."

Answering your inquiry, you are advised that in our opinion the town board may, under the facts as stated in your letter, "straighten its originally established road without having to re-establish and pay damages to such abutting land owner."

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

July 15, 1938. 377b-10(d)

266

HIGHWAYS—Town roads—Improvement of.

Mr. Elmer C. Jensen, Township Attorney.

You state that during the summer of 1933, a certain person residing in the Township of Hutchinson in your county did some grading and graveling work "on a line between Sections 27 and 28, the same commencing at a public road running along the south side of said sections" and extending northward about one-half mile "along the line between the said sections."

You also state that the records of the town do not show that the line between said sections was ever established as a public road. It also appears that the contractors who were employed to make such improvements "were not employed by the township," said contractors being employed by the person referred to in your letter, although there was some conversation between said person and the chairman of the town board "to the effect that if said road were a public road, the township would pay the bills, otherwise it would not."

You further state that in 1937, the District Court "declared and determined that the half mile strip so graded and improved, constituted a public highway by reason of user and by reason of certain occasional work done on said road by the township or under its authority."

You inquire:

1. "Whether the chairman acting as he did, bound the town board to pay for the bills, or whether his action was wholly without legal liability as to the township itself."

Under the facts as stated in your letter we are of the opinion that such action by the chairman of the town board did not have the effect of binding the town to pay for the cost of said improvements. In Reed v. Township of Monticello, 164 Minn. 358, our Supreme Court said:

> "The town board had not authorized him (chairman of town board) to employ anyone. In the absence of a statute authorizing one member of the board to act for the town, the town can be bound only by the board when acting at a meeting of its members."

You also inquire:

2. "Whether in view of the town chairman's statement and the consequent court determination that the same was a public highway, establishes any liability on the part of the township to pay for the grading and graveling."

It appears from your letter that when said improvements were made such roadway had not been legally established as a public road. However, aside from the question of whether the road referred to had become a public highway by user at the time said improvements were made, we do not believe that there is any legal liability on the part of the town to pay for the cost of said improvements.

As pointed out by our Supreme Court in Reed v. Township of Monticello, supra, a town is not bound by the acts of an individual member of the town board in the absence of proof that such acts were later ratified by the town board acting as such.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

September 2, 1938. 434a-7

267

HIGHWAYS—Roads—Town roads—Roads on town line between two counties—Establishment and maintenance of.

Mr. Geo. L. Angstman, County Attorney.

You state that about fifteen years ago the Town of Grass Lake in Kanabec County and the Town of Royalton in Pine County apparently laid out a town road on the line between those two townships, said road being on the boundary line between Kanabec and Pine Counties. You further state that such road has since been maintained by said townships.

You direct attention to Section 2581, Mason's Minnesota Statutes of 1927, which you state seems to indicate that roads on the line between two counties can only be established through judicial proceedings.

You inquire if the road you have reference to was legally established and whether the town boards of said towns have the right to spend town funds in continuing to maintain said road.

Although Section 2581, Mason's Minnesota Statutes of 1927, provides for the establishment of a road on or partly on the line dividing two or more counties by judicial proceedings, this office has heretofore held that the language used by our Supreme Court in Town of Mount Pleasant v. Town of Florence, 138 Minn. 359, indicates that the town boards of two towns situated in adjoining counties have authority to establish a road between such towns on the line between said counties and that such towns are authoribed to maintain their proportionate share of such road.

That case involved the validity of proceedings establishing a road between two towns on the dividing line between two counties and also the validity of an agreement entered into between the town boards of such towns providing for the maintenance of certain portions of said road by each town.

In disposing of the question of the legality of the proceedings establishing such road the Court said:

> "Granting that these proceedings were fatally defective, and we do not see now why they were, there was a legal highway by user, as good a basis for the contract to maintain in repair as if the road had been legally established in the beginning."

In holding valid the agreement between the town boards of the two towns with respect to maintaining such road, the Court held that said town boards were authorized under the provisions of General Statutes of 1894, Sections 1824-1827, to enter into such an agreement. Section 1824 of said General Statutes of 1894 provided for the location of a new road or the alteration or discontinuance of an old one on the line between two towns. Section 1825 authorized the supervisors of the two towns to divide such road into two or more road districts in such manner that the keeping in repair of such road should be as nearly equal as possible. Section 1826 provided that each road district should be considered as belonging wholly to the town to which it was allotted for the purpose of opening the road and keeping it in repair. Section 1827 provided that all roads so laid out on the line between any two towns should be "divided, allotted, recorded and kept in repair in the manner above directed." In construing said statutory provsions as authorizing the agreement between the two towns to maintain their proportionate share of said road the Court said:

> "Manifestly these provisions apply to highways already existing, as well as to those established under the provisions. **We think they apply to roads lying between two towns though in different counties."**

It will be noted that the above referred to provisions of General Statutes of 1894 are similar to the provisions contained in Section 2587, Mason's Minnesota Statutes of 1927, relating to the establishment by the town boards of two adjoining towns of roads on the line between said towns.

Assuming that the road you have reference to has been used and kept in repair and worked for at lease six years continuously as a public highway, we are of the opinion that even though such road was not established pursuant to the provisions of Section 2581, Mason's Minnesota Statutes of 1927, the same is now a legally established highway by user under Section 2590, Mason's Minnesota Statutes of 1927, which provides as follows:

> "Whenever any road or portion thereof shall have been used and kept in repair and worked for at least six years continuously as a public highway, the same shall be deemed dedicated to the public, to the width of two (2) rods on each side of the center line thereof and be and remain until lawfully vacated, a public road, whether the same has ever been established as a public highway or not."

We are also of the opinion that under the decision of our Supreme Court in the case of Town of Mount Pleasant v. Town of Florence, supra, the town boards of such two towns may continue to maintain and keep such roads in repair.

DWIGHT N. JOHNSON,
Special Counsel.

February 17, 1938. 377b-10(d)

268

TRUNK HIGHWAYS—Highway patrol—Collection of fines—Payment of costs and expenses.

Hon. N. W. Elsberg, Commissioner of Highways.

Inquiry is made as to the proper method of making reimbursement to counties for expenses involving court costs, jurors' fees and costs of boarding prisoners arrested by highway patrol officers. You also make inquiry as to what expenses in this connection would be reimbursable to the county.

Mason's Minnesota Statutes for 1927, as amended, Section 2554-18 (b) covering this matter reads as follows:

> "All fines, from traffic law violations, collected from persons apprehended or arrested by such employees, shall be paid into the state treasury and shall be credited to a separate fund hereby established for that purpose. Out of such fund shall first be paid to counties all costs and expenses incurred by them in the prosecution and punishment of persons so arrested and for which such counties have not been reimbursed by the payment of such costs and expenses by the person prosecuted, and so much of said fund as shall be necessary for the making of such reimbursement is hereby appropriated therefor. Such payment shall be made by the state treasurer upon the claim of the county verified by the county auditor. On the first day of each calendar month the moneys remaining in such fund shall be credited to that part of the trunk highway fund which is set apart for maintenance purpose; and so much of said maintenance fund as shall be necessary for the salaries and maintenance of such employees is hereby appropriated for that purpose. Subd. 18(a), as amended by Chap. 304, L. 1935.)

You have called my attention to a former opinion of the Attorney General's Office issued October 25, 1932, which opinion quotes in part the law then in force which is the same as the present law. The law specifically provides that all fines from traffic law violations collected from persons arrested by the highway patrol shall first be paid to the state treasurer and credited to the separate fund for that purpose. The law then specifically advises that out of such fund shall first be paid to counties all costs and expenses incurred by the patrol in the prosecution and punishment of persons so arrested and for which the counties have not been reimbursed by the person prosecuted.

I concur in the former Attorney General's opinion dated October 25, 1932, that the law appears to be plain that it is the duty of the state treasurer upon receipt of the proper invoices from the counties to make this reimbursement as, presumably and from the the wording of the law, it is clear to me that only after the payment of these expenses out of the separate fund is the remainder then appropriated and credited to the state trunk highway fund. It is recommended, however, that the counties in rendering their invoices covering such expenses submit the same to the highway department for checking of the various items and for the further purpose

of approving such items as are directly applicable to the arrest and prosecution of violators of trunk highway traffic laws. It is obvious that the state treasurer's office would not be in a position to verify or check these invoices but, on the other hand, the patrol of the highway department being conversant with each case would be in a position to check and approve and recommend payment to the state treasurer of such bills. If the bills by the counties are not first submitted to the highway department, but rather sent to the state treasurer's office, it is recommended and suggested that the state treasurer, before making payment of same, transmit such invoices to the highway department for check and approval for payment.

You have made an inquiry as to the items that would be reimbursable to the counties. You will note that the law states that the county in effect shall be reimbursed for all costs and expenses incurred by such counties in the prosecution and punishment of persons so arrested and for which such counties have not been reimbursed by the person prosecuted. The language is general and so broad and inclusive that, presumably, the legislature had in mind that the counties would be made whole and suffer no financial loss by virtue of the apprehension and prosecution of violators of the traffic act on the trunk highways when apprehended by the state highway patrol.

It is the opinion, therefore, of the writer that court costs, costs of boarding prisoners, and the fees of the jurors actually serving on any highway patrol case would be proper reimbursable items to the counties and including any other direct expense in connection with such arrest and prosecution.

Regarding the payment of jurors' fees, it is my view and opinion that the county should only properly be reimbursed for fees of the jurors who actually serve in such cases and the counties should not, accordingly, be reimbursed for other jurors on the panel who do not actually serve in the prosecution of highway patrol cases.

ORDNER T. BUNDLIE,
Assistant Attorney General.

March 3, 1938. 199b-3

269

TRUNK HIGHWAYS—Highway patrol—Payment of fines.

Hon. N. W. Elsberg, Commissioner of Highways.

You state that questions have arisen concerning what fines are to be paid into the State Treasury under the Patrol Act. It appears particularly that questions have arisen as to whether or not the Department is entitled to credit for fines assessed where the Patrolman has not signed the complaint, in which cases the highway patrolman has been familiar with the case but has not made the complaint. It is further represented that in some of these cases the County has submitted the fine money to the State Treasurer and in other cases has claimed that inasmuch as the complaint had been signed by an officer other than the highway patrol or by a citizen, that

the Department could not properly claim the fine. An opinion has been requested to clarify this situation.

Mason's Minnesota Statutes of 1927, Section 2554-18(b) reads in part:

> "All fines from traffic law violations, collected from persons apprehended or arrested by such **employes**, shall be paid into the state treasury and shall be credited to a separate fund hereby established for that purpose."

Subdivision (a) of the law provides for the creation and establishment of the highway patrol and limits the authority of the patrolman to the enforcement of the provisions of the laws relating to the protection of and use of the trunk highways. It is, therefore, apparent that the patrolmen's activities are confined to violations of the state laws, particularly the Uniform Highway Traffic Act, committed upon the trunk highways of the State.

The request for opinion concerns the signing of a complaint for traffic violations. I do not think that it is material in the least whether or not a highway patrolman actually signs the complaint or whether the same be signed by a witness or a citizen or other law enforcement officer. The law definitely states that the fines collected from persons **apprehended or arrested by such employes** (referring to highway patrolmen) shall be paid to the state treasury and credited to a separate fund out of which fund shall be paid to the counties all costs and expenses incurred in the prosecution and punishment of the persons so arrested, and the balance on the first day of each calendar month to be credited to the trunk highway fund. It is the opinion of the writer that where a highway patrolman arrests or apprehends a violator upon the trunk highways, regardless of the fact as to whether or not such patrolman signs the complaint, that any fines collected from such violator should, under the law and the clear intent thereof, be paid to the state treasury as provided by the patrol act.

Arrest is defined in 5 Corpus Juris, paragraph 1, page 385-6, as follows:

> "Arrest:—Consists in taking under real or assumed authority custody of another person for the purpose of holding or detaining him to answer to a criminal charge or civil demand. The custody or control, the assumption of which is involved in an arrest imports actual restraint or detention; the mere utterance of words indicative of an arrest being insufficient, except perhaps, when followed by submission. An arrest is not consummated until there has been a taking of possession of the person by manual caption or otherwise, but requisite control may be assumed without force, and in any manner by which the subject of the arrest is brought within the power or control of the person making it. In order to constitute arrest there must be real or assumed authority to take the person into custody, with the intention to effect an arrest."

Apprehended is defined in 4 Corpus Juris, page 1410-11, as follows:

> "It is the seizing or taking a hold of a person, and detaining him with a view of ultimate surrender; and seizure, taking or arresting of a person on a criminal charge."

It will be noted that the terms are more or less synonymous and concern the actual arrest or taking into custody of the alleged violator. The test therefore, as to whether or not such fine money goes into a separate fund of the state treasury must be predicated upon a patrolman actually arresting or apprehending a violator. I have made inquiry of the highway patrol as to whether or not there have been instances where patrolmen have arrested or apprehended violators and where such patrolmen have not in such cases signed the complaints. I am informed that in numerous cases the complaints are signed by persons other than the patrolmen, particularly where some citizen or other law enforcement officer has likewise witnessed the violation. The fact that the patrolmen did not in these cases actually sign the complaint is not in the least determinative as to whether or not any resulting fines should be paid into the state treasurer's office or paid to local authorities.

Undoubtedly the legislature contemplated that only such fines collected from persons apprehended or arrested by the patrol on trunk highways should be paid into the state treasury and that fines resulting from violators apprehended by citizens or other law enforcement officers should not accrue or be paid to the state treasury for the purposes set forth in the patrol act. Many of the trunk highways go through cities and villages, which highways, one might say, serve in a dual capacity, i.e. both as a trunk highway and as a city or village street. Such streets or highways are likewise usually patrolled by local police officers and many violators are arrested or apprehended by the local police. The fines resulting from this type of arrest and conviction should not be paid into the state treasury under the patrol act. The law has clearly limited the fines payable to the state treasury under the patrol act as being only those originating from apprehension or arrest by the highway patrol, and if it were intended to cover all fines of every nature on trunk highways for violation of the traffic act, the law, no doubt, would have so stated.

ORDNER T. BUNDLIE,
Assistant Attorney General.

March 24, 1938. 199b-4

270

TRUNK HIGHWAYS—Hauling within 35 miles from Cities of the First Class on Sundays and Legal Holidays.

Hon. N. W. Elsberg, Commissioner of Highways.

You ask whether the operation of certain vehicles between the hours of 9:00 A. M. and 12:00 midnight on Sundays and holidays on highways within a distance of 35 miles of cities of the first class in the state are restricted by Chapter 431 Laws of 1937. You further call attention to the fact that this law contains certain exemptions for vehicles hauling certain commodities, which renders it necessary upon occasions for patrolmen who are required to assist in the enforcement of this act, to inspect cargoes carried in the vehicles. You further point out that many of the vehicles are of the

closed type and the cargo sealed, similar to those used by the railway companies in sealing doors of freight cars. You further state that inspection of the cargo carried in this type of vehicle makes it necessary for the patrol officer to break the seal. You inquire specifically as to the right of the officer to break such seal for the purpose of inspection and whether or not the patrolmen are within their rights in breaking seals of trucks for such purpose.

Chapter 431 was passed largely as a safety measure. Section 1, Subdivisions 1, 2 and 3, define the purpose of such act to be to relieve the existing and undue burdens on the highways arising by reason of the use thereof by commercial vehicles, to protect the safety of the traveling and shipping public in the use of the highways, and to better preserve, foster and regulate transportation of this type. Section 4 of the act provides that it shall be unlawful without specific permission for any person to operate a commercial truck, tractor, truck-tractor, trailer or semi-trailer on the highways of this state within 35 miles, measured by the most direct highway route, from any city of the first class between the hours of 9 a. m. and 12 midnight on Sundays and legal holidays, from Decoration Day, May 30, to the second Sunday in September, both inclusive, of each year. This section provides for certain exemptions from the operation of this act including Class T motor vehicles, commercial motor vehicles of a manufacturer's rated capacity of one ton or less, vehicles used for the transportation of livestock on Sundays and holidays whether operating with or without loads, vehicles when used for the transportation of various commodities, such as newspapers, non-intoxicating beverages, ice cream, dairy products, poultry, etc., emergency vehicles of public utilities used incidental to making repairs, vehicles used exclusively in highway construction and vehicles used exclusively as service or repair cars. The section also exempts vehicles operating wholly within the corporate limits of cities and villages or between incorporated cities or villages whose boundaries are coincidental.

Section 7 of the act is as follows:

> "Any inspector of the Commission or any police officer is authorized to require the driver of a commercial motor vehicle to stop at any time to submit to an inspection. Any driver of a commercial motor vehicle who fails or refuses to stop and submit to such an inspection when directed to do so by an inspector of the Commission or a police officer shall be guilty of a misdemeanor."

Section 8 provides in brief, that the inspectors of the Commission for the purpose of enforcing this act shall have all the powers conferred by law upon police officers, to serve warrants and other processes in this state, and it shall be the duty of the State Commissioner of Highways upon written request of the Commission to require the State Highway Patrol to assist in the enforcement of this act.

It is quite clear that these sections of the statute above quoted, upon request of the Railroad and Warehouse Commission, authorize and direct the Highway Patrol to assist in carrying out the enforcement of the law and to stop commercial vehicles and if necessary, make an inspection to

determine whether or not there has been a violation of the act. The statute seems to be a reasonable exercise of the police power of the State, as set forth in Section 1, Subdivisions 1 to 3 above referred to. It has been held in Minnesota that, "It is largely a matter of discretion with the legislature to determine the subject of police regulation, the mode and extent of such regulation." Bohman v. Gould, 169 Minn. 374.

The legislature is in the first instance the judge of what is necessary for the public welfare. 233 U. S. 685-699, Erie Ry. v. Williams. Only when the exercise of the police power of the state unconstitutionally affects the personal or property rights do the courts take cognizance. The legislative determination of the methods, restrictions, and regulations is final, except when so arbitrary as to be violative of the constitutional rights of the citizens. Our State Constitution provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated.

Statutes similar to Chapter 431, Laws of 1937, are not unusual. It has been held by the Minnesota Supreme Court in many cases that the legislature may regulate, within reasonable limits, a legitimate business or profession, but it cannot prohibit it altogether. State v. Graves, 161 Minn. 422. A law for the inspection of steam boilers, exempting certain classes of boilers from such inspection, has been held constitutional. State v. McMahon, 65 Minn. 453. Also, a law for the inspection of illuminating oils, a law for the inspection of animals imported into the state, etc.

The question of whether or not a police officer is within his rights in breaking a seal in order to inspect the cargo of a commercial vehicle being moved on the highway on Sunday or a holiday, as prohibited by Chapter 431, within 35 miles of a city of the first class, is one of considerable doubt in the absence of a search warrant. It should be noted, however, that Chapter 431, prohibits the movement on the highway, within certain areas and during certain times, of certain vehicles, and then goes on to exempt certain types of motor vehicles, and also other types of vehicles carrying certain types of cargo. It follows from the wording of Chapter 431 that the movement on the highways of certain motor vehicles during prohibited times and in prohibited areas is unlawful, and becomes legal and lawful only when the cargo being transported brings the movement within the exemptions set out in the law.

The question as to whether or not patrolmen have the legal right to break seals without a search warrant for the inspection of the cargoes, presents a serious question. I find under Mason's Minnesota Statutes for 1927, Section 5090, regarding seals on cars of grain, that the statute provides that no person shall knowingly break any seal on such cars of grain subject to State inspection prior to the delivery thereof, except such seals may be broken by employees of the railroad and warehouse commission and the owner of said grain or authorized agent, under rules provided by the railroad and warehouse commission. Section 5086 provides that violation of this constitutes a misdemeanor.

In view of the great uncertainty as to the patrol officers' legal right to break the seal on a cargo, it appears to me reasonable that the patrolmen

could stop such a vehicle and request the driver to demonstrate that such cargo is one within the exempted class. Upon failure to so demonstrate undoubtedly the patrolmen would have the right to hold the truck until the lawfulness of its further movement is demonstrated. In other words, where the appearance and size of the vehicle is of such type as to come under the provisions of Chapter 431, covering restricted movement to types of vehicles on Sundays and holidays, the patrolman would be well within his right to stop such vehicle and demand a demonstration as to the legality of the cargo as coming within the exempted clauses. The burden of proving the vehicle within the exemptions of the law would rest upon the owner or operator.

An analogy might be drawn between the instant case and the provision in the Drivers License Law which requires each operator to carry his license upon his person and when called upon to display same and same is not in his possession, the party is subject to arrest, it being a complete defense, however, if at or before the trial the license certificate is produced.

To summarize, it is recommended that the patrolmen, in case of sealed cargoes, do not force or break the seal, but request the operator to demonstrate that such vehicle and contents are under the exempted clauses. Failure to so demonstrate at that time would justify the officer in holding such vehicle from further movement on the highways until such demonstration is made to the officer's satisfaction, and in case of violation of the law, the necessary arrest being made.

ORDNER T. BUNDLIE,
Assistant Attorney General.

August 19, 1938. 632a-24

271

TRUNK HIGHWAYS—Highway Traffic Regulation Act—Lights on motor vehicles.

Hon. N. W. Elsberg, Commissioner of Highways.

You direct my attention to Section 84a requiring every vehicle upon the highways within the State at any time from a half hour after sunset to a half hour before sunrise to display lighted lamps, as required by the provisions of the Highway Traffic Regulation Act. You also direct my attention to Section 85a which is mandatory in requiring every motor vehicle other than a motorcycle to be equipped with two headlamps, one on each side of the front of the vehicle, while Section 86a requires vehicles to be equipped with rear lamps.

You specifically inquire as to the application of the above quoted sections of the law with respect to vehicles operated only during the hours of daylight and you ask my advice as to whether or not vehicles operated only during the hours of daylight are required to have headlamps and rear lamps as required by Sections 85 and 86 supra.

Article 15 of the Highway Traffic Regulation Act covers the subject of motor vehicle equipment, which article includes sections 84, 85 and 86 concerned with herein. Your attention is specifically directed to Section 83b which reads:

> "The provisions of this article with respect to equipment on vehicles shall not apply to implements of husbandry, road machinery, road rollers, farm tractors except as herein made applicable."

This provision covers the only exceptions in the Highway Traffic Regulation act and it is my opinion that the Act must be strictly construed, and just such exceptions as are specifically set forth in the Act are outside the provisions covering necessary equipment. Consequently, the conclusion is that only such vehicles as are specifically exempted, as set forth in Section 83b supra, are excepted from the general provisions of the Act, and all other vehicles, although same may be used only during the daylight hours must be equipped with the requisite headlamps and rear lamps which must be in working condition and adjustment.

The Highway Traffic Regulation Act is penal in nature and under the rules of legal construction, requires a strict and literal interpretation and no exceptions from the operation of the general provisions of the Act can be made except those expressly enumerated and set forth.

ORDNER T. BUNDLIE,
Assistant Attorney General.

August 1, 1938. 632a-22

272

TRUNK HIGHWAY—Military Reservation—Expense of maintenance of bridge.

Hon. N. W. Elsberg, Commissioner of Highways.

You state that the existing Seventh Street bridge which forms a part of the trunk highway and which bridges the Mississippi River at Fort Snelling was, according to your understanding, constructed at the cost and expense of the War Department, and that the War Department is at the present time exercising its jurisdiction to the same extent as other parts of its reservation. You further call attention to the fact that the Legislature in 1933 designated the trunk highway over this bridge. It further appears that some maintenance and repairs are necessary on this bridge and that Colonel Williams at Fort Snelling has asked the Highway Department to cooperate in the repair and maintenance of this particular structure as a very large portion of the traffic using it could be properly classified as trunk highway traffic. You inquire specifically as to whether or not the Commissioner of Highways is authorized to enter into an agreement with the Fort authorities for any such expenditure. In addition you have also informed me that it is contemplated that the cost of the repair and maintenance would be borne by both the Federal Government through the War

Department and the State of Minnesota upon some equitable basis that may be mutually agreeable to the parties.

Article 16 of the State Constitution authorizes the esablishment of the trunk highway system and in this Article 16 70 primary routes were authorized with the right to add additional routes when 75% of the primary routes have been permanently located and constructed. The 1933 Legislature made a finding that 75% of the primary routes had been established and permanently constructed and under the constitutional authority, added approximately 4400 additional miles of trunk highways, including, as I understand your request for opinion, the trunk highway over the Fort Snelling-Mississippi River Bridge.

The Supreme Court in the case of State v. Voll, 155 Minn. 72, 192 N. W. 188; Automatic Signal Advertising Company v. Babcock, 166 Minn. 416, 208 N. W. 132; and State v. Werder, held that the Commissioner of Highways is the agent of the State in all matters pertaining to the trunk highway system and has complete and full authority with reference to the specific location, construction and maintenance of the trunk highway system.

The Highway Act passed in 1921 places upon the Commissioner of Highways the specific duty of locating, constructing and maintaining the trunk highway system. It is a mandate of the people and it is his duty to so locate, construct and maintain. If this bridge were entirely outside of the military reservation, then there would be, of course, no question as to the Commissioner's duty and authority to keep such road and bridge in a reasonable state of repair and maintenance. In view of the fact, however, that the bridge does form a part of the military reservation and the bridge was originally constructed by the military authorities of the nation, I am of the opinion that the Commissioner of Highways cannot, without the express agreement and consent of the War Department, maintain this bridge or expend money therefor.

On the other hand, I believe, and it is the writer's conclusion, that the situation is such regarding the trunk highway and bridge through the Fort Snelling Reservation, that the proper military authorities of the United States and the Commissioner of Highways could legally enter into an agreement concerning the proper maintenance, repair and reconstruction, if necessary, of the trunk highway, including the bridge within the reservation limits, and that such agreement could be predicated upon such terms and conditions and apportioning the cost and expense as the parties might mutually agree upon, in order that the trunk highway be kept in a reasonable state of repair for the motoring public, as well as the personnel of the reservation. In view of the fact that the legislature deemed fit to add to the trunk highway system this particular road, including the bridge, it is but reasonable to presume that the legislature intended that the Commissioner of Highways possess such power and right to cooperate with the Federal authorities and enter into any reasonable agreement as to expense and work necessary in connection with the bridge and road so as to make same useable by the public including the military authorities.

You are, therefore, advised that it is well within your discretion as Commissioner of Highways, to cooperate with the Federal military authorities concerning the maintenance and construction of the trunk highways within the reservation and upon such terms as may be equitable and mutually agreed upon.

ORDNER T. BUNDLIE,
Assistant Attorney General.

February 15, 1938. 229k

273

HIGHWAYS—Vacation of by county board.

Joseph P. O'Hara, County Attorney.

You state that a petition for the vacation of a certain road has been presented to the county board and that the same was set over to the next meeting of the board "for the reason that there was not attached to the petition a certified copy of the resolution or resolutions of the village council approving the same as provided by Section 2582, subd. 4."

You state that you have been requested to obtain the opinion of this office on the question of whether, under the following statement of facts, such a resolution is required:

> "A road petition has been presented to the county board based upon subdivision 4 of Section 2582, Mason's Minnesota Statutes, asking for the vacation of a portion of road on what is known as the old Hutchinson Water-Town road. This road runs through several townships. The portion asked to be vacated lies in the township of Winsted, the road extending through this township and into a township to the east, Carver County and a township to the West, McLeod County. A few portions of this road have already been vacated; one of which is a portion near the village of Silver Lake. A provision in this subdivision provides as follows: 'If the petition relates to a road or roads partly in a town or towns, and partly in the unplatted portion of a village or villages, before it shall be acted upon by the county board it shall have attached thereto a certified copy of a resolution of the village council or each village council, as the case may be, approving the same.' "
> Said Subdivision 4 of Section 2582, Mason's Minnesota Statutes of 1927, provides, in part, as follows:
>
> "Whenever twenty-four freeholders of any county petition the board of the county for the establishment, alteration or vacation of any road or of any roads which connect with each other, running into more than one town, or partly in one or more towns, or on the line between two or more towns, in such county, or along the shore of any lake wholly or partly in such county, or which constitutes a connecting link between an established highway and any public park, ground or monu-

ment, or into a town or towns and the unplatted part of any village or villages therein, such road or roads not being within a city, or any road wholly within a town, which constitutes a direct connecting link with two or more roads, * * * and file the same with the auditor, he shall forthwith lay the same before the board, if in session, and if not, at their first session thereafter. **If the petition relate to a road or roads partly in a town or towns, and partly in the unplatted portion of a village or villages, before it shall be acted upon by the county board it shall have attached thereto a certified copy of a resolution of the village council or of each village council, as the case may be, approving the same."**

We believe that the provisions of said section requiring that a certified copy of a resolution of the village council approving said petition be attached thereto, apply only to petitions relating "to a road or roads partly in a town or towns, and partly in the unplatted portion of a village or villages." In other words, we believe that the county board is authorized to act on such a petition in all cases provided for therein without the approval of the council of any village except in cases where the road referred to in said petition lies partly in the unplatted portion of any village in the county.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

September 24, 1938. 377a-15

274

HOSPITALS—Minnesota General—Patients—Certification of by County Board.

Mr. George L. Angstman, County Attorney.

You inquire:

"Does this act give to this welfare board the power and duty of certifying patients to the University Hospital for treatment and, if so, who should issue the certificate? As you know, in the past the county commissioners certified patients to the University Hospital. Does this act take away from the commissioners this duty and impose such duty on the new welfare board?"

The above questions are answered in the negative. The procedure for certifying patients to the University Hospital for treatment is set out in Chapter 411, Laws of 1921 as amended. This is a separate enactment and we believe that the procedure provided for therein must be followed in certifying such patients. In other words we do not believe that the legislature at the time of the enactment of Chapter 343, Laws 1937, intended to change the procedure with reference to certifying such patients to said hospital.

We are, therefore, of the opinion that such certification should be made by the board of county commissioners pursuant to the provisions of said Chapter 411 Laws 1921, as amended, and not pursuant to the provisions of Chapter 343, Laws 1937.

DAVID J. ERICKSON,
Deputy Attorney General.

August 24, 1937. 1001c

275

INCOMPATIBLE OFFICES—City treasurer—City clerk—Incompatible on terms of Glenwood charter.

Mr. Herman A. Senneka, City Attorney.

You inquire:

> 1. "Are the offices of City Treasurer and City Clerk in a city of the fourth class incompatible where the officers are appointive by the governing body under a home rule charter?"

Although you do not so state, our information is that the City of Glenwood is operating under a home rule charter, adopted in July, 1912. Assuming this to be true, we direct your attention to Sections 35, 126, 153, 202 and 204.

It is true that Section 35 of the charter provides that,

> "The commission, at any time when in its judgment the interests of the city so demand, may place in charge of one such officer the functions and duties of two or more such officers,"

and that,

> "The commission shall by ordinance, prescribe the duties of the chief officials. The commission shall, at the first regular meeting after the election of its members, or as soon thereafter as practicable, proceed to the appointment of the said officers and the **determination of their duties as provided in this section.**"

However, this section of the charter must be read and construed in the light of other applicable sections of the said charter. For example, Section 126 provides that all moneys belonging to the city "shall be paid out only upon the order of the Mayor, countersigned by the City Clerk," and that "every order drawn upon the Treasury shall designate the purpose for which it is drawn," etc. In other words, under this section the city order as drawn upon the city treasurer must be countersigned by the city clerk; that is, the clerk acts as a check on the treasurer. The same seems to be true with Section 153, except that under this section the city treasurer acts as a check upon the clerk where moneys are collected by the clerk and turned over to the treasurer.

Under Section 202, which provides for the collection of special assessments, all warrants issued for the collection of such assessments must be delivered by the city clerk to the city treasurer, and the clerk, upon such delivery to the treasurer, is required to take a receipt for such warrants.

Under Section 204 the city treasurer in certain cases is required to divide such special assessments into proper installments and make a record of the same and to transmit duplicate notices to the city clerk who shall note such fact in his record book of assessments.

There are other provisions of the city charter which seem to evidence an intent on the part of the electors at the time of the adoption of said charter that the said two offices were intended to be separate and distinct and that said offices should not be occupied by the same person at the same time. In other words, it seems to us that these two offices under the terms of your city charter are incompatible, that their functions are inconsistent and that the performance of the duties of both offices by one person at the same time would result in antagonism and a conflict of duty so that the incumbent of one of said offices could not discharge with propriety the duties of both.

You also inquire:

2. "May provisions be incorporated in a home rule charter in a city of this class to make it lawful for the same person to hold both the offices of city clerk and city treasurer?"

We believe that this may be done so long as the duties imposed on one of said officers do not conflict with those imposed upon the other.

DAVID J. ERICKSON,
Deputy Attorney General.

April 7, 1937. 358e-1

276

INCOMPATIBLE OFFICES—County—Register of Deeds and member of city council.

Mr. Ralph W. McGrath, City Attorney.

You state that a member of your city council was recently elected register of deeds for Washington County; and that as a member of the city council under your city charter he received no compensation for his services.

You inquire if this man may "hold both offices in the event he wishes to do so."

Assuming that there is no provision in your city charter prohibiting a member of the city council from holding such a county office, it is the opinion of the writer that said two offices are not incompatible. The prohibition contained in Section 128 of the charter seems to relate solely to a city office

or employment. This section, therefore, would not prohibit a member of the city council from holding a county office such as that of register of deeds.

DAVID J. ERICKSON,
Deputy Attorney General.

November 22, 1938. 358e-1

277

INCOMPATIBLE OFFICES—County—Coroner and Village Marshal.

Mr. Magnus Wefald, Village Attorney.

You inquire whether the offices of County Coroner and Village Marshal are incompatible.

In our opinion your inquiry is to be answered in the affirmative.

DAVID J. ERICKSON,
Deputy Attorney General.

July 26, 1937. 358e-8

278

INCOMPATIBLE OFFICES—Member Legislature and Deputy Sheriff.

Mr. Thomas J. Naylor, County Attorney.

You state:

> "The Sheriff of St. Louis County is confronted with the following problem. He has recently appointed a duly elected and acting member of the Minnesota legislature as one of the deputies. He now desires an opinion whether or not the two offices are incompatible or whether the appointment is in violation of Article 4 of the constitution of this State."

Article 4, Section 9 of the constitution of this state reads as follows:

> "No senator or representative shall, during the time for which he is elected, hold any office under the authority of the United States or the state of Minnesota, except that of postmaster, and no senator or representative shall hold an office under the state which has been created or the emoluments of which have been increased during the session of the legislature of which he was a member, until one year after the expiration of his term of office in the legislature."

It is obvious that the answer to your question depends on whether the position of deputy sheriff is an "office" or an "employment." This office has uniformly held that the constitutional provision above referred to applies to offices and not to places of employment, and if the legislative member under

the law and in the performance of his duties is an employee and not an officer, no constitutional objection exists to such employment.

Mason's Minnesota Statutes of 1927, Section 917 reads as follows:

> "Every sheriff shall appoint under his hand, a sufficient number of persons as deputy sheriffs, for whose acts he shall be responsible, and whom he may remove at pleasure. Before entering upon his official duties, the oath and appointment of each shall be filed with the register of deeds."

Mason's Minnesota Statutes of 1927, Section 916, provides that no sheriff or deputy sheriff shall "be eligible to any other lucrative civil office, except village or city marshal."

Because of the constitutional and statutory provisions above referred to, it is our opinion that a member of the Minnesota legislature is ineligible to hold the office of deputy sheriff. It does not follow that a member of the legislature would be ineligible to hold some other employment in the office of the sheriff.

WILLIAM D. GUNN,
Special Assistant Attorney General.

October 7, 1937. 280h

279

INCOMPATIBLE OFFICES—Office holder seeking election to another.

Hon. Ernest Lundeen, United States Senator.

You inquire whether a state official, before his term expires, may file for election to another state office without resigning the position he holds.

Subject to exceptions noted hereafter, we advise you that this may be done. Section 7 of Article 7 of the State Constitution provides as follows:

> "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 section sets up the only requirements for eligibility to public office in this state except certain restrictions as to members of the legislature and except as to judges of the Supreme Court and district courts, who must be "learned in the law," (Section 6 of Article 6) and who during their continuance in office are specifically prohibited from running for any office except a judicial office. The prohibition reads (Section 11 of Article 6):

"And all votes for either of them for any elective office under this constitution, except a judicial office given by the legislature or the people, during their continuance in office, shall be void."

Section 9 of Article 4 of the State Constitution prohibits state senators and representatives, during the term for which they have been elected, from holding any office under the authority of the United States or the state, except that of postmaster, and no state senator or representative may hold any office under the state which has been created or the emoluments of which have been increased by the legislature during the term he was a member of that body until one year after the expiration of such term. The Supreme Court has held that not even by resigning can a member of the legislature place himself beyond the operative effect of this provision. It follows that a member of the legislature cannot be a candidate for an office the term of which starts before his term as such member expires, or for an office which has been created or the emoluments of which have been increased during the session of the legislature of which he was a member providing the term of such office starts earlier than one year after his term as such member expires.

There are many cases in which the holder of one state office has been a candidate for another. To mention only the last important one—the Hon. Hjalmer Petersen filed for Railroad and Warehouse Commissioner while Lieutenant Governor and finished his campaign for that office while Governor and continued to serve for two months as Governor after his election as Railroad and Warehouse Commissioner.

The legality of running for one office while holding another has been upheld by the Supreme Court in the case of Hoffman v. Downs, 145 Minn. 465. In this case the Supreme Court, construing Section 7 of Article 7 of the State Constitution, held that a county commissioner may properly be a candidate for county auditor without resigning his office as county commissioner. The court held that the constitutional provision "applies to all elective offices—to those created by statute as well as to those created by the Constitution."

MATTHIAS N. ORFIELD,
Deputy Attorney General.

March 16, 1937. 184i

280

INCOMPATIBLE OFFICES—Member of school board and city health officer are.

Mr. Albert Running, City Attorney.

You state that the Health Officer of the City of St. James has been elected a member of the school board of Independent District No. 21, "of which district the City of St. James is the major portion."

You inquire if the office of "city Health Officer" and the office of member of the school board of Independent School District No. 21 of which the district of St. James is a major portion are incompatible.

In our opinion your inquiry is to be answered in the affirmative. The Board of Education of which the person in question is a member must by proper action determine whether the rules of the State Board of Health shall be enforced in the school district. When this is done, it becomes the duty of this person as a member of the Board of Education, particularly if he be chairman thereof, to see that the order is enforced. It would be the duty of this health officer to enforce the rules of the State Board of Health while on the other hand this person as a member or chairman of the local Board of Education might be opposed to the putting into effect of said rules and regulations. It seems to us, therefore, that the functions of these two offices are inconsistent, their performance resulting in antagonism and a conflict of duty, so that the incumbent of one cannot discharge with propriety the duties of both.

DAVID J. ERICKSON,
Deputy Attorney General.

July 26, 1937. 358f

281

INCOMPATIBLE OFFICES—Village clerk and village attorney.

Mr. Thomas A. Flynn, Village Attorney.

You inquire:

> "Kindly advise if the office of village recorder and village attorney are incompatible."

The village clerk is a member of the village council and it would be improper for said village clerk to receive an appointment to a village office from the appointing body of which he is a member. The two offices are also incompatible for the reason that it would be improper for said village clerk to be appointed village attorney and act as the legal adviser of the village council of which he is a member.

You also inquire:

> "Would it affect your decision if the attorney was appointed on a contingent fee basis instead of on an annual salary?"

For the reasons stated in answer to your first inquiry, we do not believe that a member of the village council may be appointed village attorney either on a "contingent fee basis" or on "the basis of an annual salary."

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

September 30, 1938. 470g

282

INEBRIATES—Municipal Court has no authority to commit to or release from State hospital.

Mr. Downer Mullen, State Board of Control.

It appears that a certain inebriate man was committed to the Willmar State Hospital by a Judge of a Municipal Court.

Our opinion is requested as to the authority of such a Judge to make a commitment of this character.

An inebriate may be sent to the Willmar State Hospital either on his own application or committed on the petition of a reputable citizen of the county of the inebriate's settlement or presence. If the inebriate makes voluntary application, he may be received at the institution on such terms as the Board of Control may determine, and may be detained as though he were committed by a court of competent jurisdiction and until such time as he is released on his own demand or by the action of the authorities. Where a commitment is made on petition, such commitment is made by the probate court. See Laws of 1935, Chapter 72, Sections 173, 174, 175 and 176. A Municipal Court Judge does not have any authority to make such a commitment, nor does such a Judge have any power or authority to order the release of an inmate of the State Institution. Consequently, the original order of commitment and the order of June 28, 1937, ordering the Superintendent to release the inmate are both void. Since the commitment is void, the inmate should be released.

ROY C. FRANK,
Assistant Attorney General.

July 7, 1937. 306b-12

283

INEBRIATES—Must be committed to Willmar Hospital.

Mr. Downer Mullen, Secretary, State Board of Control.

Our opinion is requested on the following questions:

1. "Has a judge of probate authority to commit a person found to be an inebriate to a state hospital for the insane?"

We answer this question in the negative.

Mason's Minnesota Statutes of 1927, Section 4537, provided for the creation of a farm for inebriates. Sections 4535-1 to 4535-4, inclusive, provides that the farm for inebriates established at Willmar shall be considered as an asylum for the insane, and that all lands, buildings, properties and funds acquired before the enactment of Sections 4535-1 to 4535-4, inclusive, and held for the foundation and maintenance of the farm for inebriates are transferred and set apart and appropriated to the establishment, support

and maintenance of said asylum for the insane. Said sections also provide that the State Board of Control is authorized to continue the treatment of inebriates at said asylum. This language clearly shows that it was the intention of the legislature that inebriates should be committed to the Willmar hospital rather than to other state institutions. Section 176 of Chapter 72, Laws of 1935, provides that "If the patient is found to be insane or inebriate, the court shall issue to the sheriff or any other person a warrant in duplicate committing the patient to the custody of the superintendent of the proper state hospital." In the case of an inebriate patient the proper state hospital would be the Willmar institution.

2. "Is the provision contained in Section 4535-4, Mason's Minnesota Statutes that 'No inebriate shall be committed for treatment except as may be authorized and permitted by the State Board of Control' still in effect?"

We are of the opinion that the above quoted portion of Section 176 of Chapter 72 supersedes that part of Section 4535-4 set forth in your question. The two provisions are directly in conflict and the former is repealed by the latter. See Section 196 of Chapter 72, which section repeals all laws inconsistent with the provisions of Chapter 72.

ROY C. FRANK,

Assistant Attorney General.

November 26, 1937. 248b-6

284

INSANE PERSONS—Commitment to superintendents jointly of state and federal institutions.

Mr. G. A. Klefsaas, Director, Division of Insane,

State Board of Control.

You enclose a copy of a letter from Dr. George H. Freeman, Superintendent of St. Peter State Hospital, which reads as follows:

"Under the new law commitment warrants are in triplicate, providing commitment both to the Hospital here and to the Veterans Hospital at St. Cloud. In such cases where the patient is received at St. Cloud I would like to know just what his status is as far as we are concerned.

"It is my understanding that if a patient escapes from the St. Cloud Institution and is absent seven days he is discharged. If such a patient, where this triplicate warrant had been issued, were picked up by a sheriff and brought here, would we be compelled to receive him?"

Your attention is directed to Laws of Minnesota for 1935, Chapter 72, Section 176, as amended by Laws for 1937, Chapter 435, Section 23, which section reads as far as here pertinent as follows:

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

From the foregoing statute we are of the opinion that once a patient is received by the Veterans Hospital at St. Cloud his commitment to a state institution becomes discharged and that his commitment to the Veterans Hospital at St. Cloud is a sole commitment and, therefore, if a patient escapes from the Veterans Hospital at St. Cloud and is later apprehended by a sheriff, that the authorities at St. Peter State Hospital would not be empowered to receive him.

JOSEPH M. DONAHUE,
Law Assistant.

March 30, 1938. 248b-10

285

INSURANCE—Corporations—Home Office, principal place of business.

Hon. Frank Yetka, Commissioner of Insurance.

The Attorney General, William S. Ervin, acknowledges your oral request for an opinion defining the term "home office."

The term "home office" of a company engaged in the business of writing insurance has been judicially defined to mean its principal office or place of business within the state or country in which it is incorporated or formed. Words and Phrases, Judicially Defined, Vol. 4, P. 3325, 1st Edition.

In People v. Parker, 34 N. Y. Supp. 269, 87 Hun. 341, the court stated that the term in the statute, "office of a corporation," means its principal place of business within the state if it has any principal office therein. It further held that the term "principal office" and "principal place of business" are synonymous as used in respect to corporations organized under the laws of the state. See also State v. Mobile and G. R. Co., 108 Ala. 29, 18 Southern 801. Burdick v. Dillon, 144 Fed. 737, 738, 75 C. C. A. 603.

Attention is called to that certain provision contained in Section 3320, Mason's Minnesota Statutes of 1927, which provides that whenever an insurance company establishes any agency in a place other than that of its principal place of business, all signs, cards, pamphlets or other printed matter issued shall designate such principal place.

It is therefore our opinion that the term "home office" relating to a company incorporated under the laws of the State of Minnesota to engage in any business of insurance, is synonymous with the term "principal place of business" as that term is used in the statutes of this state relating to the incorporation, operation and control of domestic insurance companies.

FRANK H. OSTERLIND,
Assistant Attorney General.

July 16, 1937. 92b-7

286

INSURANCE—Township mutual insurance companies—Miscellaneous questions relative to.

Hon. Gilbert W. Terwilliger,
Chairman of Insurance Committee, House of Representatives.

You state that the Committee on Insurance of the House has before it a number of bills relating to township mutual insurance companies, and ask our opinion on the following questions:

1. "Can they, the township mutuals, limit the liability of members for losses and expenses?"

We answer this question in the negative. Losses sustained by mutual companies are payable by assessments on the policyholders. Dwinnell v. Minneapolis F. & M. Mut. Ins. Co., 87 Minn. 59, 91 N. W. 266. The essential principle upon which mutual insurance companies are based is that each member will pay his proportionate share of the losses incurred during the time of his membership and that he shall not be required to pay any greater amount thereof than his pro rata share; and any assessment which violates this principle cannot be enforced against him. Swing v. H. C. Akeley Lumber Co., 62 Minn. 169, 64 N. W. 97; Minnesota Farmers Mutual Ins. Co. v. Landkammer, 126 Minn. 245, 148 N. W. 305. To defeat these well established rules of law relative to mutual insurance companies a statutory enactment is necessary. Dwinnell v. Minneapolis F. & M. Mut. Ins. Co., supra. A careful search of our statutes relative to township mutual insurance companies fails to reveal any such statute, and consequently, we must hold that the liability of the members of a township mutual insurance company cannot be limited so as to prevent them from being responsible for the full amount of the losses of the company.

2. "Are they liable for the premium tax or the Fire Marshal's tax?"

A township mutual insurance company is liable for the premium tax on fire insurance policies written in any municipality maintaining an organized fire department, but not on policies written in townships or in municipalities not maintaining an organized fire department. See that part of Mason's Minnesota Statutes of 1927 (1936 Supplement), Section 3347, which reads as follows:

"Provided, further, that every town and farmers' mutual insurance company shall pay to the State Treasurer on or before April 30th, annually, a sum equal to two per cent of the gross direct fire premiums, on policies effective subsequent to June 30, 1935, * * * during the preceding calendar year upon business written in municipalities in this state maintaining organized Fire Department, * * *."

In so far as the Fire Marshal's tax is concerned, we answer your question in the negative. Mason's Minnesota Statutes of 1927, Section 5973, reads in so far as applicable as follows:

"For the purpose of maintaining the department of state fire marshal and paying all the expenses incident thereto, every fire insurance company doing business in the state of Minnesota, excepting town insurance companies, farmers' mutual fire insurance companies and township mutual fire insurance companies, shall hereafter pay to the state treasurer on or before March 1, 1914, and annually thereafter, a tax upon its fire premiums or assessments or both, as follows: * * *"

3. "Could they pass restrictions to take away the right of a member living and insuring property of villages up to 1000 as against members insuring farm property in the same company?"

We are somewhat in doubt as to what you mean by this question. If you have in mind the question of whether such a company can refuse to issue policies of insurance in villages of under 1000 inhabitants and limit its business to property in townships, we answer your question in the affirmative. If you have in mind the question of whether such a company can discriminate against its policyholders living in such a village, we answer your question in the negative. If you will advise us more definitely, we will be able to render a more definite opinion.

4. "Are they under the supervision of the Insurance Department and does it examine them?"

Yes. Mason's Minnesota Statutes of 1927, Section 3648, provides that the certificate of incorporation of every township mutual insurance company must be approved by the Commissioner of Insurance, and must be filed with him. Section 3651 provides that the by-laws of such a company must be filed with the commissioner. Section 3668 provides for the payment of certain fees to the commissioner. Section 3671 provides for the consolidation of two or more of such companies upon the approval of the commissioner. Section 3672 provides for the examination of the affairs of any such company at the request of five or more members thereof.

5. "Are there any restrictions on an agent or anyone else selling their insurance?"

We presume that you have in mind the question of whether or not a person selling insurance for a township mutual insurance company must have a license to so do. We are unable to find any statute requiring such person to have a license. Mason's Minnesota Statutes of 1927 (1936 Supplement), Section 3659, provides that:

"No law relating to insurance companies now in force in this state shall apply to township mutual fire insurance companies unless it shall be expressly designated in such law that it is applicable to such companies."

The statute relative to agent's licenses does not apply to township mutual insurance companies.

6. "Are they obliged to use a Standard Fire Policy, and if not, are there any restrictions of the wording of the policies they may use?"

Both parts of your question are answered in the negative. See Buck v. Patrons Co-operative Fire Ins. Co., 177 Minn. 509, 225 N. W. 445, wherein our court said:

"The defendant, being a township mutual, is governed by the statutes specially applicable to them * * *. So defendant was not required to issue its fire policies in the standard form."

Also see Kampen v. Farmers Mut. Fire Ins. Co., 116 Minn. 68, 133 N. W. 163; Trost v. Delaware Farmers Mut. F. Ins. Co., 137 Minn. 208, 163 N. W. 290; and State Savings Bank v. Ins. Co., 172 Minn. 122, 214 N. W. 926. We are unable to find any statute applicable to township mutual insurance companies imposing any restrictions in the wording of the policies issued by such companies.

7. "Are they limited or restricted as to the amount of insurance they may carry on one risk?"

We answer this question in the negative.

8. "Is there any requirement as to the amount of funds they must have on hand to pay losses?"

We answer your question in the negative. However, Mason's Minnesota Statutes of 1927, Section 3662, as amended by Chapter 63, Laws of 1931, provides that the directors of a township mutual insurance company may collect advance assessments and maintain an emergency fund in an amount not to exceed five mills on a dollar of the total amount of insurance in force, such amount to be used for the payment of losses and other purposes for which assessments may be used. This statutory provision is not mandatory.

9. "What are the requirements necessary for obtaining a charter and license for a township mutual?"

The requirements are set forth in Mason's Minnesota Statutes of 1927 (1936 Supplement), Section 3646, as follows:

"It shall be lawful for any number of persons not less than twenty-five (25) residing in adjoining towns in this State who shall collectively own property worth at least Fifty Thousand Dollars ($50,000.00) to form themselves into a company or corporation for mutual insurance against loss or damage by fire or lightning. * * *."

ROY C. FRANK,
Assistant Attorney General.

March 10, 1937. 249b-13

287

JURY—Grand—Compensation of Members.

Mr. Ed. J. Goff, County Attorney.

You direct attention to Section 7010, Mason's Statutes of 1927, as amended by Chapter 123, Laws of 1933, relating to per diem compensation of grand and petit jurors for attendance in District Court.

It appears from your letter that the only record which the Clerk of District Court keeps of the attendance of grand jurors "is when a juror answers roll call in open court, and when it comes to payment, he is confronted with demands for extra days' pay which the juror claims were put in on investigation and committee meetings on days when the Grand Jury as a whole had no meeting, and no quorum was present."

You resubmit to this office the following question from the Clerk of District Court:

> "When the Secretary of the Grand Jury presents a list of many other days' attendance 'not a quorum,' can I take it for granted that it complies with the wording 'attendance in District Court' and pay them accordingly?"

The above question is answered in the negative. Section 7010, Mason's Statutes of 1927, as amended by Chapter 123, Laws of 1933, provides that "each grand and petit juror shall receive three dollars per day, including Sundays, for attendance in district court." We have heretofore construed the expression "attendance in district court" to mean actual attendance at court. We find no language in the statute indicating any intent on the part of the legislature to compensate an individual juror "for extra days' pay which the juror claims were put in on investigation and committee meetings on days when the Grand Jury as a whole had no meeting, and no quorum was present." If the legislature had intended to compensate individual grand jurors for such so-called "extra days' pay" we believe that it would have used language expressing such intent.

Our court has repeatedly said that a public officer takes his office cum onere and is entitled to no compensation for his official services except as prescribed by law. That an individual juror is not entitled to "extra days' pay * * * put in on investigation and committee meetings on days when the Grand Jury as a whole had no meeting, and no quorum was present" is confirmed by the language of Section 10603, Mason's Minnesota Statutes of 1927, which provides in part that:

> "A grand jury is a **body of men or women,** or both, returned at stated periods from the citizens of the county before a court of competent jurisdiction, * * * and sworn to inquire as to public offenses committed or triable in the county. It shall consist of not more than twenty-three nor less than sixteen persons, **and shall not proceed to any business unless at least sixteen members are present.**"

DAVID J. ERICKSON,
Deputy Attorney General.

April 30, 1937. 260b

288

LICENSE—Driver's—Revocation of.

Mr. W. W. Bane, City Attorney.

You state that a resident of Minnesota on May 12, 1937, was convicted of driving a motor vehicle while under the influence of intoxicating liquor. At that time he was the owner of a motor vehicle registered in Minnesota and held a Minnesota driver's license which the Commissioner of Highways, upon receipt of the court record of conviction, revoked. It appears further that the operator appealed the case to the District Court on law and fact, which appeal was dismissed upon stipulation of the attorneys and the case remanded to the Municipal Court, and the defendant or sureties paid the fine and costs. It further appears that when the appeal was taken the Commissioner of Highways rescinded his order of revocation but that when the appeal was dismissed and the case remanded to municipal court, the Highway Commissioner reinstated his former order of revocation, such reinstatement being in December, 1937. It further appears that after the appeal but before the dismissal of same and remanding back to the municipal court, and during the time that the order of revocation of the driver's license was rescinded, the defendant moved to and became a resident of Michigan and there registered his car under the laws of the State of Michigan. In 1938, defendant's car being registered in Michigan, he drove to Minnesota and under the reciprocity act, Chapter 355, Laws of 1935, applied for and received a reciprocity permit on May 31, 1938, from the Secretary of State. You state that the defendant was arrested on a charge of driving a motor vehicle upon the highways while his driver's license was revoked. You ask whether the order of revocation which was again in force in December, 1937, was in force as against the defendant in view of the fact that the defendant had a reciprocity permit as a non-resident. You further inquire as to whether or not the reciprocity act is in conflict and renders nugatory the order of revocation. The other queries presented will be included in the answers given to the main question as above stated.

I believe that the main thing to bear in mind under your statement of facts is that the driver's license revocation by the Commissioner of Highways was, after the dismissal of the appeal, reinstated in December, 1937. So the situation is that at the time the reciprocity permit was issued, that an order of revocation of the defendant's license to operate a motor vehicle upon the highways of this state was in effect. Your attention is directed particularly to the reciprocity act, supra, Section 2 thereof, which provides generally for the granting of the reciprocity permit or a certificate showing that such non-resident is entitled to operate his motor vehicle within this state. Section 2 further provides, as follows:

> "But subject nevertheless, to suspension, revocation or cancellation for any cause that would justify similar action with respect to any motor vehicle license or registration issued to any citizen or person of this state."

In other words, the permit as granted by the Secretary of State is, as a matter of law, qualified to this extent, which places a non-resident upon

the same footing or standing as a resident operator. Consequently, the reciprocity act, which is a later enactment than the driver's license law, and the driver's license law are not in conflict, but same are in harmony.

The conclusion, therefore, is that a non-resident defendant, under the order of the Commissioner of Highways, could not legally operate his motor vehicle within the State during the period of revocation, despite the reciprocity certificate which is expressly contingent, as provided by statute, upon the fact that the holder of the certificate is subject to the revocation or suspension, as the case may be, the same as resident operators.

You further ask whether, if no application for a new license is made by the non-resident, there is a statute of limitation or if the revocation is for the natural life of the revoked licensee.

The driver's license law, as you will recall, provides the manner and method of obtaining the re-issuance of a license in case of revocation. The law is mandatory in that under a revocation, a petition to the District Court by the applicant cannot legally be made until after the expiration of one year from the date of such revocation. Naturally, if the defendant never makes an application to the District Court for the re-issuance of his driver's license, such defendant, under the existing law, could never legally operate his automobile in this state.

There has been some lack of understanding of the status of a revoked license. When a license is revoked, it exists no more. The former licensee is in the same category as any other person not having a driver's license and will remain in that status until such time as he again becomes a licensee in this state, which under the law, must be by due petition to the district court after one year from the date of revocation.

It is worthy to note also that the reciprocity act, Chapter 355, Laws of 1935, does not repeal in any manner Chapter 351 and Chapter 352, Laws of 1933, the Drivers License and Financial Responsibility Act respectively.

ORDNER T. BUNDLIE,
Assistant Attorney General.

August 19, 1938. 291k

LICENSE—Driver's—Surrender of upon conviction.

289

Mr. J. Norman Peterson, County Attorney.

You call attention to the provisions of the Drivers License Law, Section 10 of Chapter 352, Laws of 1933, Mason's Minnesota Statutes for 1927, Section 2720-168, concerning the mandatory revocation by the Commissioner of Highways of motor vehicle driver's license upon conviction of the offenses

outlined therein. You inquire specifically as to whether or not the Justice of the Peace, at the time of the conviction, should require the convicted operator to surrender his driver's license to the Court so that same may be forwarded to the Commissioner of Highways.

You ask the following questions:

> "Shall the Justice of the Peace, at the time of conviction, pick up the driver's license and forward same to the commissioner or how should this matter be handled?"

You are advised that there is no provision in the Drivers License Law making it mandatory for the Justice of the Peace or judge of any court to secure possession of a driver's license for the purpose of forwarding same to the Commissioner of Highways in cases where a conviction results as a matter of law in the revocation of the driver's license of such person. Section 10 (a) of the law provides that the Commissioner shall forthwith revoke the license of any person, and require that the certificate of license be returned to him upon receipt of the record of conviction from the court, covering any one or more of the offenses outlined in such act. The courts have, in many cases, at the time of conviction, requested such driver's license and have made it a practice to a great extent to forward such license to the Commissioner of Highways at the time of the certifying of the record of conviction of such operator. In most cases the license is surrendered without objection.

However, it is quite clear that should the defendant object and refuse to surrender such driver's license to the court upon request, that he is within his rights in so doing; but as a matter of fact, we have yet to hear of a case where a convicted operator has refused to surrender his license to the court. Technically there is nothing to prevent the defendant from operation of a motor vehicle until such time as the Commissioner actually revokes such license by written order, at which time the Commissioner, under the law, is required to demand the surrender of the license to him. Incidentally, the order of revocation issued by the Commissioner of Highways and forwarded to the revoked operator has a clause specifically ordering him to forthwith surrender his license to the Commissioner, which is ordinarily complied with quite promptly. In the event of refusal to do so for any reason within a reasonable time, officers of the highway patrol personally call upon the operator and request surrender of the license which is forwarded to the Commissioner and retained in the files until such time as the District Court orders a restoration of such license under the provisions of the Drivers License Law.

We believe that it could well be made a part of any sentence imposed for a motor vehicle violation which results in revocation, to require an immediate surrender of the license to the Court, which would be in effect, a part of the sentence and penalty for violation of the law and would necessarily prohibit such defendant from operating a motor vehicle for a definite period of time, thus giving the court time to prepare the certificate of conviction and forward the same to the Commissioner of Highways in

order that the Commissioner may issue his order of revocation. In other words, this procedure would do away with the period of time between the time of conviction and the order of revocation by the Commissioner of Highways and consequently safeguard the public from the operation of motor vehicles by unsafe drivers.

ORDNER T. BUNDLIE,
Assistant Attorney General.

August 19, 1938. 291f

290

LICENSE—Minors under 15 years of age.

Mr. J. H. Lebens, City Attorney.

You state:

> "In view of the repeal of Sec. 2, Chapter 412, Laws of 1927, under the present state of the law, is it permissible for a person under 15 years of age to drive a motor vehicle on the highways of this state when such person is accompanied by the owner of such vehicle, such owner being a duly licensed and qualified driver and authorizing the operation of such motor vehicle by the person under 15 years of age."

Your inquiry is answered in the negative. We direct your attention to the present law, Laws 1933, Chapter 352, which is an act regulating the licensing of persons operating motor vehicles upon the highways of this state. Particularly we direct your attention to Sections 2 and 6 thereof. It is obvious therefrom that only persons, that is persons 15 years of age or over, to whom a driver's license may be issued by the Commissioner of Highways in accordance with said Chapter 352 may drive or operate motor vehicles upon the public highways of this state.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

December 24, 1937. 291y

291

LICENSE—Driver's—Proof of financial responsibility after revocation.

Hon. Mike Holm, Secretary of State.

You state and inquire:

> "Suppose that an operator was convicted on January 10, 1936 of driving a motor vehicle while under the influence of intoxicating liquor; his license was immediately revoked, as provided by law. Sup-

pose, that for one reason or another he does not apply for a new operator's license until July 10, 1938. There having been no violations or convictions in the meantime affecting his right to operate a motor vehicle, he is granted a new operator's license. For how long after July 10, 1938 when he was granted a new operator's license must he continue to file proof of financial responsibility required by the Act?"

Pertinent to your inquiry are the provisions of Section 2720-111, 1938 Supplement, Mason's Minnesota Statutes of 1927, of the Safety Responsibility Act, which reads as follows:

"The Commissioner may cancel such bond or return such evidence of insurance, or the Treasurer may, with the consent of the Commissioner return such money or collateral to the person furnishing the same, provided three years shall have elapsed since the filing of such evidence or the making of such deposit, during which period any such person shall not have been convicted of any of the offenses or violated any provisions of the Motor Vehicle Laws specified in Section 2 of this Act, and provided no suit or judgment for damages as aforesaid, arising from the ownership, maintenance, or operation hereafter of a motor vehicle shall then be outstanding or unsatisfied against such person. The Commissioner may direct the return of any money or collateral to the person who furnished the same upon the acceptance and substitution of other evidence of his ability to respond in damages, or at any time after three years from the expiration of any registration or license issued to such person, or at any time in the event of the death or insanity of the person required to furnish such proof, provided no written notice shall have been filed with the Commissioner stating that such suit has been brought against such person by reason of the ownership, maintenance or operation of a motor vehicle and upon the filing by such person with the Commissioner of an affidavit that he has abandoned his residence in this State, or that he has made a bona fide sale of any and all motor vehicles owned by him, and does not intend to own or operate any motor vehicle in this State for a period of one or more years."

Answering your inquiry, it is our opinion that the operator referred to therein must furnish proof of financial responsibility continuously for three years from the date of the filing of the first proof on July 10, 1938, and that thereafter the operator must furnish proof at the discretion of the Commissioner of Highways in accordance with the provisions of the above quoted statute, that is (1) if during the three-year period the operator has been convicted of any of the offenses or violated any provisions of the motor vehicle laws specified in Section 2720-102 of the Safety Responsibility Act, it is the duty of the Commissioner of Highways to require continuance of proof of financial responsibility from the operator; (2) if there is a suit or judgment for damages arising from the ownership, maintenance or operation of a motor vehicle outstanding or unsatisfied against the operator after the three-year period, it is the duty of the Commissioner to require continuance of proof of financial responsibility from the operator.

If the circumstances are the reverse of what we have stated in (1) and (2), the Commissioner may cancel and direct the return of any evidence of proof of financial responsibility furnished by the operator.

Also, under the above statute, in the event of death or insanity of the operator, providing no written notice shall have been filed with the Commissioner of Highways stating that suit has been brought against the operator by reason of ownership, maintenance or operation of a motor vehicle, or upon the filing by the operator with the Commissioner of an affidavit that he has abandoned his residence in this state, or that he has made a bona fide sale of any and all motor vehicles owned by him and does not intend to own or operate any motor vehicle in this state for a period of one or more years, then in such cases the Commissioner may cancel and direct the return of any evidence of proof of financial responsibility furnished by the operator.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

August 29, 1938. 291k

292

LIQUORS—Intoxicating—Day of school election not an election day.

Mr. Thorild Peterson, City Attorney.

You present the following statement of facts for our consideration:

"The City of St. Peter, Minnesota, is organized under Chapter 5 of the Special Laws of Minnesota for 1891, page 151. The Schools of the City are organized under Chapter 9 of Chapter 5 of said Special Laws, and known as Independent School District Number One of the City of St. Peter.

"The City regulates the sale and distribution of intoxicating liquor under Ordinance No. 105, a copy of which is enclosed.

"Section 5 of said Ordinance No. 105 provides 'no sale of intoxicating liquor shall be made—on any Election Day in the City of St. Peter.'

"Annual school elections are held in the month of July. The usual notices of an annual meeting and school election are published and posted. Voting is held in one of the rooms in the City High School between the hours of 4 p. m. and 8 p. m."

Our opinion is requested on the following question:

"Does said school election constitute an 'Election Day' under Ordinance No. 105, so as to require the closing of establishments selling intoxicating liquor?"

The ordinance provision stated in your letter is evidently based on Section 8 of Chapter 46, Extra Session Laws of 1933-34, which section forbids the sale of intoxicating liquors before 8 o'clock p. m. "on any Election Day in the district in which such election shall be held."

We have heretofore informally held that this prohibition does not apply to days on which school elections are held. At this time we make such ruling official and answer your question in the negative.

ROY C. FRANK,
Assistant Attorney General.

May 22, 1937. 218c-1

293

LIQUORS—Intoxicating—Exclusive liquor store may sell non-intoxicating malt liquors at off-sale but not at on sale.

Mr. James A. Garrity, County Attorney.

You call our attention to Chapter 421, Laws of 1937, and ask:

> "Do you believe that under this chapter, an off sale liquor store has authority to handle 3.2 beer?"

It is our opinion that an exclusive liquor store is authorized by Chapter 421 to sell non-intoxicating malt liquor at off sale but not at on sale. Provided, of course, an off sale non-intoxicating malt liquor license is obtained. An exclusive liquor store is defined by Chapter 421 to be:

> "An establishment used exclusively for the sale of intoxicating liquors, cigars, cigarettes, all forms of tobacco, non-intoxicating malt beverages and soft drinks at retail, either on sale or off sale, or both * * *."

While this statutory provision permits the sale of non-intoxicating malt liquors in an exclusive liquor store, it does not affect the provisions of Chapter 116, Laws of 1933 which act makes the sale of non-intoxicating malt liquors without a license a criminal offense. Under the terms of Chapter 116 an off sale license may be issued to any kind of a business, but an on sale license can only be issued to drug stores, hotels, restaurants and bona fide clubs and railroad companies. Consequently, an exclusive liquor store may obtain a non-intoxicating malt liquor off sale license but it cannot obtain a non-intoxicating malt liquor on sale license. We also call your attention to that part of Section 7 of Chapter 46, Extra Session Laws of 1933-34 which reads as follows:

> "No 'off sale' license shall be issued for any place where non-intoxicating malt beverages shall be sold for consumption on the premises."

ROY C. FRANK,
Assistant Attorney General.

May 27, 1937. 218j-10

294

LIQUOR—Intoxicating—Issuance of licenses for sale of in townships forbidden.

Mr. P. M. Lindbloom, County Attorney.

You ask our opinion on the following question:

> "Please advise me whether an incorporated club otherwise qualified to sell intoxicating liquor according to the Statute can legally obtain a license to sell intoxicating liquor if said club is not situated within the corporate limits of a city, village or borrough?"

We answer your question in the negative. Licenses for the sale of intoxicating liquors in townships cannot be legally granted. An intoxicating liquor license can only be granted by the governing bodies of cities, villages and boroughs for sale of said intoxicating liquors within the boundaries of such municipalities. A township board does not have authority to issue such licenses. The fact that an applicant is an incorporated club does not change the situation in any manner, since licenses are issued to clubs in the same manner as to any other person or business.

ROY C. FRANK,
Assistant Attorney General.

October 18, 1937. 218g-9

295

LIQUORS—Intoxicating—Miscellaneous questions.

Mr. Harvey E. Gardner, Village Attorney.

In your letter you state that upon the passage of Chapter 46, Extra Session Laws of 1933-34, the Village of Janesville enacted an ordinance authorizing the issuance of not more than three "on-sale" intoxicating liquor licenses to be granted to exclusive liquor stores and the issuance of "off-sale" intoxicating liquor licenses to exclusive liquor stores. In pursuance with the provisions of said ordinance, the council issued licenses and three exclusive liquor stores were established in said village, each of which stores was granted both an "on-sale" and "off-sale" intoxicating liquor license. Both the on and off sale licenses expire on June 30 of each year.

At the present time there is some agitation in Janesville for the establishment of a municipal liquor store. At the request of the village council you ask our opinion as follows:

1. "Whether or not the Village of Janesville, after passing and adopting the ordinance above referred to and granting licenses to

individuals can now repeal that ordinance and refuse to grant those individuals who are now established a license for the sale of intoxicating liquors."

We advise you that the council of the Village of Janesville has the authority to repeal the intoxicating liquor ordinance referred to and having repealed said ordinance refuse to grant on or off sale intoxicating liquor licenses. However, such repeal should not be effective until the expiration date of the licenses now in existence.

2. "May the question of whether or not the Village of Janesville may establish a municipal liquor store for 'on-sale' and 'off-sale' consumption of liquors be voted on at the general election to be held in this Village on December 7th of this year?"

We answer this question in the negative. Under the provisions of our intoxicating liquor acts, the authority to establish municipal liquor stores is vested in the governing bodies of the various municipalities of this state. There are no provisions contained in said laws for the submission of the question of the establishment of a municipal liquor store to the voters. If a vote is taken it would be of no legal effect and the council would still have the authority to do as it deemed best.

3. "If the council, either by the submission to the voters or upon their own vote of this question, established a municipal liquor store and repealed the existing ordinance and thereafter refused to grant a new license to those exclusive liquor stores now established, would the holders of the licenses have any remedy, either legal or equitable, against this municipality for so refusing to grant them a license?"

We also answer this question in the negative. An intoxicating liquor license is not in the nature of a contract, but is merely a permit authorizing the holder of the license to sell intoxicating liquors during the term of said license. The council issuing the license may at its pleasure refuse to renew the said license. The holder thereof does not have any vested or inherent rights to obtain a renewal thereof. Since the council need not grant a new license to a previous holder, the holder of the license would not have a cause of action against the council because of its refusal to renew said license.

4. "When the license expires on June 30th and the fee prescribed by ordinance is paid, does this constitute a renewal of the existing license or is this to be construed as the issuance of a new license?"

We also answer this question in the negative. A license cannot be renewed merely by the payment of the prescribed fee. The issuance of a new license calls for the same procedure as the issuance of the original license. In other words a new application must be made, the council must approve of said application, a new bond must be filed and the prescribed fee paid.

ROY C .FRANK,
Assistant Attorney General.

October 20, 1937. 218g-6

296

LIQUOR—Intoxicating—Council may establish municipal liquor store without authority of electors.

Mr. C. J. Benson, County Attorney.

In your letter you state that one of the villages in your county has a private liquor store. A new council has been elected and plans on installing a municipal liquor store. You ask whether or not it is necessary to submit the question of a municipal liquor store to the electors of the village, or whether the council would have the authority to install a municipal liquor store without such a vote.

We advise you that the question of whether or not a municipal liquor store is to be established rests entirely within the discretion of the council. If the council desires, it can refuse to issue a private license and establish a municipal liquor store and the electors of a village do not have anything to say in connection therewith.

ROY C .FRANK,
Assistant Attorney General.

December 20, 1937. 218g-13

297

LIQUOR—Intoxicating—Municipal liquor store cannot sell to private licensees.

Mr. L. P. Blomholm, City Attorney.

You ask whether your city council could enact an ordinance providing that a retail intoxicating liquor licensee must purchase intoxicating liquors sold by him from the municipal liquor store operated by your city.

We answer your question in the negative. This office has heretofore held that a municipal liquor store must engage strictly in a retail business. It cannot make sales at wholesale. Should the municipal store sell to private licensees for the purpose of resale the store would be engaging in the wholesaling of intoxicating liquors and would be violating the law. Since the municipal store cannot legally sell intoxicating liquors to private licensees for the purpose of resale, it necessarily follows that the city cannot compel said licensees to purchase intoxicating liquors from the municipal store.

ROY C .FRANK,
Assistant Attorney General.

June 1, 1937. 218j-10

298

LIQUOR—Intoxicating—Municipal liquor store cannot be taxed.

Mr. A. C. Richardson, County Attorney.

You ask:

"Is the liquor stock-in-trade of a municipal liquor store taxable?"

Public property used exclusively for any public purpose is exempt from taxation. Constitution of Minnesota, Art. 9, Sec. 1, Mason's Minnesota Statutes, 1936 Supplement, Sec. 1975. The problem for determination is whether a municipal liquor store is "public property used exclusively for any public purpose." Since a municipal liquor store is established and maintained through and by the use of municipal funds, and the property thereof belongs to the municipality, there can be no question but that such a store is public property. Since the Constitution only exempts public property when used exclusively for any public purpose, we must ascertain whether or not the use of such a store is a public purpose.

The control of the sale of intoxicating liquors is a well recognized function of not only the state government, but through the delegation of power by the state, of the local municipal governments, for the prevention of crime and for the preservation of public health and morals and for the general welfare of the community. It is concededly the duty of the legislature, and of local governing bodies, to adopt such laws and ordinances as may be necessary to protect the public health. State ex rel. Peacock v. Osakis, 112 Minn. 365, 128 N. W. 295. This principle is recognized by our Court in the case of State v. Fitch, 162 Minn. 184, 202 N. W. 719, when it adopts the following quotations, the first from 12 R.C.L. 1264, and the second from 29 C.J. 242:

> "That the preservation of the public health is one of the duties devolving upon the state, as a sovereign power cannot be successfully controverted. In fact, among all of the objects sought to be secured by governmental laws, none is more important than the preservation of the public health; and an imperative obligation rests upon the state, through its proper instrumentalities or agencies, to take all necessary steps to promote this object. * * * It is as much for the interest of the State that the public health should be preserved as that life should be made secure."

> "It is a well recognized principle that the protection of the public health is one of the first duties of government. Therefore, whatever rationally tends to promote and preserve the public health is an appropriate subject of legislation."

We find the same rule adopted by other courts. See Stone v. Mississippi, 101 U. S. 814, in which the Supreme Court of the United States said:

> "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants.

The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them."

What is true concerning public health is most certainly true of public morals and crime. There can be no doubt that the unrestricted sale of intoxicating liquors has a detrimental effect upon the health and morals of the citizens of a community and increases crime. An apt statement is found in the case of State v. Roberts, 74 N. H. 476, 69 Atl. 722:

"It is the unrestricted and unregulated sale of it (intoxicating liquor) that the courts have regarded as tending to pauperism and crime."

Our own court, in State v. Stroschein, 99 Minn. 248, 109 N. W. 235, recognized the truth of the above statement when it said:

"It has always been the policy of this state to protect the youth of our land from the immoral and vicious influences connected with the liquor traffic, and to guard them so far as possible from the formation of a habit inimical alike to them and to the welfare of society."

In pursuance with its obligations the legislature of this state enacted a liquor regulatory act, Extra Session Laws of 1933-34. This act provided for two types of retail sale, one by private licensees, and the other by municipal liquor stores. Certain classes of municipalities may establish municipal liquor stores and when they so do private licenses cannot be granted therein. The purpose of issuing private licenses or operating municipal liquor stores is not primarily to furnish intoxicating liquors to the people of the community, but rather to preserve the health, morals and safety of the people in the sale of such liquors by providing certain safeguards. If a certain municipality deems it expedient or necessary to establish a municipal liquor store to afford greater protection to its citizens, it cannot be said that such store is not serving a public purpose. In the case of County of Anoka v. City of St. Paul, 194 Minn. 554, 261 N.W. 588, our Court said:

"In our opinion the city is engaged in its governmental capacity when it manages or operates any public utility such as a waterworks, an electric power plant, a sewage disposal plant, etc., where the entire citizenry benefits thereby and the health and welfare of the community make such action expedient or necessary."

In the case of Central Lumber Co. v. Waseca, 152 Minn. 201, 188 N.W. 275, the Court had under consideration the question of whether or not a municipal fuel yard was devoted to a public purpose within the meaning of the constitution. The Court said:

"Economic and industrial conditions are not stable. Times change. Many municipal activities, the propriety of which is not now ques-

tioned, were at one time thought, and rightly enough so, of a private character. The constitutional provision that taxes can be levied only for public purposes remains; but conditions which go to make a purpose public change.

"In our judgment the establishment of a municipal fuel yard is a public purpose."

The fact that the enterprise might yield a profit is not material. See County of Anoka v. City of St. Paul, supra, in which case the Court said:

"It is true that the funds used to operate the waterworks are not raised by general taxation, but come from water rents or charges made by the board against the individual consumer. This factor does not affect the status of the waterworks. It is none the less a public enterprise. It still subserves a public purpose. It is immaterial that operation of the waterworks might in any one year yield a profit. * * * This, however, is not a controlling feature nor even an important consideration to this decision."

For the reasons stated we are of the opinion that a municipal liquor store is public property being used exclusively for a public purpose and accordingly answer your question in the negative.

ROY C. FRANK,
Assistant Attorney General.

May 14, 1938. 218k

299

LIQUORS—Intoxicating—Population of village for license purposes is that of last state or federal census.

Mr. Hyman Edelman, Village Attorney.

You present the following statement of facts:

"The last official census, being the 1930 census, shows the population of Golden Valley to be between 1300 and 1400. Villages with a population under 2500 are entitled to only 3 'on-sale' intoxicating liquor licenses. It is contended now that the population has reached 2500. Of course there is no official way to determine this. Application has been received by the Council for a fourth license, the applicant contending that the population is now sufficiently large to warrant the issuance of another license."

Based upon these facts you ask our opinion on the following question:

"Would the Council be justified in issuing such license without taking steps to get a census, or must they wait until the next official census?"

We answer your question in the negative.

Subdivision 12 of Section 10933, Mason's Minnesota Statutes of 1927 provides that "the word 'population,' and the word 'inhabitants,' when used in reference to population, shall mean that shown by the last preceding census, state or United States, unless otherwise expressly provided." In the absence of any specific definition of the terms "population" and "inhabitants," the provisions of subdivision 12 of Section 10933 are controlling. You will further note that the first paragraph of Section 10933 provides 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." The terms "population" and "inhabitants" are not specifically defined in Chapter 46, Extra Session Laws of 1933-34 and consequently we must revert back to Section 10933 to determine the meaning of said terms as they apply to Chapter 46. Consequently, the population of Golden Valley must be determined from the last state or federal census and said population cannot be changed for the purpose of issuing an intoxicating liquor license until the next official state or federal census.

ROY C. FRANK,
Assistant Attorney General.

June 7, 1937. 218g-11

300

LIQUORS—Intoxicating—Prescriptions must be filed with Liquor Control Commissioner within thirty days.

Mr. Edward J. Prochaska, Minnesota State Board of Pharmacy.

There appears to be some question as to whether a pharmacist must file intoxicating liquor prescriptions with the Liquor Control Commissioner. We call your attention to that portion of Chapter 418, Laws of 1937, reading as follows:

> "Every prescription upon which any sale of intoxicating liquor is made, as herein provided, shall, at the time of such sale, be taken from the purchaser of the intoxicating liquor by the seller thereof, and by such seller cancelled by writing in ink across the face of such prescription over his signature, * * * **and such prescriptions shall be kept by the seller until filed by him with the Liquor Control Commissioner within thirty days after such prescription has been issued.**"

It is clear that all liquor prescriptions, after they have been filled and cancelled, must be filed with the Liquor Control Commissioner.

ROY C. FRANK,
Assistant Attorney General.

June 8, 1937. 218j-17

301

LIQUORS—Intoxicating—Prescription can be refilled once.

Mr. Philip R. Monson, City Attorney.

You quote from Section 12 of Chapter 418, Laws of 1937, as follows:

> "It shall be lawful for any duly licensed and registered pharmacist or druggist within this state to make sales of intoxicating liquor for medicinal purposes upon bona fide prescription by a physician, dentist or veterinarian, **written in ink** without having to obtain an off sale license."

and ask:

> "Does this mean that it is necessary for the said doctor to write such prescription in long hand with ink, or can he use his typewriter as long as he signs it in ink?"

By virtue of the above quoted provisions of law, a prescription calling for intoxicating liquor must be filled out in ink by the physician, dentist or veterinarian issuing the same. It is not sufficient that the signature be written in ink, the entire prescription must also be written by the issuer thereof in his own handwriting and in ink.

You also quote from Section 12:

> "No more than one quart of liquor may be sold upon any one prescription, and no prescription shall be filled more than once unless after the expiration of one month from the time of its issuance and delivery."

and ask:

> "Does that mean that on one prescription one might, during such period, buy two pints at different times, or does it mean that such prescription can be refilled with another quart of liquor?"

We call your attention to the fact that the quotation stated in your letter does not follow the law. The correct statutory provision is as follows:

> "No more than one quart of liquor may be sold upon any one prescription, and no prescription shall be refilled more than once, nor after the expiration of one month from the date of its issuance and delivery."

The meaning of this provision is obvious. Up to one quart of intoxicating liquor may be sold on a prescription at its original filling. The prescription can be refilled once, at which time up to one quart of intoxicating liquor may be sold. The prescription cannot be filled or refilled unless so done within one month after its issuance. In other words, after one month from the date of its issuance the prescription is automatically void.

ROY C. FRANK,
Assistant Attorney General.

May 14, 1937. 218j-17

302

LIQUORS—Intoxicating—Village cannot impose additional license fees on wholesalers and manufacturers.

Mr. Garfield H. Rustad, Village Attorney.

You state:

> "The Village council of the Village of Dilworth are anticipating the passage of an Ordinance which will provide that each brewer who sells his brand of beer to the retailer must pay a license fee to the Village of $25.00 per year per tap. We also intend to include the distillers who sell hard liquor in the village, requiring them to list with the Clerk the names of their brands and pay a license fee before they are permitted to sell the retailer. We base this Ordinance upon the public health provisions of the law, which will afford the Village to have chemical analysis made of the beer from time to time, as well as the liquor."

You then ask:

> "whether there is anything in this suggestion that * * * would be illegal."

We are of the opinion that the plan suggested in your letter would be illegal. In so far as non-intoxicating malt beverages are concerned, see Bernick v. City of Little Falls, 191 Minn. 128, 253 N. W. 369. In like manner the wholesalers and manufacturers of intoxicating liquors pay a license fee to the state and in return therefor are permitted to sell such liquors to retailers. We do not believe that the various cities and villages have authority to impose an additional license fee on wholesalers and manufacturers.

ROY C. FRANK,
Assistant Attorney General.

June 8, 1937. 218g-12

303

NON-INTOXICATING LIQUORS—Council may limit number of licenses.

Mr. Magnus Wefald, Village Attorney.

In your letter you ask our opinion as to whether or not a village council has the authority to amend its non-intoxicating malt liquor ordinance to limit the number of licenses issued to a certain number.

We answer your question in the affirmative. It is within the power of a village council to specifically limit the number of such licenses it will issue and the mere fact that the limitation was not in the original ordinance does not prevent the council from amending said ordinance to provide for such limitation.

ROY C. FRANK,
Assistant Attorney General.

October 7, 1937. 218g-11

304

LIQUORS—Non-Intoxicating—County board may regulate closing hours for sale of malt liquors.

Mr. C. J. Benson, County Attorney.

You ask "whether or not the County Commissioners may, by resolution, fix the closing hours for sale of non-intoxicating malt liquors * * *?"

We answer your question in the affirmative.

ROY C. FRANK,
Assistant Attorney General.

July 16, 1937. 217f

305

LIQUORS—Non-Intoxicating—Voters of township have no right to vote on question of sale.

Mr. A. E. Finseth, Township Attorney.

You advise us that the citizens of Richland Township in your county have presented a petition to the board of township supervisors asking for a special election on the sale of non-intoxicating malt liquors.

You ask whether or not the town board is required to call such election.

We answer your inquiry in the negative. The voters of the township do not have the right to vote on the question of whether or not non-intoxicating malt liquors should be sold. If such an election was held, it would be of no effect.

ROY C. FRANK,
Assistant Attorney General.

June 29, 1937. 434a-10

306

MARRIAGE—Application for license must be made in person.

Mr. F. H. Stadsvold, County Attorney.

You inquire:

> "May the Clerk of District Court accept applications for marriage license by mail?"

Mason's Minnesota Supplement, 1936, Section 8569, as far as here pertinent, provides that:

"Application for a marriage license shall be made at least five days before a license shall be issued. The clerk shall examine upon oath the party applying for license relative to the legality of such contemplated marriage, and if, at the expiration of said five-day period, satisfied that there is no legal impediment thereto, he shall issue such license, * * *. Any clerk who shall knowingly issue or sign a marriage license in any other manner than in this section provided shall forfeit and pay for the use of the parties aggrieved not to exceed one thousand dollars."

Under the terms of said Section 8569 the clerk shall examine upon oath the party applying for license relative to the legality of such contemplated marriage. We do not see how it would be possible for the clerk to so examine upon oath such applicants if the application for a marriage license was received by mail. This opinion is in conformity with other opinions of this office relative to the same section. Also, in view of the stringent penalty of $1000 provided by the statute if any clerk knowingly issues or signs a marriage license "in any other manner than in this section provided," we feel that the procedure as outlined in this opinion should be strictly followed.

JOSEPH M. DONAHUE,
Special Assistant Attorney General.

February 4, 1938. 300m

307

MARRIAGE—Legal age of applicant—Consent of parent or guardian.

Mr. H. A. Irwin, County Attorney.

You submit the following inquiries which we have numbered for the purpose of our opinion:

1. "What is the effect of the amendment of the Probate Code (Laws 1935, Chapter 72, Sec. 185) by Laws of 1937, Chapter 435, Sec. 24, defining a minor, upon Section 8569, Mason's Minnesota Statutes of 1927, providing that if any person under age intending to marry shall apply for a marriage license, such license shall not be issued unless the consent of the parent or guardian be given?

2. Does the amendment require the consent of guardian or parent of a female between the ages of 18 and 21 years?

3. What effect has Chapter 79, Laws 1937, also which defines a minor for purposes of minimum wage law?

4. Shall a Clerk of Court now require a consent from a female person's guardian or parents, where the female is under the age of twenty-one years?"

With reference to your first inquiry. It is our opinion that the amendment of the Probate Code, Laws 1935, Chapter 72, Section 185, by Laws

1937, Chapter 435, Section 24, defining the term "minor," does not in any way affect the provisions of Section 8569, Mason's Minnesota Statutes of 1927, as amended by Laws 1931, Chapter 401, or any of the other provisions of the marriage laws of this state.

We answer your second inquiry in the negative.

With reference to your third inquiry, it is our opinion that Laws 1937, Chapter 79, which defines the term "minor" for purposes of the minimum wage law, does not affect any of the provisions of the marriage laws of this state.

We answer your fourth inquiry thus: A clerk of court shall now, as in the past, require a consent from a female person's guardian or parents where the female is of the full age of fifteen years and under eighten years of age.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

May 13, 1937. 300a

308

MINIMUM WAGE—Entire act operative after the reversal by the Supreme Court of the United States of its decision in the case of Adkins v. Children's Hospital 261 U. S. 525; C. 547, L. 1913.

Industrial Commission.

You ask us to advise you as to whether it is now your duty to enforce that portion of Chapter 547, Laws of 1913, pertaining to the regulation of minimum wages of adult women.

The minimum wage law of Minnesota was passed in 1913. It provides for the appointment of a commission called a minimum wage commission with authority to investigate the wages paid women and minors in any occupation in the state, to hold public hearings as to wages, profits and other pertinent conditions of an industry or occupation, and to summon witnesses and compel the production of books, papers, and other evidence. The powers and duties of the minimum wage commission were transferred to the industrial commission in 1921 as a part of the functions of the division of women and children in the department of labor and industries, and the minimum wage commission was abolished. (Laws 1921, Chapter 84; Mason's Minnesota Statutes, 1927, Sections 4210-4213.)

If after investigation of any occupation the industrial commission is of the opinion that the wages paid to one-sixth or more of the women or minors employed therein are less than "living wages" the commission is required to proceed to establish legal minimum rates of wages for said occupation. The rate so established may be made applicable to the entire state or within any area of the state if differences in the cost of living warrant such a restriction.

The validity of the minimum wage act came before the Supreme Court of Minnesota in 1917 in the case of Williams v. Evans, 139 Minn. 32, which was brought by a taxpayer to restrain the minimum wage commission from expending any state money in carrying out the provisions of the act. The nature of the action was such as to bring before the Court the question as to the validity of the entire act.

It was alleged that the act interfered with the right to contract and in so doing resulted in depriving all parties to a labor contract of liberty without due process of law, in violation of the Fourteenth Amendment. But the Court pointed out that the liberty to contract is not an absolute right, but subject to the power of the legislature, in the exercise of its police power, to pass laws to promote the public health, the public safety, the public morals and the general welfare; that the state under certain circumstances may regulate hours of labor of women (Muller v. Oregon, 208 U. S. 412; Riley v. Massachusetts, 232 U. S. 671) and of minors in certain occupations (Sturges & Burn Manufacturing Co. v. Beauchamp, 231 U. S. 320) and of men engaged in hazardous employments (Holden v. Hardy, 169 U. S. 366; (Bunting v. Oregon, 243 U. S. 426) and of men employed on public work (Atkin v. Kansas, 191 U. S. 207). It may regulate conditions of labor and the time of payment of employes (Patterson v. Bark Fudora, 190 U. S. 169; Erie Railroad Co. v. Williams, 233 U. S. 685, and the medium of payment (Knoxville Iron Co. v. Harbison, 183 U. S. 13; McLean v. Arkansas, 211 U. S. 539).

The Court declared that the liberty of contract guaranteed by the constitution is not freedom from reasonable regulation, but freedom from arbitrary restraint. If the limitation imposed is a reasonable regulation to safeguard the public interest it is valid.

The Court pointed out that women are not on an equality with men in the economic battle, that in many cases the wages received are insufficient to pay the cost of living, that such conditions more or less inevitably result in injuries to the health of employed women, in immorality and in dangers to the well being of future generations. These considerations, in the opinion of the Court, were amply sufficient to justify the act.

In the case of Miller v. Minimum Wage Commission, 145 Minn. 262, the validity of the act was assumed and various orders issued by the commission thereunder were upheld.

In the case of State v. Allyn, 150 Minn. 123, it was held to be error for the lower Court to refuse to receive evidence that a certain order of the commission had not been served on defendant, who was charged with a violation thereof. Again the Court assumed that the statute was valid and it found no fault with the order, but only with the exclusion of evidence of failure to serve the order.

In the case of Stevenson v. St. Clair, 161 Minn. 444, which was decided in 1925, the Court held the act valid as to minors. Plaintiff in the case being a minor, this was the only part of the act before the Court. Prior to the rendering of the decision in this case the Supreme Court of the United

States had held invalid as to adult women a similar minimum wage law passed by congress for the District of Columbia (Adkins v. Children's Hospital, 261 U. S. 525). Commenting on the effect of this case the Supreme Court of this state said:

> "We may assume, for the purposes of this decision, that the Adkins case renders the part of our act fixing a minimum wage for women repugnant to the Federal Constitution, * * *."

You will note, however, that the validity of that portion of the Minnesota act pertaining to adult women was not before the Court. Consequently the statement quoted above is dictum. The Supreme Court of this state has not at any time, either before or after the decision in the Adkins case, held invalid any portion of the state minimum wage law.

On March 29, 1937, the Supreme Court of the United States, in the case of West Coast Hotel Company v. Ernest Parrish and Elsie Parrish, passed upon the validity of the minimum wage law of the state of Washington. In common with the minimum wage act of Minnesota the Washington act authorizes a commission to establish standards of wages for women and minors employed within the state. Without taking time to analyze the act it is sufficient to say that the Washington act raises substantially the same questions as to constitutionality as does the Minnesota act. If the one act is constitutional the other also is constitutional. In this case the Supreme Court was specifically asked to reconsider and reverse its decision in the Adkins case, and by a vote of five to four it did reverse that decision. This, in our opinion, was one of the most important decisions ever rendered by the Supreme Court. Prior to that decision there existed in the constitutional structure of this nation a "No Man's" land in which neither state nor nation could legislate. Prior to that decision neither state nor nation could exercise governmental power over a matter as important as the regulation of wages of adult women. That power is now open to every state.

Chief Justice Hughes, in his admirable statement of the reasons for the Court's decision, points out that the fact that the parties are of full age does not deprive the state of the right to interfere where they do not stand in a position of equality or where the public health demands that one party shall be protected against himself.

The Chief Justice continues:

> "It is manifest that this established principle is peculiarly applicable in relation to the employment of women in whose protection the State has a special interest. That phase of the subject received elaborate consideration in Muller v. Oregon (1908), 208 U. S. 412, where the constitutional authority of the State to limit the working hours of women was sustained. We emphasized the consideration that 'woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence' and that her physical well being 'becomes an object of public interest and care in order to preserve the strength and vigor of the race.' We emphasized the need of protecting women against oppression despite her possession of con-

tractual rights. We said that 'though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right'."

In a later paragraph the Court further emphasizes the great importance to the state of adequately protecting the health and wellbeing of its womanhood, saying:

"With full recognition of the earnestness and vigor which characterize the prevailing opinion in the Adkins case, we find it impossible to reconcile that ruling with these well-considered declarations. What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce the evils of the 'sweating system,' the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection."

The Court further points out that there is now a further compelling reason for permitting state interference in wage contracts, namely, the fact that the exploitation of a class of workers who are in an unequal position as to bargaining power and thus relatively defenseless against the denial of a living wage is injurious, not only to their health and welfare, but casts a heavy burden upon the community for their support. The cost of living must be met. If it is not paid by the consumer as wages, it must be paid by the taxpayer as taxes.

It is interesting to note that a few months earlier the Supreme Court of the United States in the case of Morehead v. New York ex rel. Tipaldo, 298 U. S. 587, held invalid the New York minimum wage act for women. In so doing it affirmed the decision of the Court of Appeals of the State of New York. The Supreme Court now explains that in that case the matter of reversing the Adkins decision was not raised and was not given consideration.

In deciding to reverse the Adkins case the Supreme Court of the United States has once more placed its decision in line with the best medical information and with that advancing complexity of economic structure which justifies the extension of the police power of the state over fields hitherto believed to lie beyond its province.

It may also be of interest to point out that not only does the decision of the Supreme Court in the West Coast Hotel Company case put back into operation state minimum wage acts for women considered invalid after the decision in the Adkins case and open the door for additional legislation in this field, but the tenor of the Court's opinion is such that we are led to believe that it may sustain properly limited minimum wage acts for men.

We have pointed out that the minimum wage act of Minnesota has been held valid by the State Supreme Court in one case and that it has never been held invalid by our highest Court; that while the Adkins case was the interpretation of minimum wage acts for women our act was believed to be inoperative as to adult women; and that this decision, the only bar to the full operation of our minimum wage act for women, has now been reversed. It follows as a matter of course that said act is now fully operative and unquestionably valid.

We accordingly advise you that it is now your duty to enforce all the provisions of Chapter 547 of the Laws of 1913.

MATTHIAS N. ORFIELD,
Deputy Attorney General.

April 16, 1937. 86a-53

309

MOTHER'S PENSION—Divorced woman entitled to when—Remarriage of —Grandmother qualifying as mother.

Mr. Paul D. Stratton, County Attorney.

You state:

"1. Is a divorced woman entitled to a mother's pension under any circumstances?

"2. A woman having been given a mother's pension and receiving same re-marries. Does she automatically lose the pension?

"3. Can a grandmother ever qualify for a mother's pension, she being the sole support of the deceased child's child?

"If the grandmother legally adopted the child, would that make her eligible for a mother's pension? Assuming in all these cases that property qualifications and other requisites would show the parties entitled to pensions otherwise."

We answer your first inquiry in the affirmative. Section 8671, Subdivision (a), 1936 Supplement, Mason's Minnesota Statutes of 1927, authorizes the allowance of mother's pension to the mother of a child if she is a widow. Subdivision (b) (4) of said section authorizes the allowance of mother's pension to the mother of dependent children, who is otherwise

qualified, upon a finding that "there is and has been for three months past an outstanding warrant for his (the husband's) arrest on a charge or after conviction for the crime of abandoning such child," if the court is satisfied that he is a fugitive from justice and that the mother has in good faith assisted and will continue to assist in all reasonable efforts to apprehend him. While the statute makes no provision for the payment of allowance to a divorced mother, the term "widow" in Subsection (a) has been construed to include a divorced woman. See In the Matter of the Application of Gunde Koopman for a County Allowance, etc., 146 Minn. 36.

Relative to your second inquiry, it is our opinion that if the children have been taken into the family of the stepfather, under circumstances from which the presumption arises that he has undertaken to support them, the allowance the mother was receiving prior to such remarriage should cease. Speaking generally, there is no liability on a stepfather for the support and maintenance of his stepchildren. A liability may exist by reason of some ante-nuptial contract or otherwise between the stepfather and the mother of the stepchild. However, in any event, whether a woman having been granted a mother's pension loses the pension upon remarriage involves questions of fact in each case which must be determined by the Juvenile and Probate Judges in this state.

We answer your third inquiry in the affirmative. Section 8681, 1936 Supplement, Mason's Minnesota Statutes of 1927, provides as follows:

> "Whenever the court shall be of the opinion that the welfare of a dependent child will be best served by permitting such child to live in the family and under the care of a grandmother of such child, and where such person meets the requirements of residence and citizenship as contained in Mason's Minnesota Statutes of 1927, Section 8671 (f), as amended and is found to be a proper person mentally, morally, and physically to care for and bring up such child, and where a finding has been made that support is not obtainable from the father of such child by reason of one of the alternatives specified in Mason's Minnesota Statutes of 1927, Section 8671, subdivision (b) as amended, the court may grant such person such allowance as is provided for such child by this act, provided, however, that no allowance shall be made to the grandmother for the care of such child where the grandparents are able and required to support such child pursuant to the provisions of Section 3157 of Mason's Minnesota Statutes for 1927."

In connection with this inquiry we herein enclose a copy of an opinion of this office dated November 29, 1933, addressed to Mr. E. R. Selnes, County Attorney, Pope County, for your information.

We answer your inquiry, "If the grandmother legally adopted the child, would that make her eligible for a mother's pension," thus:

Generally and legally speaking, when a child is adopted by its grandparents, the grandmother becomes the mother of said child and the husband of the grandmother becomes the father of said child, for all purposes.

In our opinion the provisions of Section 8671 apply to the grandmother referred to in your inquiry in the same manner as to the real mother of the child. In other words, the grandmother is subject to the same conditions and requirements of Section 8671 as the real mother of the child.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

June 9, 1937. 540c

310

MOTOR VEHICLES—Combination motor vehicle and feed grinder.

Mr. T. O. Streissguth, County Attorney.

You call the attention of this office to the following provisions of Section 2673, 1938 Supplement, Mason's Minnesota Statutes of 1927, to-wit:

> "* * * Motor vehicles, which are used only for the purpose of carrying sawing machines, well drilling machines, feed grinders and corn shellers **temporarily** attached to them, shall be subject to the registration tax as herein provided, but the machine so attached shall not be subject to this tax but shall be listed for taxation as personal property as provided by law. Motor vehicles, which are used only for the purpose of carrying sawing machines, well drilling machines or corn shellers **permanently** attached to them shall not be subject to the registration tax as herein provided, but shall be listed for taxation as personal property as provided by law. * * *"

You state and inquire:

> "Note that the first sentence quoted makes reference to feed grinders temporarily attached to motor vehicles but that the second sentence contains no reference to feed grinders permanently attached to the motor vehicle.
>
> "It would seem that inasmuch as there is no provision exempting from the registration tax feed grinders permanently attached to motor vehicles, such combination motor vehicle and feed grinder is subject to registration tax.
>
> "Being so subject to this tax, the question is whether or not the combination motor vehicle and feed grinder is not **exempt from the personal property tax** under Section 2674 which provides that motor vehicle tax shall be in lieu of all other taxes.
>
> "Because of the state-wide application of this question, I prefer to follow whatever ruling you make rather than interpret the statute myself."

We agree with your interpretation of the provisions of the above statute "that inasmuch as there is no provision exempting from the registration tax

feed grinders permanently attached to motor vehicles, such combination motor vehicle and feed grinder is subject to registration tax (motor vehicle tax)."

Being so subject to the motor vehicle tax, it is our opinion that the combination motor vehicle and feed grinder permanently attached to the motor vehicle is exempt from the personal property tax. It is specifically and expressly provided for in Article 16, Section 3, of the State Constitution, and in Section 2674, 1938 Supplement, Mason's Minnesota Statutes of 1927, that motor vehicle tax is in lieu of all other taxes.

LOUIS F. SOUKUP,

Special Assistant Attorney General.

August 1, 1938. 632e-2

311

MOTOR VEHICLES—House trailers—Rate of tax.

Mr. Ray J. Quinlivan, City Attorney.

You ask to be advised "as to the law applicable to the licensing of two wheel trailer houses used for pleasure purposes and towed by automobiles."

In our opinion house trailers used for pleasure purposes only and towed by the ordinary type of pleasure passenger motor vehicles or automobiles assume the nature of the towing vehicle and as such are subject to the tax provided for in Laws 1935, Chapter 161, Section 1, as motor vehicles for carrying passengers at the rate of 2.2% of value.

Relative to your statement in your letter, "I understand that there is some doubt and confusion in the mind of the Secretary of State on this question and perhaps your office has already given an opinion," we advise that house trailers used for pleasure purposes and towed by the ordinary pleasure type of passenger motor vehicles or automobiles have been classified and taxed as motor vehicles for carrying passengers by the Secretary of State ever since the advent of the use of such house trailers upon the highways of this State, and that the Department of Secretary of State, Division of Motor Vehicles, inform this office that there never was any doubt or confusion in that department regarding the classification and taxation of such house trailers. This office has not previously rendered an opinion relative to the question here involved.

LOUIS F. SOUKUP,

Special Assistant Attorney General.

June 16, 1937. 632e-33

312

MOTOR VEHICLES—License—Improper plates—Penalty.

Hon. Mike Holm, Secretary of State.

You state and inquire:

"In your communication under date of March 29, 1938, which has just been returned to this department after review, you say that the use of 1937 plates (gross-weight-use registration) by the owner before February 15 during the period in which he is allowed by law to use his 1937 plates while he is making application for his 1938 plates, does not preclude the possibility for him of registering for 1938 in another class carrying a lower tax rate such as class 'T,' class 'X' or the truck-mile class (YI). This seems logical because our motor vehicle registrations are for the period of the calendar year and under the provisions of Section 2680, MMS., the annual registrations expire at midnight on December 31 with the provision that under certain conditions the owners may continue to use the plates during the months of January, February and March of the following year while such motor vehicles are being re-registered. The registration tax is paid for the period of the calendar year for which the vehicle is registered and, where the use of the vehicle determines the tax, obviously it is the use of the vehicle during the **calendar year** for which it is registered which determines the amount of the tax to be paid.

"Your accord with this view is brought out in your statement that the owner may re-register the vehicle in the lower class for 1938 'providing the particular motor vehicle had not been used during the year 1938 outside of the use permitted in the lower rate class sought by the owner.' In view of the foregoing, we are puzzled at your negative answer to the two concluding questions in our inquiry, viz:

" 'a. The record owner of a truck registered for 1937 in the gross-weight-use class was operating his vehicle in January, 1938, under his 1937 Y plates. He was convicted of carrying a greater load than his 1937 Y registration allowed. May he register in the T class without any payment in arrears on account of this conviction, if his vehicle is to be used only as the law provides for a T registration?

" 'b. Might he register in the X class without any payment in arrears on account of this conviction, if his vehicle is to be used only as the law provides for an X registration?'

"Doubtless, the wording of our question implied that the vehicle had been used for other purposes than allowed in class 'T' or class 'X' before application for registration was made; therefore, **let us re-submit the questions in the following form:**

"A.* A truck registered in 1937 in the gross-weight-use class with the 1937 tax paid for the gross-weight of sixteen thousand (16,000) pounds was owned and operated January 1, 1938 and thereafter by

bona fide farmer hauling only agricultural products and other merchandise as the law permits for a vehicle registered in the 'T' class. On the first of February, before he had made application for re-registration in 1938, he was stopped on the road by a patrolman who checked his load and found that he was operating with a gross weight of twenty thousand (20,000) pounds. Has this farmer violated any law in 1938 by hauling a heavier load of his own farm products and supplies in 1938 than the vehicle was registered for in 1937? Must he register in the 'Y' class for 1938 with payment of a gross-weight-use tax for a minimum of twenty thousand (20,000) pounds? May he not register for 1938 with only the payment of the tax required in the 'T' class for his vehicle?

"B. A truck registered in 1937 in the 'gross-weight-use' class with the 1937 tax paid for a gross-weight of sixteen thousand (16,000) pounds was owned by an operator on January 1, 1938, who on January 1 and thereafter operated only within a 35-mile zone as permitted for a vehicle registered in the 'X' class. On the first of February, before he had made application for re-registration in 1938, he was stopped on the road by a patrolman who checked his load and found that he was operating with a gross weight of twenty thousand (20,000) pounds. Has he violated any law in 1938 by hauling a heavier load in 1938 than the vehicle was registered for in 1937? Must he register in the 'Y' class for 1938 with payment of a gross-weight-use tax for a minimum of twenty thousand (20,000) pounds, though he operated in 1938 in good faith only as allowed for a vehicle in the X class? May he not register for 1938 with only the payment of the tax required in the 'X' class for his vehicle?"

Your inquiries A and B, as resubmitted, may be answered together thus:

It is our opinion that the owners of the vehicles therein referred to have violated the gross-weight-use tax provisions of Section 2674, 1938 Supplement, Mason's Minnesota Statutes of 1927, particularly the provisions of Subdivision (a)-2 thereof, to-wit:

"(a)-2. The applicant for a Y license shall state in writing upon oath, among other things, the unloaded weight for such vehicle and the maximum load which the applicant proposes to carry thereon and such vehicle shall be licensed to carry as the maximum legal load the load-weight so selected, and no vehicle shall exceed such authorized load weight by more than 1,000 pounds. The gross weight of the vehicle for which such license tax is paid shall be stencilled in a conspicuous place on said vehicle by the owner thereof and the weight of a tractor or truck-tractor shall be likewise stencilled in a conspicuous place thereon.

"The Registrar of Motor Vehicles shall cancel the certificate of registration and/or license plate issued by him upon conviction of the owner of such vehicle for transporting a loadweight exceeding the authorized loadweight by more than 1,000 pounds. No certificate of

registration and/or license plate shall thereafter be issued to operate such vehicle during such year except upon payment of a tax based on the gross loadweight said vehicle was transporting at the time such offense was committed and the tax so to be paid shall be subject to a proportionate tax as provided herein."

in that during the year 1938, specifically on February 1, 1938, the owners operated their respective trucks with 1937 Class Y license plates transporting load weights exceeding the load weights by more than 1,000 pounds the vehicles were authorized and permitted to carry under the Class Y registrations and license plates. If the owners were convicted of such offense, they must register the trucks in the Y Class for 1938 with payment of gross-weight-use tax for a minimum of 20,000 pounds the trucks were transporting on February 1, 1938, when the offense was committed. Under such circumstances the owners cannot register the trucks for 1938 with only the payment of the tax required in the T and X Class.

It is true, as you indicate, that under the provisions of Section 2680, Mason's Minnesota Statutes of 1927, the annual registration certificates issued under the Motor Vehicle Act and the right to use the license plates expires on December 31 of the year for which issued. However, the proviso in said section immediately following such provisions "that during the months of January, February and March in each year, upon delivery of such application duly executed to the office of the registrar on or before February 15th, accompanied by payment of the proper tax and fee such vehicle shall be deemed to be registered subject to the cancellation, amending or approval of the registration by the registrar, * * *" qualifies the previous provisions so that in effect the registration certificates and license plates do not in fact expire on December 31 of the year for which issued. It is obvious from such provisions that vehicles operated on the highways of this state after December 31 without first being registered in accordance with the provisions of Section 2680 are subject to the provisions of the law pertaining to the class in which the vehicles are registered. It follows that if a vehicle having a 1937 Y license is operated under that license in 1938, before application for registration for the year 1938 is filed with the registrar, and carries a load in excess of that permitted by its license, it becomes subject to the penalty prescribed by Section 2674 (a)-2, and no certificate of registration or license shall thereafter be issued upon conviction for such vehicle during 1938, except upon the payment of a tax based on the gross load weight said vehicle was transporting at the time such offense was committed.

Applying the provisions of Section 2680 and the provisions of Subdivision (a)-2 herein quoted and referred to to your questions A and B, we reach the conclusion that if the owners of the Class Y trucks were convicted of the offense referred to in said questions, such owners are precluded from the possibility of registering the trucks for the year 1938 in Class T and Class X; that the applications of the owners for registration of the trucks for the year 1938 are subject to the cancellation and tax provisions and penalty provided for in Section 2674 (a)-2; and that under such circumstances the owners of the trucks must register the trucks in the Y class for the year 1938 with payment of the gross-weight-use tax for the minimum of 20,000 pounds.

You also ask:

"If the farmer owner in the foregoing question 'A' cannot register in the 'T' class for 1938, and if the operator in question 'B' cannot register in the 'X' class for 1938, kindly explain under what conditions your answer to our first general question could be made to apply to the owners in questions 'A' and 'B' or any others."

In answer to this question, we advise that if the owners of the trucks in the foregoing questions A and B were not convicted of violating the provisions of Subdivisions (a)-2 then our answer to your first general question in our communication of March 29, 1938, could be made to apply to the owners referred to in your questions A and B.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

June 15, 1938. 632a-16

313

MOTOR VEHICLES—Interstate commerce—truck mile tax.

Hon. Mike Holm, Secretary of State.

You state and inquire:

"Kindly let us know whether a motor vehicle under the following conditions of operation may be registered as 'engaged exclusively in transporting property in interstate commerce' so as to be entitled to registration in the 'truck-mile-tax' class:

"The truck makes deliveries within the Twin Cities as a continuation of interstate movement. It meets incoming trucks from other states in the Twin Cities and takes the merchandise from the incoming trucks in so-called 'tail-gating' service. In other words, the merchandise brought in to Minnesota is unloaded directly from the incoming truck to this delivery truck.

"In other words, the operator employs more than one vehicle in transporting the goods from the original point in a foreign state to the destination in Minnesota. One of these vehicles never leaves the State of Minnesota, but the owner claims a right to register the vehicle in the truck-mile class because it is engaged only in providing continuous movement for the goods being transported in interstate commerce."

In our opinion the motor vehicle referred to in your inquiry, upon the basis of the conditions of operation as set forth therein, may be registered as "engaged exclusively in transporting property in interstate commerce" so as to be entitled to registration in the "truck-mile-tax" class provided for in the motor vehicle registration and taxation act, particularly

provided for in the provisions of Subdivisions (a)-3 and (a)-4 of Section 2674, 1936 Supplement to Mason's Minnesota Statutes of 1927, as amended by Laws 1937, Chapter 346.

Dunnell's Minnesota Digest, Vol. 3, Section 4894, in part, sets forth the following rule as to what constitutes "interstate commerce," to-wit:

> "The sale and shipment of goods from one state to another constitutes interstate commerce. Interstate commerce is not confined to the sale of commodities. * * * The transportation of property by a common carrier, including the rates to be charged therefor, is commerce. Transportation between two points in this state over a route extending across a neighboring state is interstate commerce. Shipments between two points within the state, the route of transportation being wholly within the state, are not interstate commerce, and the provisions of the Interstate Commerce Act are inapplicable. * * * See cases cited thereunder.

Words and Phrases, First Series, Vol. 4, page 3724, defines "interstate commerce" as follows:

> "Interstate commerce is commerce between two or more states of the Union."

Words and Phrases, Second Series, Vol. 2, page 1166, reads as follows:

> "The importation into one state from another is the test of 'interstate commerce.'"

See U. S. v. Colo. & N. R. Co., 157 Fed. 321, 323, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893.

Words and Phrases, First Series, Vol. 4, page 3725, reads as follows:

> "'Interstate commerce' is not business done within a state, but is business done between two or more states, or business commenced in one state and ended in another. * * * A contract for the carriage of goods from one state to another is an entire contract, and is an interstate contract, and the carriage of goods under such contracts is interstate commerce, and is not business done within any of the states from, through, and to which they are carried on such account. Western Union Telegraph Company v. City of Fremont, 58 N. W. 415, 423, 39 Neb. 692, 26 L. R. A. 698."

LOUIS F. SOUKUP,
Special Assistant Attorney General.

April 19, 1938. 632e-14

314

MOTOR VEHICLES—Taxation—Manufacturers retail list price as base price.

Hon. Mike Holm, Secretary of State.

In connection with your file B10E18 you attach copies of reports or

statements required by the provisions of Section 2692, 1936 Supplement, Mason's Minnesota Statutes of 1927, of the motor vehicle act which your department received from Buick, Hudson and Chrysler automobile manufacturers and from which said reports or statements, pursuant to the provisions of said Section 2692, and Section 2674, 1936 Supplement, Mason's Minnesota Statutes of 1927, your department determines the base price of each of the motor vehicles listed in said manufacturers' statements for taxation purposes for the year 1938.

The Buick manufacturers in their statement quote the **advertised delivery price at the factory** and the **list price at the factory.** The **advertised delivery price at the factory** in all instances of the automobiles listed in said statement being different and greater than the **list price at the factory.**

You state that "in conference with the Minnesota distributor for the Buick Company, we learn that this difference is made up of the federal tax and handling and delivery charges" and that "it would seem that because of the nature of these items composing the added price, our Minnesota motor vehicle registration tax should not be computed on the so-called 'Adv. Del. Price.' "

You state that you also learned that the automobile manufacturers in the past have used the term "List price at the factory" to designate only the price of the stripped chassis and that now the term is used to include such accessories as bumpers, spare tire, lighting equipment et cetera.

The Hudson manufacturers in their statement quote a "List Price for License Purposes" which you state is "evidently a special list they have computed for use in Minnesota with the purpose of making present quotations comparable with quotations in the past."

The Chrysler manufacturers in their statement quote "Delivered at Detroit prices" and suggest that " 'In States wherein the registration fee depends on a list price such a price may be taken as ninety per cent (90%) of the Delivered at Detroit price.' "

Your file B10E20 is intended to supplement your file B10E18. Attached
6 6
thereto is a copy of a statement you received from the Pierce-Arrow Motor Corporation, which you state "sets out more clearly than the other reports did the computation by which they arrive at the so-called 'Delivery Price at the Factory.' " For instance said statement of the Pierce-Arrow Motor Corporation sets forth the computation relative to model 1701, chassis 139" as follows, to-wit:

"1937 List	Extra Tire and Tube	Adv. & Del. Chg.	Federal Tax on Car & Tire	Adv. Factory Del. Price
$2650	$27.65	$90.00	$47.59	$2820"

You ask:

"Kindly advise what we shall use as the **'Base price'** for computing the motor vehicle registration tax for 1938. Shall we take the

so-called 'Delivery price at the factory' or the quoted 'List price at the factory' in its new significance.

"If neither of these, shall we take the arbitrary list suggested by the factory to be computed by a certain percentage reduction, or their list price quoted for 'License purposes.' "

We answer your inquiries thus:

It is our opinion that your department should use as the base price for computing the motor vehicle registration tax of the motor vehicles listed in the statements of the respective manufacturers for the year 1938, the price for which the manufacturers sell the said motor vehicles listed in said statements as of October 1, 1937, at the factory, at retail.

We construe the terms "base price" and "list price at the factory" in Section 2674 and the term "retail list price" in Section 2692 as having the same meaning, that is we construe the terms "base price," "list price at the factory" and "retail list price" to be the price at which manufacturers sell the automobiles listed in the manufacturer's statements on October 1, 1937, at the factory at retail.

It follows that if the so-called "Adv. Del. Price At Flint, Mich." in the Buick statement and the so-called "Delivered at Detroit Prices" in the Chrysler statement, and the so-called "List Price for License Purposes" in the Hudson statement and the so-called "Adv. Factory Del. Price" in the Pierce-Arrow statement are, in fact, prices at which the respective manufacturers sell the automobiles listed in their respective statements on October 1, 1937, at the factory at retail, it is our opinion that such respective prices should be used by your department as the "base price" within the provisions of Section 2674 for the purpose of computing the registration tax for 1938 to be imposed upon each of the motor vehicles listed in the respective manufacturer's statements.

As respecting whether or not accessories, such as bumpers, spare tires, lighting equipment et cetera, are to be included, we submit that all accessories included by the manufacturer in the retail sale price of the motor vehicles at the factory should be included by your department in the base price. This is evidently the intention of the provisions of Section 2692, Mason's Minnesota Statutes of 1927, pertaining to added accessories not included in the factory list price.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

November 4, 1937. 632a-25

315

MOTOR VEHICLES—Zones—Mail Carriers.

Hon. N. W. Elsberg, Commissioner of Highways.

You ask as to whether or not vehicles used exclusively for rural mail

route purposes may be operated beyond the limits of the 35 mile zone when registered in Class X. You also wish advice as to whether or not a vehicle used on the Star mail route, that is, carrying mail from one postoffice to another, may be operated beyond the 35 mile zone while engaged in carrying United States mail, the vehicle carrying such mail being now registered under Class X registration.

You refer to an Attorney General's opinion dated January 23, 1934, which indicates that a rural mail carrier operating a truck in Class X registration is not obliged to comply with all requirements of Section 2672, Mason's Minnesota Statutes as amended, which provides in part that the postoffice address of the owner or the zone selected for operation shall be stencilled by the owner in a conspicuous place on said motor vehicle. Such opinion relates only to stencilling and it is held that under the facts as presented in the request for opinion, that the operator of the motor vehicle is not allowed to stencil any name on the vehicle, presumably pursuant to some Federal regulation. The opinion is then predicated on this assumption that there is a Federal law or regulation that does not permit any stencilling of vehicles used by rural mail route carriers and, therefore, the opinion states that the Federal law would govern and that the owner of such vehicle used in such mail route is thereby exempt from such regulation requiring stencilling. The opinion is directed to vehicles used exclusively for rural mail route purposes.

Mason's Minnesota Statutes, Section 2673, defines the vehicles exempt from motor vehicle licenses and private vehicles used exclusivly for carrying mail are not included within the terms of the law regarding exemptions from motor vehicle license fees. Such motor vehicles presumably are owned by private individuals who have contracted with the Federal government for carrying mail. Such vehicles, accordingly, are subject to state motor vehicle licenses, in the proper classification, the same as all other motor vehicles in the State. Section 2672 defines Class X trucks and permits the operation of trucks registered under Class X to be operated only within the zone prescribed, being a zone circumscribed by a line running parallel to the corporate limits of any city or village or contiguous cities and/or villages and 35 miles distant therefrom.

Under the definition, the type of motor vehicle concerned with herein is not permitted to operate beyond the 35 mile zone under X classification, and necessarily therefore, if such vehicles are operating beyond the 35 mile zone, such vehicles are improperly licensed and should be required to have Y license plates. Motor vehicles used in transporting mail under contract to the Federal government are not among the exemptions which permit certain trucks of Class X classification to be operated beyond the 35 mile zone, and not being so included within the exemptions, such vehicles with X classification must necessarily keep within the 35 mile zone or be required to carry Y license plates.

ORDNER T. BUNDLIE,
Assistant Attorney General.

May 16, 1938. 632e-36

316

NEWSPAPERS—Legal—Qualifications for.

Mr. E. A. Hauser, City Attorney.

You state and ask:

> "There are two weekly newspapers in Sleepy Eye.
>
> "If they buy a newspaper press jointly and locate it in the plant of one of the papers, would the paper in whose plant it is not located qualify as a legal newspaper if it carried in its masthead both the address of its main business office and the address of the building in which the press is located?"

Assuming for the purpose of our opinion that the newspaper in whose plant the press referred to is not located is now a legal newspaper within the meaning of Section 10935, 1936 Supplement Mason's Minnesota Statute 1927, relating to qualifications of a legal newspaper, and that it is merely the intent of said newspaper to do its press work on said press in the plant of the other newspaper, in other words, to merely change its place of publication, it is our opinion that such newspaper would retain its qualifications as a legal newspaper within the said provisions of said section 10935.

We regard the fact that the press work if done by said newspaper under the circumstances in the plant of the other newspaper as nevertheless a compliance with subdivision 2 of said section 10935 and that that fact merely indicates a change of the place of publication of said newspaper which is permitted under the provisions of the last paragraph of said section.

The masthead may carry both the address of the main business office of said newspaper and the address of the building in which the press is located, but we deem it sufficient if the masthead carries merely the address of said business office of said newspaper.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

April 19, 1938. 314b-11

317

NEWSPAPERS—Change of ownership—Change of place of publication within same county.

Mr. Edward L. Rogers, County Attorney.

You state:

> "The Walker Pilot, Walker, Minnesota, a weekly newspaper has been mailed from the village of Walker, Cass County for the past

40 years. Some 7 years ago it was bought by the Cass County Independent, and thereafter all of its press and job work has been done at the plant of the Cass County Independent, some 8 miles east of Hackensack, in this county. At the Walker offices of the Walker Pilot there has been maintained a Manager who is an expert printer, gathers all local news and writes the editorials. The entire press work in the printing of the Walker Pilot however, is done by the Cass County Independent. After such paper is printed they are mailed to the Manager at Walker, who mails them from the Walker Post Office. The same complies with all the legal requirements of a legal newspaper, except that all of the press and job work is done outside of the village."

You inquire:

"Is the Walker Pilot a legal newspaper?"

In view that in your letter, in addition to the above, you make reference to the last paragraph of Section 10935, 1936 Supplement, Mason's Minnesota Statutes of 1927, we assume that the Walker Pilot was a legal newspaper prior to the time it was bought by the Cass County Independent, and, therefore, we answer your inquiry in the affirmative.

We direct your attention to Section 10935, 1936 Supplement, Mason's Minnesota Statutes of 1927, which said section relates to qualifications of a legal newspaper. It is clear therefrom that neither the change of ownership nor the change of place of publication from one place to another within the same county deprived the Walker Pilot of its standing as a medium of legal publication.

It also clearly appears from the information you submit that since the Walker Pilot was bought by the Cass County Independent, it has been and still is being printed from its new known office of publication within the same county, Cass County, and that the press work on that part of the newspaper devoted to local news of interest to the community which it purports to serve as well as all other press work is done in its new known office of publication, all of which is in due conformity with the qualifications set forth in said Section 10935.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

December 22, 1937. 314b-17

318

NEWSPAPERS—Suspension caused by fire—Legal Status.

Mr. Walter T. Ryan, City Attorney.

You state that the City of South St. Paul has always used the South St. Paul Daily Reporter as its paper for the publication of legal notices; that on the night of July 22, 1937 the South St. Paul Daily Reporter had

a fire in its building by reason of which the building and a substantial amount of the paper's equipment was seriously damaged; that for a period of more than twenty years prior to the fire the paper had been continuously duly qualified as a legal newspaper as defined by the Minnesota statutes.

On behalf of the City of South St. Paul you submit five questions for our opinion which we hereinafter quote and answer separately.

First question:

> "If the South Saint Paul Daily Reporter suspends publication for a period not exceeding three months, will it be a duly qualified legal paper after resuming publication under Section 10935, Sub-Division 4, Mason's Minnesota Statutes 1927 and Supplement 1936?"

We answer your first question in the affirmative. In our opinion, under the provisions of Section 10935, 1936 Supplement, Mason's Minnesota Statutes of 1927, suspension of publication of a legal newspaper for a period of not more than three months resulting from the destruction of the office and equipment by fire or by elements of other unforeseen accidents to the equipment does not effect the legal qualifications of the newspaper after resuming publication.

Second question:

> "If during a temporary period the paper is printed in a County other than Dakota County but actually put in circulation from the South Saint Paul Daily Reporter's office in South Saint Paul, will its legal status be in any manner effected during such temporary period?"

It is our opinion that during the temporary period that the South St. Paul Daily Reporter would be printed in a county other than Dakota County, that is outside of the county in which its known office of publication is located, the newspaper would not be a legal newspaper during that period even though it would be actually put in circulation from its known office of publication at South St. Paul in Dakota County. It appears that in such case the newspaper would not meet the requirements of Subdivision (1) which provide that "A newspaper in order to be qualified as a medium of official and legal publications, shall: (1) Be printed in the English language from its known office of publication within the city * *" and the requirements of Subdivision (2) which provide that "the press work on that part of the newspaper devoted to local news of interest to the community which it purports to serve, shall be done in its known office of publication," and that the change of place of its publication to another county would not conform to the provisions of the last paragraph of said Section 10935 which provide that "Neither * * the change of * * place of publication from one place to another within the same county shall deprive it of standing as a legal newspaper * *."

Third question:

> "If during a temporary period the South Saint Paul Daily Reporter has at least two-hundred fifty copies of its paper printed by a publish-

ing company within South Saint Paul and all of such copies circulated from its own office, will its status as a legal newspaper be in any manner effected during such temporary period?"

We answer your third question in the negative. The question indicates that the provisions of Section 10935 (4) which provide that a legal newspaper must "Be circulated in and near its place of publication to the extent of at least two hundred and forty copies regularly delivered to paying subscribers" would be complied with, and that the newspaper, the South St. Paul Daily Reporter, would merely change the place of its publication from one place to another within South St. Paul in Dakota County within the provisions of the last paragraph of Section 10935 permitting such change **within the same county** without in any way effecting its standing as a legal newspaper. We, of course, assume that the South St. Paul Daily Reporter has entry as second class matter in its postoffice at South St. Paul.

Fourth question:

"Do the provisions of Section 10934, Mason's Minnesota Statutes 1927, permit the South Saint Paul Daily Reporter to completely suspend publication for a period of one week without its status as a legal newspaper being in any manner effected after resuming publication?"

We answer your fourth question in the affirmative.

Fifth question:

"The paper has heretofore always been a daily paper, supposing it changes from a daily paper to a weekly or semi-weekly paper, will such change in any manner effect its status as a legal paper?"

It is our opinion that the status of the newspaper as a legal publication will not be effected by either of the proposed changes, that is, if it changes from a daily to a weekly or semi-weekly publication. It will be the same newspaper except that certain publications thereof are discontinued.

We may add, however, that there exists a very serious question of whether a notice which was being published on one of the days that ceases to be a day of publication after the change is made can be published on one of the other days. The statute now requires the publication of a notice to be at regular intervals, and in our opinion a change from a daily to a weekly or semi-weekly publication would prevent the publication of any running notice on any other day of the week except on which it was originally commenced.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

July 27, 1937. 314b-6

319

NOTARY PUBLIC—Sureties—Insolvency of.

Miss Evelyn C. Kelly, Notarial Clerk.

You request an opinion as to the correct procedure to be followed in the case of a bonding company or surety becoming insolvent after the issuance of a notarial commission. Assuming that to be correct, it is our opinion that the person appointed and commissioned as a notary public should be informed of the insolvency of the bonding company or of the insolvency of the surety; that he must furnish a new bond in some solvent company or with suitable individual sureties within a specified time; that if he does not do so, his office as notary public will be declared vacant under the provisions of Section 6953, Mason's Minnesota Statutes of 1927; or that he may, instead of complying with the aforesaid, if he deems it advisable so to do, resign from his term of office covered by the bond of the insolvent company or by the bond of the insolvent surety, and make an application for a new appointment and commission, furnish a new bond in some solvent company or with a suitable individual surety, and pay the required fee of $3.00 to the Governor's secretary as in the case of ordinary new applications.

The law is deficient in not requiring the notaries public to keep the Secretary of State or the Governor informed as to their postoffice addresses. It seems to us that your office should use reasonable diligence to inform itself as to the postoffice addresses of the notaries bonded in an insolvent bonding company or with any insolvent surety, and informing them as soon as their addresses can be ascertained of the insolvency of the bonding company furnishing their bond, or of the insolvency of the sureties, as the case may be.

For your information in connection with the above we herein enclose a copy of a former opinion of this office dated November 19, 1912, addressed to Hon. Ralph W. Wheelock, secretary to the Governor.

Further it seems that you want an opinion as to whether or not a notary public's commission terminates automatically on the failure of the bonding company or the surety. Assuming that to be correct, we answer the same in the negative. This office has previously held that a notary public who has been duly commissioned and has taken an oath, and who is acting pursuant thereto, remains a notary de facto although his official bond has been impaired by the insolvency of the surety. We enclose herein copy of an opinion of this office dated October 25, 1933, addressed to Miss A. V. Egan, notarial clerk, Office of the Governor, to that effect.

Mr. Lemon, in his letter states that the Lemon Insurance Company executed and furnished a notarial bond in the Detroit Fidelity and Surety Company for a Miss Boyne, on April 21, 1930; that in August, 1933, the said Detroit Fidelity and Surety Company went into bankruptcy; that thereupon the Lemon Insurance Company furnished a new bond in the Fireman's Fund Indemnity Company "which I should think would run and

qualify Miss Boyne as a Notary, from August, 1933, for seven years." Mr. Lemon's inquiry: "does it, or does it only qualify her as Notary until April, 1937, the seven year period for which she would have originally been bonded by the Detroit?"

In our opinion, under the facts stated, Miss Boyne is only qualified as a notary public until April 21, 1937, assuming of course, that she was commissioned a notary public on April 21, 1930. She is qualified as a notary public only for the term for which she was originally appointed and commissioned.

We herewith return Mr. Walter T. Lemon's letter which you submitted to this office in connection with this matter.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

May 15, 1937. 320b

320

NURSERIES—Inspection of—Fees for, are charge for services rendered and are not a tax.

Mr. A. G. Ruggles, State Entomologist.

You give us facts as follows:

"Minnesota Mason's Statutes 6145 as amended requires that any nursery stock before it is moved from place to place within the state must be inspected and a copy of a certificate stating the fact attached to the package. Other states require that nursery stock be inspected in the state of origin before shipment is made and a copy of a certificate attached.

"A number of the federal nurseries in the state ask us to perform this work for them. We are glad to comply with their request even if they were not going to ship, because it is our job to see that nursery stock is clean from dangerous insects and plant diseases. But practically all these nurseries do some shipping either within or outside of the state and according to our Minnesota law require a certificate of inspection.

"On November 4, 1937, the nursery manager at the Soil Conservation Nursery at Winona requested that we issue him a nursery inspection certificate in order that he might ship some nursery stock to Maryland. We had already at his request made the inspection. The nursery was found free from dangerously injurious insects and plant diseases and was entitled to a certificate on payment of fee. On December 3, 1937, I received a letter from the Federal Accounting Office disallowing the charge of $25.00 for inspection fee on the grounds that the charge is a tax by a state against the Federal Government

and that a state was without authority to restrict or interfere with the operation of a nursery by the United States."

You inquire, in view of the foregoing facts, whether or not the inspection fee of $25.00 as provided for by said Section 6145 et seq. as amended is an inspection fee or whether or not it could be construed to be a tax.

It is apparent from an examination of the statutes in question that their object is one which rightfully falls within the police power of the state and are designed for the purpose of preventing fraud and imposition on the purchasing public in the sale of a commodity, the quality of which is not readily ascertainable, and also to prevent the spread of infectious, contagious or injurious plant diseases and injurious and dangerous insect pests. Such laws having for their general objects the subjects in question have been declared to be within the police power of the State. State v. Bartles Oil Co. 132 Minn. 138, 155 N.W. 1035, L.R.A. 1916 D. 193.

The statutes in question provide a complete working law and in order to carry them out effectively and efficiently, a fee for inspection is provided. The fee involved in each inspection is varied for the work done. In other words the fee for inspection of strawberry plants, evergreen, herbaceous plants, bulbs and roots, is fixed at $10.00; for the inspection of fruit plants together with the plants mentioned heretofore, the fee is fixed at $15.00, and for the inspection of a general nursery stock including any and all of the foregoing plants, a fee of $25.00 is made by the statute. The inspection provided for is one of great detail and is very carefully done. Such an inspection must be done by trained experts, and it should readily be appreciated that the fee for such inspection is a very small charge in consideration of the work done. Such an inspection fee therefore is for services rendered and cannot be construed to be a revenue raising measure.

In the case of State v. Bartles Oil Co. 132 Minn. 138, 155 N.W. 1035, L.R.A. 1916 D. 193, it was held that the law providing for testing of gasoline, and requiring that it be branded, was a proper police measure and that it was not open to the objection that it was a revenue law clothed in the guise of an inspection law, and that the charges for the inspection being reasonable, such charges being only intended to cover the cost of making the inspection, could not be construed to be a revenue raising measure.

So too the same law was held to be valid by the Supreme Courts of Minnesota and of the United States in the case of State v. Pure Oil Co. 134 Minn. 101, 158 N.W. 723, 248 U.S. 158, 39 S.Ct. 35, 63 L.Ed. 180.

The rule of law stating that such inspection fees are not to be construed as a tax is found in 32 Corpus Juris 934, Section 10, wherein it is stated:

> "As an incident to its power to enact valid inspection laws, a state may impose a reasonable fee or charge for the purpose of defraying the expenses of inspection, and such a fee is not a tax"

The Supreme Court of the United States and courts of jurisdictions of various states have construed such laws and held that the fees were

not to be considered a tax. See Texas Co. v. Brown, 266 Fed. 577, affirmed 258 U.S. 466, 42 S.Ct. 375, 66 L.Ed. 721; People v. Harper, 91 Ill. 357; Louisiana State Board of Health v. Standard Oil Co., 107 La. 713, 31 S. 1015; St. Louis v. Grafeman Dairy Co., 190 Mo. 492, 89 S.W. 617, 1 L.R.A. (N.S.) 936. From the foregoing cases in the jurisdictions wherein the matter has been of judicial inquiry, the rule seems to be universal that such an inspection fee is not to be termed a tax.

The only other objection which could arise, that to the mind of the writer might be pertinent, is that of unreasonableness of the inspection fee. That claim is not made here but we think that it is not amiss to consider the same in view of the fact that an unreasonable inspection fee might be termed a tax.

Section 6145-8 Mason's Minnesota Statutes of 1927 as amended, provides for a graduated fee for inspections as are desired or are necessary and states that such fees are for inspection. As above pointed out, the work involved is very detailed and requires highly trained and well equipped inspectors. The legislature might well determine that the inspection fees provided for by the act conform to the requirements of the inspection, and if as time goes on and the eradication of plant diseases and insect pests is accomplished or lessened, the legislature might in its wisdom and discretion reduce the fees if and when that time should come.

The Supreme Court of the United States has recognized such a situation in the cases of Patapsco Guano Co. v. Board of Agriculture, 171 U.S. 345, 43 L.Ed. 191, 18 S.Ct. 862, and Red "C" Oil Manufacturing Co. v. Board of Agriculture, 222 U.S. 380, 56 L.Ed. 240, 32 S.Ct. 152, wherein it was stated that where the Court is unable to conclude that an inspection fee is seriously in excess of what is necessary for the purpose of inspection, it will assume that, if experience will show that the fee is excessive, the necessary corrections will be made in the orderly conduct of the business of the state to cause the act to conform to the authority of the legislature.

From the facts stated and from an examination of the law relating to the question involved which is supported by the cases and law cited, we are of the opinion that the $25.00 charge is an inspection fee and may not properly be classified as a tax and is therefore a charge which may be properly made to the nursery involved, by your department.

JOSEPH M. DONAHUE,
Law Assistant.

Feb. 1, 1938. 923e

321

OLD AGE ASSISTANCE—Appeals by applicants to state agency.

State Board of Control, Division of Old Age Assistance.

You state and inquire:

"Some question has arisen as to the province of the State Agency on appeals to it by applicants who are dissatisfied with the action of

the County Agency under the provisions of Section 11 of the Old Age Assistance Act (Extra Session Laws of 1935-36, Chapter 95).

"It has been the contention of some counties that the State Agency on an appeal hearing is limited to a consideration of the facts in a particular case as they existed at the time of the consideration of the case by the County Agency, and that subsequent and changed circumstances cannot be considered by the State Agency in its hearing.

"The State Agency has construed the appeal provisions as allowing the State Agency to consider all matters before it at the time of its hearing; in other words, that the hearing before the State Agency is a trial de novo, at which time all existing pertinent facts may be considered. Is the State Agency right in this construction?

"The State Agency, under the Old Age Assistance Act, Section 11, may make such additional investigation as it may deem necessary, and shall make such decision as to granting of assistance and the amount and nature of assistance to be granted the applicant or recipient as in its opinion is justified and in conformity with the provisions of this act.

"Does the last mentioned provision permit the State Agency to make an ex parte investigation subsequent to the hearing, and utilize such additional information in arriving at a decision?"

We deem that the aforesaid inquiries are the result of the decision of the District Court for Hennepin County dated May 17, 1938, in the matter of the application for old age assistance of Belle Glover.

In view of the provisions of our Old Age Assistance Act, particularly in view of the provisions of Section 3 (b) and Section 34 thereof, this office deemed it proper and necessary to submit your inquiries and a copy of the decision of the Hennepin County District Court, above referred to, to the Federal Social Security Board for its opinion, and this office did submit the same under date of October 3, 1938. On October 26, 1938, the following opinion of the Federal Social Security Board, signed by Helen M. Dart, Acting Regional Representative, was rendered to Mr. Benjamin E. Youngdahl, Director of Assistance, State Board of Control, to-wit:

"In connection with our discussion of the Belle Glover case, I have had some further discussion and some advice from our General Counsel's office which will be of interest. While, as you point out in your letter of October 11, it is entirely possible for the state to reopen the case in regard to any client by filing a new application, I still think the question is pertinent as to whether such procedure would not weaken the supervisory authority which the state has and also tend to detract from the value of the whole fair hearing procedure. I would like to quote directly from a memorandum which I have just received in response to my inquiry:

'The District Court seems to have held that the State Agency is limited in its review of any case to the consideration of facts existing at the time of the hearing and determination of the ques-

tion by the county authority. If the State Agency is to be bound by this opinion, it will become merely a reviewing agency and will not have the supervisory or administrative powers required under the Social Security Act. Although the administration of a plan in local areas may rest either with the State Agency or with an appropriate political sub-division, in either case the State Agency is held responsible by the Social Security Board for the efficient and uniform administration of the State plan.

'The fair hearing procedure prescribed by the Social Security Act is an **administrative** procedure designed to assure adequate consideration of an individual's rights and needs rather than a judicial procedure for the purpose of passing upon the legality of county action. The State Agency must be in a position to assure assistance to every eligible applicant or recipient in accordance with his current needs. The State must be able to maintain uniform standards and to avoid discrimination as between various recipients in various parts of the State. In order to do this, the State must have the power to make investigation and take action at any time with respect to the current circumstances of any recipient or applicant.

'The second question addressed by the State Agency on September 21 to the attorney general was whether the State Agency is permitted "to make an ex parte investigation subsequent to the hearing and utilize such additional information in arriving at a decision." We believe that this procedure would violate one of the principal requisites of a fair hearing; namely, the right of the individual involved to hear all evidence on which the decision on an appeal is to be made. Any information considered in making a decision in a fair hearing case should be introduced at the hearing. The individual is always entitled to be heard in respect of any State Agency decision affecting his status. This is not to be interpreted, however, as affecting the power of the State Agency to make investigations and determinations with respect to individuals at times other than during a hearing.'

"I would also like to quote further from a memorandum prepared by the General Counsel's office:

'I have your memorandum of October 6, 1938, to which I find attached a copy of the inquiry submitted by the office of the attorney general of the State of Minnesota. The attorney general asks whether an old age assistance plan would meet certain requirements of the Social Security Act if the state agency, in reviewing decisions of the county subdivision, were limited as indicated in the decision of the District Court for Hennepin County.

'That court seems to have held that the state agency is limited in its review of any case to the consideration of facts bearing upon the applicant's need as they existed at the time of the hearing and determination of the question by the county authority.

'In our opinion you should advise the state officials as follows:

"Under the Social Security Act and, as we have assumed, under the Minnesota law, the state agency is a **supervisory** and not merely a **reviewing** body. In fact there is only one agency in our view, and that is the 'State Agency.' The state agency, as such, moreover, assumes full responsibility for all awards currently paid in which the Social Security Board participates under the theory of the Social Security Act.

"The difference between action in a supervisory capacity and action in a reviewing capacity is well expressed, we think, by Mr. Justice Brewer in the case of **Orchard v. Alexander,** 157 U. S. 372, at p. 381. There Mr. Justice Brewer pointed out that, having supervisory powers, the secretary in question did not have to 'sit quietly by and allow a proceeding to be consummated' but could intervene and 'direct action' as seemed to him advisable in the particular case.

"It should be carefully noted that we are assuming a supervisory power only as between the county and state officials. Such is, however, the essential purpose and contemplation of the federal requirement of administration or supervision by a single state agency; namely, that the state agency shall have the power to act upon its own motion without appeal being made to it by anyone. Of course the law makes it clear that the recipient of assistance will be entitled to a fair hearing before that same state agency in relation to any decision which it makes affecting him or his rights. It must be plain, however, that the state agency could not maintain uniformity and avoid discrimination as between various recipients in various parts of the state if it did not have the power to direct investigation to be made and action to be taken at any time in relation to any recipient."

'The trouble that we have with the decision of the Minnesota District Court as we see it is the fact that it applies procedural limitations of a purely judicial nature in such manner as to nullify the advantages of more flexible administrative procedure which it is the apparent purpose of the legislature to procure.' "

In our opinion the aforesaid opinion of Helen M. Dart, Acting Regional Representative of the Federal Social Security Board, answers your inquiries completely.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

November 4, 1938. 521b-2

322

OLD AGE ASSISTANCE—Appeal pending—Payment as determined by state agency to be made.

Mr. Austin L. Grimes, County Attorney.

You ask for an opinion concerning the following which we quote from your letter, to-wit:

> "The county agency has awarded old age assistance to a recipient. The recipient being dissatisfied with the amount of the award appealed to the state agency. The state agency has made an increase in the amount of such assistants. The county agency has appealed to the District Court from the decision of the state agency. Pending the appeal to the District Court, the county agency contends that the amount to be paid to the recipient is the amount which has been heretofore fixed by the county agency in making the award. The state agency contends that the amount to be paid pending the appeal to the District Court by the county agency is the increase in the amount of the award."

You quote and refer this office to the provisions of Section 11 (b) of the Old Age Assistance Act, Extra Session Laws 1935-36, Chapter 95, as amended by Laws 1937, Chapter 482, which reads as follows:

> "During the pendency of said appeal, if the state agency has awarded old age assistance to a recipient, said old age assistance shall be paid to him pending the determination of said appeal. If said appeal shall be from the order of the state agency raising or lowering the amount paid to a recipient, and if the order of the state agency shall not be sustained, then the recipient shall receive the amount, if any, theretofore fixed by the county agency."

Answering your inquiry, it is our opinion that the contention of the state agency, as set forth in your statement of facts: "The state agency contends that the amount to be paid pending the appeal to the District Court by the county agency is the increase in the amount of the award," is correct.

Section 11 (b), from which you quote, relates to appeals to the state agency, to the district court and to the supreme court. Subdivision (a) thereof expressly provides that: "All decisions of the state agency shall be binding upon the county involved and the applicant or recipient **and shall be complied with by the county agency unless modified or reversed on appeal * * *.**"

LOUIS F. SOUKUP,
Special Assistant Attorney General.

July 27, 1937. 521c

323

OLD AGE ASSISTANCE—Claims against estates of deceased recipients—

Duty of county agency to file claims.

State Board of Control, Division of Old Age Assistance.

You state:

"The first case is being tried in Probate Court wherein the Marshall County Agency is making a claim against the estate of a person now deceased for funds granted under the Old Age Assistance Act. The court has referred to us their question as to whether or not in filing claims in the Probate Court, the County Agency is the proper party to make and file such a claim which represents three separate parties; namely, the federal government, the state government, and the county government, of which the least party in interest is the county agency. The objection is raised that either the county can claim only one-sixth of the funds granted or that the claim must be jointly made out by the State Agency, the Federal Agency, and the County Agency, or that either the State or Federal Agency but not the County Agency is to be responsible for making the claim."

We direct your attention to the following provisions of the Old Age Assistance Act, Special Session Laws of 1935-36, Chapter 95, to-wit:

Section 2 (d) provides in part as follows:

"When used in this act the term:

"'County agency' or 'county agencies' shall mean the board of county commissioners, or such other board as may be hereinafter authorized to administer this act in any county * * *."

Section 3 (a) reads as follows:

"The state agency shall:

"Supervise the administration of old age assistance by the county agencies under this act."

Section 4 (a) reads in part as follows:

"The county agencies shall administer the old age assistance system in their respective counties under the supervision of the state agency * * *."

Section 15 reads as follows:

"On the death of any person who receives any old age assistance under this or any previous old age assistance law of this state, or on the death of the survivor of a married couple, either or both of whom received such old age assistance, **the total amount paid as old age assistance** to either or both, without interest, **shall be allowed as a claim against the estate of such person or persons by the court having juris-**

diction to probate the estate. The statute of limitations which limits the county agency or the state agency, or both, to recover only for assistance granted within six years shall not apply to any claim made under this act for reimbursement for any assistance granted hereunder." Section 17 reads as follows:

"Whenever any amount shall be recovered from any source for assistance furnished under the provisions of this act, there shall be paid to the United States the amount which shall be due under the terms of the Social Security Act and the balance thereof shall be paid into the treasuries of the state, county, town, village, borough or city in the proportion in which they respectively contributed toward the total assistance paid."

We answer the inquiry: "whether or not in filing claims in the Probate Court, the County Agency is the proper party to make and file such a claim which represents three separate parties; namely, the federal government, the state government, and the county government, of which the least party in interest is the county agency," in the affirmative.

The statutes, Sections 2 (d), 3 (a) and 4 (a) clearly indicate that it is the duty of the county agencies to administer the old age assistance system in their respective counties in the first instance and under the supervision of the state agency, which, of course, means that pursuant to the provisions of Section 15 of the act, above quoted, it is the duty of each county agency as a "county agency" to file claims in the probate courts for the **total** amount paid as old age assistance against the estate of a deceased recipient, and that if the county agency fails to file the claim, then it is the duty of the state agency to file the same. We do not believe that the probate courts need concern themselves with the amount contributed by each of the three separate governments, namely, by the county, state and federal governments. The point being that it is the duty of the county agency to file a claim for the **total** amount of assistance paid in the case of each deceased recipient. It is not the intent of the provisions of the old age assistance act that the claim need be filed by each of the three separate units of government. As a matter of fact, under the provisions of Section 17 above quoted, which provides that "whenever any amount shall be recovered from any source for assistance furnished under the provisions of this act, there shall be paid to the United States the amount which shall be due under the terms of the Social Security Act," it seems that the federal government cannot file a claim in the probate court for the amount paid as assistance out of federal funds. We have heretofore held that federal funds for old age assistance purposes when paid to the state by the federal government become state funds. Of course, we recognize the provisions of Section 17 and whenever any amount is recovered from any source including the source of the probate court in cases of claims against the estates of deceased recipients, that it then becomes the duty of the county agency and the state agency to pay to the federal government such amount as shall be due the federal government under the terms of the Social Security Act.

As herein previously determined, under the provisions of the Old Age Assistance Act herein quoted and referred to, the county agency is re-

sponsible in the first instance for the filing of claims in probate courts for the total amount of old age assistance paid to a deceased recipient. The matter of distributing the total amount recovered by virtue of the filing of the claim to the three separate units of government is a matter of administration of the provisions of the old age assistance act by the county agency under the supervision of the state agency, and entirely outside the province of the probate court.

January 6, 1937. 521g-1

LOUIS F. SOUKUP,
Special Assistant Attorney General.

324

OLD AGE ASSISTANCE—Conveyance to county for.

State Board of Control, State Office Building.

You ask for an opinion from this office concerning the inquiry submitted in the letter of Mr. Smith which is as follows:

> "The question arises as to whether or not the Beltrami County Welfare Board has authority, where they deem it advisable, to accept title to real estate in the name of the county through Probate Court proceedings in settlement of old age pension claims. Many times there is real estate in the estate which cannot immediately be sold for enough to pay the old age pension claim on file. But in some cases it is advisable to accept title to this land which avoids accumulation of additional taxes and places the county in the position where the land can be sold when the right time approaches. And if the county can accept title to such land in settlement of old age pension claims, is there any obligation on the part of the county to immediately pay to the State and Federal government their respective pro rata amount of the old age pension claim file, or can the matter remain status quo with a distribution made to the respective municipalities at the time of and when amounts are collected from the sale of these lands."

We answer the inquiry in the negative. There are no statutory provisions clothing any of the county welfare boards with authority to accept title to real estate in the name of the county through probate court proceedings in settlement of old age pension claims. However, we see no objection to keeping probate of an estate open for the purpose of making a reasonable disposal of the real estate involved in order to satisfy a claim against the estate for old age assistance payments made to the decedent. Upon recovery by any county welfare board of any money from an estate by reason of any such claim the county welfare boards should pay to the state and federal government their respective pro rata amount in accordance

with the provisions of Section 17 of Chapter 95, Extra Session Laws of 1935-36, and in accordance with the rules and regulations of the State Old Age Assistance Agency.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

November 15, 1938. 521g-1

325

OLD AGE ASSISTANCE—Discontinuance of—Establishment of new residence.

Mr. George T. Havel, County Attorney.

You direct the attention of this office to that part of Section 9 (a) of the Old Age Assistance Act, Extra Session Laws 1935-36, Chapter 95, which provides as follows:

> "For the purposes of this act every person who has resided one year continuously in any county shall have a legal settlement therein, and such legal settlement shall not be deemed lost or terminated until a new settlement shall have been acquired in another county of this state or acquired in another state."

and to that part of Section 26 which provides as follows:

> "Whenever a recipient changes his place of dwelling he shall notify the county agency in which his old age assistance certificate is in effect. If he removes to another county he shall declare whether such absence is temporary or for the purpose of taking up regular domicile."

and inquire:

> "Would you kindly inform me as to whether or not under the above provisions, after a pension has been granted, and the recipient has been absent and residing in another county, for over a year, is it permissible for the county agency to discontinue assistance on the grounds that they have established a new residence in the county in which they resided during such year?"

In our opinion it is not permissible, **under the above provisions,** after a pension has been granted and the recipient has been absent and residing in another county for a year, for the county agency to discontinue assistance **on the grounds that the recipient has established a new residence in the county in which he has resided.** There are no provisions to that effect in the statutes you refer this office to, nor in any other provisions of the Old Age Assistance Act. On the other hand, Section 26, above referred to, **in addition to the provisions you quote therefrom,** specifically and definitely provides that:

"The county originally granting old age assistance shall continue to pay the same regardless of change of residence within the state by a recipient."

A county agency may discontinue payments of assistance to a recipient only upon the grounds and for the reasons set forth in the provisions of Sections 20 and 22 of said Chapter 95. See Sections 20 and 22.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

April 22, 1937. 521t-5

326

OLD AGE ASSISTANCE—Homestead—Residence property of deceased recipient exempt.

Mr. L. A. Wilson, County Attorney.
You state and inquire:

"The County Board and our County Welfare Board have requested that I procure your opinion upon the following questions:

"1. J. and his wife, Mrs. J. have been recipients of Old Age Assistance from Mahnomen County under the provisions of Chapter 95 of the Special Session Laws of 1935-36. They had several children all of whom were of age, competent and under no disability. An adult daughter resided at home with her parents. She is unmarried. Mrs. J. was the owner of a residence property which constituted the family homestead. Neither J. or Mrs. J. owned any other property. J. died first survived by his said wife and children. He left no estate. Thereafter Mrs. J. died intestate survived by her children including her adult, single daughter who lived with her until her death. She left no estate except her said residence which had been her homestead, Section 15 of said Chapter 95 provides for the filing of claim against the estates of deceased recipients for Old Age Assistance payments made to them. Under the circumstances stated:

"(a) Is said residence property which was the homestead of the recipients exempt as homestead in the hands of the children as heirs at law or is the same subject to the payment of the claim for Old Age Assistance payments?

"(b) Would the rule be different if one or more of said children were minors? Or insane or incompetent? Or if some of the heirs at law are minor children of a prior deceased child of decedent? If there is an exemption in favor of minor or incompetent heirs is the same absolute and for all time or for the period of disability only?

"(c) Assuming that there is no homestead exemption in favor of the children in the case stated above could the deceased recipient have

devised the property to a child or children by will with a provision that the same be exempt from payment of all debts, in other words, could she have created an exemption by will which is not secured by law?

"(d) In the case stated above assume that Mrs. J. had predeceased her husband. The surviving husband would, of course, have a life estate in the homestead with remainder to the children and clearly such homestead would be exempt in so far as said life tenant is concerned but would it also be exempt in the hands of the remaindermen or reversioners upon the termination of the life estate? If so is such exemption limited or qualified in any way or is the same absolute and for all time?"

Answering your inquiry (a), it is our opinion that the residence property which was a homestead of the recipient is exempt as a homestead in the hands of the children as heirs at law, and that such homestead is not subject to the payment of the claim for old age assistance furnished to the decedent.

In connection herewith and for your information, we herewith enclose a copy of an opinion of this office dated April 6, 1936, addressed to the State Board of Control, State Office Building, and a copy of an opinion dated April 15, 1936, addressed to C. L. Erickson, Martin County Attorney, Fairmont, Minnesota.

Answering your inquiry (b), it is our opinion that the rule is not different if one or more of said children are minors or insane or incompetent or if some of the heirs at law are minor children of a prior deceased child of decedent, and that the exemption of the homestead in favor of such minor or incompetent child is absolute and for all time and not for the period of disability only.

Relative to your inquiry (c), in view of our answer to your preceding inquiry (b), we do not deem it necessary to answer your inquiry (c).

Answering your inquiry (d), it is our opinion that the homestead would also be exempt in the hands of the children as remaindermen or reversioners upon the termination of the life estate and that such exemption is not limited or qualified in any way and that the exemption is absolute and for all time.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

May 11, 1938. 521p-3

327

OLD AGE ASSISTANCE—Settlement—Husband and wife living apart.

State Board of Control, State Office Building.

You state:

"We have been confronted in a number of cases with the question as to the settlement for Old Age Assistance purposes of a married

woman and where her residence has been for a year or more in a different county than that of her husband. This has resulted in some instances from estrangement and separation of the parties, and in others from considerations of health and convenience and the like.

"Does Section 9 (a) of the Old Age Assistance Act abrogate or affect the common law rule as enunciated and followed in the case of City of Willmar v. Village of Spicer, 129 Minn. 395? If you should hold that the above mentioned rule is not affected by our Old Age Assistance Act, is it material that the parties live separate and apart whether estranged or otherwise, particularly where the wife has lived in a different county than her husband for a year or more?"

It is our opinion that the provisions of Section 9 (a) relating to residence and legal settlement for old age assistance purposes do not abrogate or affect the common law rule "that the settlement of a married woman is where her husband resides, has his settlement" enunciated and followed by our Supreme Court in the case of City of Willmar v. Village of Spicer, 129 Minn. 395, and that the same should be followed in the administration of old age assistance in the same manner as it is followed in the administration of poor relief.

This office has repeatedly held that the right of a man to fix the place of residence of his wife and family continues so long as he maintains the family relationship and discharges the duties thereof.

It is obvious that it is material that in order that a wife be entitled to establish her own residence and legal settlement and apart from her husband for old age assistance purposes that there must be some misconduct on the part of the husband which justifies the wife in living apart from him. It is our opinion that a divorce or failure on the part of the husband to furnish adequate support for his wife and children constitutes justification and that merely separation or living apart from the husband because of health and convenience may not in itself be sufficient justification for the wife to establish a residence and legal settlement of her own. In any event, every instance where the wife claims a residence and legal settlement of her own for old age assistance purposes involves questions of fact which must be determined from all the facts surrounding each particular case.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

August 14, 1937. 521t-2

328

OLD AGE ASSISTANCE—Incompetent recipient—Guardian for.

Mr. P. M. Lindbloom, County Attorney.

You inquire:

"Kindly advise me whether it is part of the official duties of County Attorney to institute guardianship proceedings for old people receiv-

ing assistance under the Old Age Assistance Law when it is deemed necessary for them to be placed under guardianship."

We answer your inquiry in the affirmative.

Section 12 of the Old Age Assistance Act, Extra Session Laws 1935-36, Chapter 95 in so far as herein pertinent provides as follows:

"The county attorney of each county shall be the attorney for the county agency in all matters pertaining to this act."

In our opinion the institution of guardianship proceedings for a person eligible for old age assistance, or a recipient thereof, who is found by the county agency to be incapable of taking care of himself or his money, is a county matter "pertaining to this act" within the meaning and intent of the provisions of Section 12 above quoted.

While the provisions of Section 18 of Chapter 95 provide for the payment of assistance "to any responsible person in trust for the recipient" who is "found incapable of taking care of himself or his money" and do not specifically provide for the institution of proceedings for the appointment of a guardian and for the payment of assistance to a guardian by the county agency in the case of such person, it is because the Federal Social Security Board, as a condition precedent to the approval of the Minnesota Old Age Assistance Act, Chapter 95, by the said Board, required the department of Board of Control, the State Old Age Assistance Agency, to adopt a rule and regulation in accordance with Section 3 and 34 of Chapter 95, specifically the rule and regulation in bulletin No. 22 issued by the state agency to all county agencies, which provides for the payment of old age assistance to a legal guardian in the case of such person, that we answer your inquiry in the affirmative.

We may state in connection herewith that payment of old age assistance by the county in the case of a person found incapable of taking care of himself or his money must be made to a legal guardian in order to entitle the county to reimbursement from federal funds for the assistance paid to such person.

Also in connection herewith we wish to advise that this office in an opinion dated July 22, 1936, addressed to Mr. Franklin E. Ebner, County Attorney of Crow Wing County, Brainerd, Minnesota, held that expenses incurred by the county agency in obtaining the appointment of a guardian to act for a recipient of assistance who is incapable of taking care of himself or his money is a proper county administrative expense.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

March 2, 1938. 521g-4

329

OLD AGE ASSISTANCE—May be granted—When.

State Board of Control, State Office Building.

Your request for an opinion from this office concerning the provisions of Section 5 (b) of the Old Age Assistance Act, Extra Session Laws 1935-36, Chapter 95, has been referred to the undersigned for attention.

Section 5 (b) of said Chapter 95 provides as follows:

> "(b) The amount and the manner of payment of old age assistance shall be fixed with due regard to the conditions in each case and shall be an amount which, when added to the net income of the applicant, including subsistence or service reasonably available to him, does not exceed a maximum of $30.00 per month, * * *."

You inquire, "does the language 'with due regard to the conditions in each case' contained in Section 5 (b) allow an applicant for Old Age Assistance to use his own personal earnings to take care of the needs of his legal dependents and allow us to grant him Old Age Assistance to take care of his personal needs if he does not have sufficient income to take care of both the needs of his legal dependents and his own personal needs?"

We answer your inquiry in the affirmative.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

May 5, 1937. 521i-2

330

OLD AGE ASSISTANCE—Warrants—Interest.

Mr. R. J. Stromme, County Attorney.

You state:

> "The county of Grant issued warrants to take care of the Old Age Assistance last year. The local banks have agreed to carry at four per cent and less. * * * But the Banks, since taking the warrants at a low interest, demand that interest be paid annually."

You inquire:

> "May the county pay annual interest on those warrants?"

You do not state whether the warrants concerned are ordinary outstanding warrants stamped, "Not paid for lack of funds," or whether such warrants were sold to the local banks pursuant to the provisions of Laws 1935, Chapter 121, or whether the county board agreed to pay interest at the time the warrants were issued.

If the warrants concerned are ordinary outstanding warrants, the applicable statute is Section 869, Mason's Minnesota Statutes of 1927.

This section permits the presentation, registration, and endorsement of warrants not paid for lack of funds and provides with certain limitations that warrants so endorsed "shall bear interest at the legal rate (6 per cent per annum) from such date of presentment." It further provides that interest shall cease thirty days after notice that funds for payment of the warrants are available. Then follows this provision:

> "No interest shall be paid on any order, except upon a warrant drawn by the county auditor for that purpose, giving the number and date of the order on account of which the interest warrant is drawn."

This office has previously held that the county board has no authority to order interest paid until money is available for the payment of the warrant; that the above quoted provision is controlling and nothing is left to the discretion of the board; that the mere reference to "interest warrant" in the above quoted portion of the statute is indicative of the intention on the part of the legislature to abrogate the rule that interest is payable only with the principal in the absence of expressed agreement for earlier payment. If the warrants concerned were sold to the local banks in accordance with the provisions of Laws 1935, Chapter 121, interest may be paid in accordance with the terms of the resolution of the county board authorizing the sale of such warrants.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

March 23, 1937. 521h-1

331

OLD AGE ASSISTANCE—Warrants not cashed prior to a recipient's death—Disposition of.

State Board of Control, State Office Building.

You state:

> "Do Old Age Assistance warrants that have been issued and delivered to the Recipient for Old Age Assistance payments, but have not been cashed prior to the death of the Recipient, become part of the estate of the deceased and pass to his heirs as other property?"

We answer your inquiry in the affirmative.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

March 25, 1937. 521g-3

332

PAINTERS—Contracting sign painters—Registration.

Industrial Commission of Minnesota, State Office Building.

You state that no individual, firm or corporation engaged in the business of sign painting has applied for a contractors' license. You inquire:

> "Shall the Industrial Commission proceed to prosecute contracting sign painters in cities of the first, second and third class in Minnesota for their failure to obtain contractors' licenses?"

You also state and inquire:

> "We assume it must follow that whatever your interpretation is regarding the status of the contracting sign painter, it will naturally follow that the journeyman sign painter will be governed thereby. As a practical problem in the administration of the law, we can see no way to enforce same when the journeyman is concerned in any other manner than we do when the contractor is involved. However, because we submitted this question to you on a prior date in such a manner that you were unable to give us a definite answer in your letter of July 12th, we request that your reply indicate the journeyman sign painter's status as well as that of the sign painting contractor."

Section 4 of Chapter 428, Laws of 1937, provides as follows:

> "(a) No person, firm or corporation shall engage in or work at the business of occupation of a painter unless registered to do so by the Industrial Commission of Minnesota. A Contracting painter may also work as a journeyman.
>
> "(b) No person, firm or corporation shall engage in the business of painting, decorating, paperhanging, preparatory work incidental thereto, unless at all times registered hereunder.
>
> "(c) The Industrial Commission of Minnesota shall prescribe rules and regulations not inconsistent herewith for the examination and registering of painters and shall require contracting painters to file a surety bond in a sum of $250 to protect persons against fraud, incompetent painting and the good faith compliances of all contracts by said Contracting painter."

Section 5 of said Chapter 428 defines a contracting painter as follows:

> "(a) A Contracting painter is any person skilled in the work of painting, decorating and/or paperhanging, and in the mixing and tinting of paints and painting materials, planning, designing, superintending, and estimating."

The answer to your first question depends upon whether in enacting Chapter 428, the legislature intended to include contracting sign painters in the definition of "contracting painters." In other words, the question is whether sign painters are covered by the provisions of the act.

The legislative intent is not entirely clear. The term "painter," standing alone, is broad enough to include all types of painters. We believe it is significant, however, that throughout the act the term "painting, decorating and/or paperhanging" is used. From information submitted to us it appears that the term "painting, decorating and/or paperhanging" is commonly used to distinguish the ordinary house or building painter from the various other types of painters. It is a term that has come to have a trade meaning.

The house or building painter applies paint to a surface for the purpose of beautifying, protecting, improving or preserving such surface. A sign painter usually applies paint to a surface for the purpose of making a sign composed of letters or pictures, or for the purpose of furnishing a background for such letters or pictures. The trade of sign painting appears to be distinct and separate from that of ordinary house or building painting.

It is probable that many expert sign painters would be unable to qualify as house or building painters, and that most house or building painters could not qualify as sign painters. Yet we find no provision in the law providing a different type of license for the two kinds of painters, and no provision which indicates that the same examination is not to be given to all applicants for a license.

For the reasons stated, it is our opinion that Chapter 428, Laws 1937, does not apply to sign painters who apply paint to a surface for the purpose of furnishing a background for a sign or for the purpose of making a sign on such background. Your first question is answered in the negative.

What we have said with reference to contracting sign painters is equally applicable to journeyman sign painters. This disposes of your second question.

WILLIAM D. GUNN,
Special Assistant Attorney General.

August 6, 1937. 636a-15

333

PAINTERS—Contracts.

Industrial Commission of Minnesota, State Office Building.

You ask:

"Can a general building contractor, who has not registered as a contracting painter, take a general contract for the building of a dwelling house, which of course would include the painting?

"This question also arises in the remodeling of store buildings, a general contractor taking the entire job, including plumbing, electrical work, painting, etc."

Mr. Richardson refers to Laws 1937, Chapter 428, and states that the painters in his county are of the opinion that the act was passed to prevent the practices above referred to.

You state that the question is one of considerable importance and request this office to advise you how the questions should be answered.

In construing the statute, the fundamental aim is to ascertain and give effect to the intention of the legislature as expressed in the language used. Questions involving the government should not be determined along technical lines. Broad and practical considerations should control. Dunnell's Digest, Section 8939. The object of the statute, the evil to be remedied and the means to be employed are to be considered. Statutes are to be construed so as to suppress the mischief and advance the remedy, and to promote rather than defeat the purpose of the legislature. Dunnell's Digest, Sections 8940 and 8962.

The problem presented by your letter of inquiry is to ascertain from the language used in said Chapter 428 whether the legislature intended that only a person who is a registered "contracting painter" may take a contract which includes painting.

The purpose of said Chapter 428 is expressed in Section 1, Subdivision (a), as follows:

> "The Industrial Commission of Minnesota shall supervise painting, decorating, paperhanging, preparatory work incidental thereto, for the prevention of perpetration of fraud upon the public arising out of the failure to comply with specifications, substitution of inferior materials, refusal to pay for labor and materials, misrepresentation in the procuring of any contract for the furnishing of any painting or decorating, and incompetency upon the part of persons engaged in the conduct of such business or occupation as a Contracting or Journeyman painter, and may prescribe minimum standards which shall be uniform."

If a person who is not registered with the Industrial Commission as a contracting painter may take a painting contract no machinery is provided so that the Industrial Commission may supervise such person and prevent the practices referred to in said Section 1, Subdivision (a).

Section 4 of said Chapter 428 provides:

> "(a) No person, firm or corporation shall engage in or work at the business or occupation of a painter unless registered to do so by the Industrial Commission of Minnesota. A Contracting painter may also work as a journeyman.
>
> "(b) **No person, firm or corporation shall engage in the business of painting, decorating, paperhanging, preparatory work incidental thereto, unless at all times registered hereunder.**
>
> "(c) The Industrial Commission of Minnesota shall prescribe rules and regulations not inconsistent herewith for the examination and

registering of painters and shall require contracting painters to file a surety bond in a sum of $250.00 to protect persons against fraud, incompetent painting and the good faith compliance of all contracts by said Contracting painter."

A contracting painter is defined in the act as "any person skilled in the work of painting, decorating and/or paperhanging, and in the mixing and tinting of paints and painting materials, planning, designing, superintending, and estimating."

We cannot escape the conclusion that a general contractor who takes a contract which includes painting, and does such painting himself or by his employes, is engaged in the "business of painting." The law expressly prohibits any person from engaging in the business of painting unless such person is registered under the act.

In answering your specific question we are assuming that a general contractor not registered as a painting contractor is to do the painting himself or it is to be done by his employes. Although the question is not free from doubt and courts may hold otherwise, it is our opinion that a general building contractor, not registered as a contracting painter, may not take a building contract for the building of a dwelling house, which contract includes the painting of such house, and do such painting himself or by his employes. This opinion also applies to a case where a general contractor takes a job of remodeling, including painting.

The act says that no person, firm or corporation shall engage in the business of painting unless registered thereunder. It does not specifically exclude the making or entering into a general contract which may be sublet to a lawful painting contractor.

WILLIAM D. GUNN,
Special Assistant Attorney General.

June 22, 1937. 636a-17(a)

334

PAUPERS—Change of system.

Mr. W. W. Bane, City Attorney.

You state that Crow Wing County is under the township system of poor relief; that up to about five or six years ago the relief was handled by the separate municipalities which were reimbursed 75% of the amount which they expended in excess of a one mill tax on taxable property in such municipality under Section 3195 of Mason's Minnesota Statutes of 1927; that about five or six years ago the county took over the distribution of direct relief in conjunction with the federal and state governments; that since that time they have been paying "all the direct relief"; that the county board, at its last meeting, voted to return the handling of relief to the towns, cities and villages within the county and that the City of Brainerd

has no money in the poor fund and is limited by its charter to a one mill levy and "has no means of investigating poor persons, except in that the city and school nurse does such investigations as a part of her duties."

You inquire as to "whether 3195 Mason's code is still in effect or if it has been amended or construed."

The Supreme Court in the case of Village of Robbinsdale v. County of Hennepin, 271 N. W. 491, held that Section 3195 of Mason's Minnesota Statutes of 1927 was unconstitutional in so far as the same applied to Hennepin County.

It will be noted that the Robbinsdale case involved a county operating under the town system and containing a city of the first class, Minneapolis, which paid "approximately 92% of the taxes levied by the County of Hennepin." The court in this case said in part:

> "It is obvious then that under the provisions of this statute the City of Minneapolis is compelled not only to pay for the support of its own destitute residents, but also to pay a large share of the cost for the support of indigent residents in cities and villages of the third and fourth class, among them the plaintiff village. * * *"

with "no recourse to the county" for reimbursement. Your county has no city of the first or second class.

The legislature, evidently having in mind the decision of the Supreme Court in the Robbinsdale case, supra, enacted Chapter 286, Laws of 1937. It will be noted that Section 4 of said Chapter 266 expressly provides that it "shall not apply to any county in this state now or hereafter having a city of the first class, in which city is located ninety per cent or more in value of the taxable property of the county."

Assuming, therefore, that your county is operating under the township system of poor relief, it would appear that it comes within the provisions of said Chapter 286, Laws of 1937, regardless of whether the language of said decision is broad enough to apply to a county such as yours. In other words said Chapter 286 was enacted to take the place of said Section 3195 of Mason's Minnesota Statutes of 1927.

You also inquire "as to where the county derived its authority to administer direct relief, and * * * as to whether the county can discontinue the paying of direct relief as they have attempted to do."

We assume that your county did not change from the township system of poor relief to the county system in conformity with Section 3164, Mason's Minnesota Statutes of 1927. In other words we assume that the county board merely adopted a resolution to cooperate with the federal and state authorities in carrying on poor relief in your county during the emergency which existed with reference to relief pursuant to Chapter 67, Extra Session Laws of 1933-34 and Chapter 101, Extra Session Laws of 1935-36 and similar statutory provisions. It would appear, therefore, that your county is still operating under the township system of poor relief, since it has not changed said system pursuant to said Section 3164.

If, therefore, the county is still operating under the township system of poor relief, the law imposes the duty upon the cities, villages and towns to care for any pauper or indigent person resident therein. We have heretofore held that the duty of so caring for the poor cannot be defeated by a failure on the part of a city to levy a tax sufficient for that purpose, and the exhaustion of the poor fund does not relieve such city in such county of its duty to care for the poor and if there is sufficient money available for the purpose in any fund it may be so used. In other words exhaustion of the poor fund or the failure to levy a sufficient tax to care for the poor does not relieve the municipality of such responsibility. We repeat, therefore, that the responsibility and duty of caring for the poor is one that rests upon the municipality, in such a county, in which the indigent person has his settlement and that this duty is absolute and mandatory and not discretionary.

We have also heretofore held that a municipality responsible for taking care of the poor has authority to levy a special tax for poor relief purposes and that such levy may exceed the mill limitation contained in the statute or charter applicable to such municipality.

DAVID J. ERICKSON,
Assistant Attorney General.

August 9, 1937. 339a-5

335

PAUPERS—Emergency cases—Power of mayor to furnish relief in.

Mr. Herman A. Senneka, City Attorney.

You state that Glenwood is a city of the fourth class operating under a home rule charter, which contains the following paragraph:

> "The mayor shall be the chief executive officer of the city. He shall see that the laws of the state, the provisions of this charter, and the ordinances of the city are observed and enforced. He shall have general oversight of the several departments of the city government, * * *.
>
> "The mayor shall be superintendent of the department of public health, sanitation, police and general welfare, * * *."

You further state that the "charter is entirely silent on the matter of paupers and poor relief"; that "no ordinances have been adopted by the city governing body to regulate such matters"; that the charter authorizes the creation of "a poor fund to provide for the support of the poor;" that the city governing body consists of a commission of five members including the mayor "who has a vote on all questions but no veto power."

You inquire:

> "Can the mayor of this city legally bind the city for aid to the poor, in emergency cases, medical or otherwise, by issuing orders for

such aid without first obtaining the consent of a majority of the commission to furnish such aid in each case?"

Although you do not so state, our information is that McLeod County is operating under the town system of poor relief. Assuming this to be true, we direct your attention to Mason's Minnesota Statutes of 1927, Section 3184, which provides as follows:

> "In counties having the town system, the town boards and city and village councils shall be superintendents of the poor. All applications for aid shall be made to such boards or councils, which shall grant such relief as they deem necessary, by paying for the board and care of the applicants, providing transportation to their homes, paying rent, furnishing provisions, clothing, fuel and medical attendance, and burying the dead. They shall pay no cash to any poor person, and shall allow no bill for goods furnished or services rendered to him, unless a member of such board or council shall certify in writing that the account is correct and just; that the goods or services were necessary for his relief, were actually delivered or rendered, and were of good quality; and that the prices charged are reasonable. Every such bill shall specify the name of the person for whom the goods or services were furnished or rendered, and the amount charged for each person."

This office, in construing the above quoted statutory provision, has heretofore held that a municipality, such as a city, may become liable for poor relief only pursuant to action taken by the governing body of such municipality. However, there may be exceptions to this general rule in emergency cases. This was recognized by our Supreme Court in the case of Robbins v. Town of Homer, 95 Minn. 201, where it was held that in case of an emergency a doctor, who had furnished medical services to an indigent person, was entitled to recover from the municipality although he had not been authorized to furnish such medical aid by the governing body of the municipality. The same rule might apply to a case where an indigent person is in need of other necessities of life, such as food, clothing or fuel. In other words, the surrounding circumstances in a particular case might be such that the poor person was in dire need of such necessities of life and that the delay incident to securing authority from the governing body would endanger the life or health of such person. In such a case we believe that the mayor, or any other member of the governing body, would be justified in furnishing aid without first obtaining the consent of a majority of the members of the commission, and that such action would be binding upon the city.

As indicated, the duty to provide for the poor is imposed by the statute upon the governing body of the municipality in which such a person has a settlement for poor relief purposes. However, it must be borne in mind that this duty so imposed by statute was intended to regulate the obligation rather than to permit an evasion of it. Emergency cases may arise where the legally constituted officials cannot, because of the existing circumstances, follow the regular procedure of obtaining authority from the governing body. In such cases necessity will supersede the exercise of

statutory or charter authority and immediate aid to the person in need must be furnished regardless of such limitations.

DAVID J. ERICKSON,
Deputy Attorney General.

January 9, 1937. 339g

336

PAUPERS—Feebleminded—Children of—Settlement when parents are committed to State Board of Control.

Mr. M. R. Vevle, Superintendent Minnesota State Public Schools.

You give us facts as follows:

> "Thomas Smith was committed to our care on August 5, 1924, from Traverse County. He was discharged from our guardianship on May 12, 1937, at which time he was 18 years of age. Thomas was working for a farmer in Steele County at that time and remained until December 22, 1937, at which time he met with a severe accident which required hospitalization and special care for a period of several months. The total of the hospital bill and the Doctor's bill came to $559.42. The money which Thomas had in his account at the School, $115.81, was paid to the hospital to apply on the bill."

You state that inasmuch as Thomas has not established settlement in Steele County that he should be still considered a legal resident of Traverse County, the County of his commitment.

You further state that Mr. Earl E. Huber, County Attorney of Traverse County, has quoted the case of County of Stearns v. Fair Haven Township, 279 N. W. 707, as holding that the state is bound to care for a feebleminded person when he is admitted to an institution of the state. That you answered that the case was not in point inasmuch as Thomas is not, and never has been, a feebleminded person.

You then quote from another letter received from Mr. Huber, which reads as follows:

> "There is another point in this case not mentioned in your letter of June 22nd. The case cited re-establishes the law that the residence of the minor is that of the parent. The day the son was committed, the mother was also committed to the state. On that day she lost her settlement and residence in Traverse County. The mother became a ward of the state on that day. In my opinion, that has the effect of relieving Traverse County of the place of settlement of a minor son."

You inquire as to the legal residence of Thomas Smith.

We have taken into consideration the quotation from Mr. Huber's letter and do not agree with his statement of the law for the following reasons:

Mason's Minnesota Statutes for 1927, Section 3161, as found therein, without any subsequent amendments, governs the facts in this case. Later amendments do not govern the facts herein as such later amendments are not retroactive. This statement is supported by the case cited heretofore, to-wit, County of Stearns v. Township of Fair Haven.

We assume that when Mrs. Smith was committed to the State Board of Control as a feebleminded person her settlement for poor relief purposes was Traverse County. If such was the fact she did not lose her settlement by the commitment. If she was a pauper, and institutionalized, the place of her legal settlement would be responsible for the statutory charge for inmates in the institution. It goes without argument that Mrs. Smith's settlement if she were released from the guardianship of the State Board of Control would be in Traverse County, inasmuch as she did nothing to lose such settlement.

The only means by which a person could lose a settlement at the time of Mrs. Smith's commitment were those found in Mason's Minnesota Statutes for 1927, Section 3161. Said section reads in part as follows:

"A settlement in this state shall be terminated and lost by:

"(1) Acquiring a new one in another state.

"(2) By voluntarily and uninterrupted absence from the state for a period of one year with intent to abandon his residence in the State of Minnesota."

It is perfectly obvious that Mrs. Smith would not come within either of the two quoted provisions of the statute.

In the case of In re Leslie, 166 Minn. 180; 207 N. W. 323, it is stated:

"A settlement is lost only by acquiring another one elsewhere."

The foregoing statement is also cited with approval in the case of County of Stearns v. Fair Haven Township.

We are of the opinion, therefore, that Mrs. Smith's settlement for poor relief purposes is in Traverse County and, therefore, her son Thomas has also a settlement in the same county.

JOSEPH M. DONAHUE,
Law Assistant.

July 13, 1938. 339d-1

337

PAUPERS—Feebleminded—Minors—Settlement of under facts stated.

Hon. Chas. F. Hall, Director, State Board of Control.

You give us the following facts: Amanda, born September 19, 1920, and Elvira, born September 20, 1922, were committed to the guardianship of the State Board of Control as dependent children on August 16, 1927,

from Clearwater County. Since August 3, 1927, Elvira has made her home with her grandparents in Duluth, and that since August 8, 1936, Amanda has been living in the same home. That recent mental tests disclose that both children are feeble-minded, and you inquire whether Clearwater County or St. Louis County is legally responsible for financial care of these girls and in which county commitment should be made to the State Board of Control in view of the fact that they have lived with their relatives in St. Louis County without cost to either St. Louis or Clearwater County.

Your attention is directed to Section 3161, Mason's Minnesota Statutes of 1927, as it is now found in Mason's Minnesota Supplement of 1938.

Said section, as amended by Extra Session Laws 1935-36, Chapter 68, Excludes the time during which a feeble-minded, delinquent or dependent person is under commitment to the guardianship of the State Board of Control for the purpose of acquiring a settlement. As a result of said amendment, if such provision applies to minors, a feeble-minded minor committed to the guardianship of the Board of Control since January 25, 1936, (the time of passage of said amendment) cannot establish a new pauper settlement while under such commitment.

Section 3161 provides as it formerly did before said amendment as follows:

> "Every minor not emancipated and settled in his own right shall have the same settlement as the parent with whom he has resided."

A recent decision of the district court of this state which was concurred in by an opinion of this office to you under date of May 16, 1938, held that the last quoted portion of Section 3161 modifies the amendment of January 25, 1936, and therefore that such amendment does not apply to minors.

Another amendment to said Section 3161 passed at the 1935-36 Extra Session by said Chapter 68 provides as follows:

> "Provided, that every minor not emancipated and settled in his own right and living apart from his parents and not supported by his parents shall, after receiving aid and support from others uninterruptedly for a period of two years, acquire the settlement of the person with whom he has resided for a period of not less than two years."

We are, therefore, of the opinion that the portions of Section 3161 herein cited, dealing with persons committed to the Board of Control and of children not emancipated and living with their parents, have been modified by the last quoted portion of the statute, and that an unemancipated minor, who has lived with persons other than his parents and not supported by them, after being supported uninterruptedly for a period of two years by others, acquires the settlement of such person with whom he has resided for a period of not less than two years. This conclusion is based upon and supported by the reasoning of the district court decision and the opinion of this office under date of May 16, 1938, herein referred to.

It is clear from the facts stated that Elvira has been supported by and has lived with her grandparents in Duluth, apart from her parents uninterruptedly for a period of two years, and has therefore acquired the settlement of her grandparents. It is also clear that the last section quoted does not apply to Amanda. From the facts given us, Amanda has not lived with her grandparents for a full two years and will not until August 8th, 1938, have acquired the same settlement as that of her grandparents.

After applying the rules to the facts given us, we are of the opinion that Elvira's settlement is that of her grandparents in St. Louis County and that she should be committed from and cared for by St. Louis County and that Amanda's settlement is that of her parents in Clearwater County (assuming, of course, that her parents have a settlement in said county), and that she should be committed from Clearwater County which county is also legally responsible for her financial care.

JOSEPH M. DONAHUE,
Law Assistant.

July 7, 1938. 339d-1

338

PAUPERS—Minors—Marriage—Emancipation of.

State Relief Agency, Federal Building.

You state that a certain minor, age twenty years, applied for relief in the City of Minneapolis on December 23, 1936; that prior to his enlistment in the United States Army in November, 1933, he had lived for several years in St. Paul; that he served in the United States Army from November, 1933, until his discharge on November 2, 1936; that at said time he was granted permission to leave the United States Army as he had secured steady employment; that from November, 1936, up until the present time he has lived in Minneapolis; that this person was married on April 29, 1935, with the consent of his mother; and that the mother of this person has been living for over a year in Steele County, Minnesota, but her son has never lived in the latter county.

You inquire as to "what constitutes the emancipation of a minor child, under what circumstances can an emancipated minor child acquire residence in his own right, and whether or not in the opinion of your office the City of Minneapolis is responsible for any public assistance that the family may need."

The question as to what constitutes emancipation of this minor and under what circumstances he can acquire settlement in his own right involves facts, some of which are not before us and upon which this office is in no position to pass.

Generally speaking we may say that to constitute emancipation of a minor child there must be surrender by the parent of the right to the

services of such child and to the control of his person. The rule is also well established that marriage emancipates a minor. See Dunnell's Digest (2nd Ed.) Section 7309; State v. Lowell, 78 Minn. 166; 46 Corpus Juris, page 1345, Section 197; and 20 Ruling Case Law, page 612, Section 22. The reason advanced in support of this rule is that marriage creates relations inconsistent with the child's subjection to the control and care of the parent. A married child, whether a son or daughter, becomes a member of a new family, and the claims of the former family become subordinate. If a minor son is married the duty of support which he owes to his wife takes precedence over his duties to labor for his parent and the parent's rights cease. It necessarily follows that after emancipation of a minor child, whether by marriage or otherwise, the settlement of such child does not follow that of the parent and such minor child may thereupon acquire a settlement of his own.

From the facts outlined in your letter it appears that the young man was married at the time he applied for relief on December 23, 1936. Under the above referred to rule, therefore, it would seem to necessarily follow that he was emancipated on account of such marriage and that Steel County would not be liable for his care and support. It also appears from the facts outlined in your letter that this young man was discharged from the United States Army on November 2, 1936, and that he made application for relief in the City of Minneapolis on December 23, 1936. It would appear, therefore, that he had not been a self-supporting resident of the City of Minneapolis for one year immediately prior to his application for relief in that municipality within the meaning of Section 3161, Mason's Minnesota Statutes of 1927, as amended. He could not acquire a settlement in Minneapolis during his time of service in the United States Army and while residing on a Federal Reservation. This being true where there is no other municipality or county in the state in which this person has a legal settlement the municipality in which he is actually living at the time he needs assistance may be responsible for his care under our poor laws. This is upon the general principle underlying our poor laws that the primary duty of furnishing assistance rests upon the municipality in which the indigent person made application for assistance, and that such municipality may furnish this assistance and recover from the municipality ultimately liable therefor if it is able to establish that such person had a settlement in such other municipality.

DAVID J. ERICKSON,
Deputy Attorney General.

August 3, 1937. 339d-4

339

PAUPERS—Property of—Recovery by county against.

Mr. James A. Garrity, County Attorney.

You inquire whether a municipality which "has furnished poor relief, has a cause of action against the person or persons receiving the relief, if

they thereafter come into property, and are in a position to repay the municipality."

Prior to the enactment of Chapter 60, Laws 1925, (Mason's Minnesota Statutes, Section 3159-1) a municipality which furnished or provided a poor person with support, maintenance, care or burial had no claims therefor against such person or his or her estate for the reasonable value thereof. In this connection see County of Brown v. Penkert, 164 Minn. 55, and County of Brown v. Siebert, Jr., 175 Minn. 39. It will be noted that said Chapter 60 was enacted after the decision of the Penkert case, supra, by the trial court and prior to its affirmance in the supreme court. The aid in the Penkert case was furnished to the poor person in question during the time that she owned an equity in a three-room cottage. This was known to the county at the time such aid was furnished. Notwithstanding this fact the supreme court held that the county could not recover since there was no statute authorizing recovery at the time said aid was furnished. In other words, until the enactment of the above referred to statute there was no right of recovery from a person or persons receiving such relief even though such persons possessed property at the time of furnishing the relief. The statute of course changes the rule so that recovery may now be had by the municipality against a poor person for relief furnished to such person where he owned property at the time of furnishing such aid. However, we do not believe that the legislature at the time of the enactment of said statute intended to afford a municipality the right to recover for poor aid furnished under the circumstances outlined in your letter. The persons referred to in your letter did not acquire or come into their property until after the county had furnished the poor aid. As indicated, therefore, we do not believe that a poor person is liable to the municipality for previous maintenance where such person did not have any property at the time of furnishing poor aid but acquired the same thereafter. We find no language in the statute evidencing any intent on the part of the legislature to permit a recovery against a poor person for aid furnished where such person has ceased to be a charge upon the municipality and become self-supporting, either through property derived from his labor or other sources subsequent to the time of receiving such relief.

DAVID J. ERICKSON,
Deputy Attorney General.

November 15, 1937. 339h

340

PAUPERS—Removal—May be removed to place of settlement within reasonable time after application has been made for poor relief.

Mr. William Russell, City Attorney.

You state that a certain family, now living in the city of Moorhead, have their legal settlement for poor relief purposes in Detroit Lakes, Becker County; that the city of Detroit Lakes "admits that the place of settlement

of the family is legally in Detroit Lakes"; that the family made written application to the city of Moorhead for relief some time ago, but were not given such relief; that after such application for relief had been made, the city warned the family to depart to their place of settlement "and did all the things necessary under Subdivision 2, Section 3186, Mason's Minnesota Statutes of 1927, prepared a warrant in writing, signed by the mayor and attested by the city clerk, requiring the chief of police who is a constable under the law to convey the family to Detroit Lakes, the place of their settlement."

You further state that when the constable served said warrant on this family it was their claim that they could not be removed from the city of Moorhead because they had not received any poor relief from said city.

We note that you also state that "the poor committee here received a telegram from the office of the State Relief Administration in St. Paul backing them up in this position."

You inquire:

> "The committee would like to be advised what rights they have under the subdivision quoted."

Said Subdivision 2 of said Section 3186 provides, in part, as follows:

> "Whenever any person not having a legal settlement therein shall be taken sick, lame or otherwise disabled, **or for any other cause** shall be in need of relief as a poor person and shall make application for relief to any such board or council of such municipality, its chairman, mayor or president shall warn them to depart, and if he is unable or refuses to do so **within a reasonable time and is likely to become a public charge,** such chairman, mayor or president may, in writing require any constable or marshal of the town, city or village to convey him to the place of his settlement, if he have a settlement in this state, * * *."

Under the above referred to statute a poor person may be removed to his place of settlement in this state after said person has made application for relief and "is likely to become a public charge."

However, this office has held that after an application for relief is made by a poor person, he must be removed to his place of settlement within a reasonable time thereafter. It does not appear from your letter when such application for poor relief was made. The question of what constitutes a "reasonable time" under the above referred to statute is one of fact. It would depend, to some extent upon the information available to the city council at the time the application was made for such poor relief. The council undoubtedly has a reasonable time within which to make an investigation to determine the place of settlement of persons making application for poor relief. Other factors might also enter into a proper determination of what should be considered a reasonable time within which an applicant for poor relief may be removed to his place of settlement under the above statute.

The question is one of fact and this office is not in a position to pass upon whether or not the removal of such family at this time would be a "reasonable time" within the meaning of said Section 3186.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

April 4, 1938. 339a-3

341

PAUPERS — Removal — Deportation to another state — Owning freehold estate.

Mr. A. L. McConville, County Attorney.

You state that a family moved from Wisconsin into your county about ten months ago; that this family purchased a piece of land for the sum of $100 and "put a small shack upon the same to live in;" that the members of this family have applied for and were given relief from the county; that the county board desires to remove this family "as paupers" back to the State of Wisconsin since "in all probability they will become a burden upon the county."

You state and inquire:

> "The fact they own the piece of land on which a shack was constructed, would that preclude us from moving them back to their legal settlement in Wisconsin?"

This department over a period of years has heretofore uniformly held that upon application for poor relief being made to a municipality in the state, it is only when such person **has a settlement in this state** that the public officers of such municipality are authorized to order and direct his removal. In other words, when such person has no settlement within the state, the local authorities have no power under the poor relief statutes to remove such person against his will to another state. See Opinion No. 652, Report of Attorney General for 1934.

Moreover, this office has also heretofore held that the statutory provisions relating to the removal of a person who has applied for poor relief in a particular county in which he does not have a legal settlement for poor relief purposes does not authorize the removal of such person **from his freehold estate** whether the same be legal or equitable and although such person so living on such freehold estate has not gained a settlement in the county or municipality in which such estate is situated. See opinion under date of February 8, 1936 to the County Attorney of Hubbard County, a copy of which we are enclosing herewith.

DAVID J. ERICKSON,
Deputy Attorney General.

June 12, 1937. 339a-2

342

PAUPERS—Removal—To another state with consent of other jurisdiction.

Mr. T. O. Streissguth, County Attorney.

You state that sometime ago a family moved into your county from Pembina County, North Dakota; and shortly thereafter consent was obtained of the Pembina County authorities to return this family to North Dakota; that at that time transportation was purchased for this family and they returned to North Dakota "of their own free will"; that a few weeks later they returned to Brown County, Minnesota, under an assumed name and have since made their home in said county; that the Pembina County authorities have again authorized your county to return this family to North Dakota, but they are not willing to return to said state, and if they are removed "it will have to be forcibly."

You direct attention to Number 320 of the Attorney General's Report for the year 1930, in which it is stated that the statute provides for the removal of a pauper from one place in the state to another therein where a settlement is in the latter place, and that "there is no provision for removing a pauper from the state."

You inquire whether "the consent of the receiving jurisdiction would change the opinion of our office in the matter of removal."

Opinion number 320 is in conformity with both former and subsequent opinions of this office wherein from time to time we have expressed the view that the local authorities of Minnesota have no power under our statutes to remove paupers against their will to other states. This view is substantiated by the case of Village of Litchfield v. County of Meeker, 182 Minn. 150, 233 N. W. 804. In this case the court said:

> " * * * the statute (3186) authorizes conveyance of the poor person to the place of his actual settlement **only if he has one 'in this state'.**"

You do not indicate whether this family made an application for aid after returning to your county from Pembina County, North Dakota. It will be noted that Section 3173 of Mason's Minnesota Statutes of 1927, which provides for the conveyance of a poor person to his place of settlement, limits the right of such removal to cases in which an "application for support or relief is made by a person whose settlement is in another county, or in a town, city, or village of another county." In other words, if this family has made no application for aid, the local authorities have no right under the statute to remove said family even to its place of settlement, if any, in this state. That is, there is no right of removal of a poor person to his place of settlement whether in this state or in another state until after application for aid has been made.

Answering your specific inquiry, we are still of the opinion that there is no statutory authority in this state for removing a poor person to his place of settlement in another state, and that in the absence of such a pro-

vision, we do not believe that the local authorities are authorized to convey such a person forcibly to another state even where the receiving jurisdiction consents thereto.

DAVID J. ERICKSON,
Deputy Attorney General.

January 29, 1937. 339o-3

343

PAUPERS—Settlement—Epileptics—Cost of maintaining—Veterans relief —Not poor relief.

Mr. J. J. Hadler, County Attorney.

You state that a certain individual resided in "A" county from June, 1933 to November, 1935; that during the last ten months of that period he received aid as a veteran; that this aid "is called veterans' relief"; that he then moved with his family into "B" county and continued to receive veterans' relief; and that one of his children now needs to be committed to an institution for epileptics.

You inquire whether or not veterans' relief is poor relief within the meaning of Section 3161, Mason's Minnesota Statutes of 1927, as amended by Chapter 68, Special Session Laws of 1935-36, so as to exclude the month or months during which such person has received such veterans' relief.

Without knowing under what statutory provisions the "veterans' relief" was furnished to this man, it is impossible for us to definitely answer your inquiry. Assuming, however, that such veterans' relief was furnished pursuant to statutory provisions relating to "relief to disabled veterans of all wars," such as Chapter 33, Laws of 1935, Chapter 101, Special Session Laws of 1935-36, or pursuant to Sections 4344 to 4366, Mason's Minnesota Statutes of 1927, we are of the opinion that such relief to disabled veterans so furnished pursuant to such statutory provisions does not constitute poor relief within the meaning of Section 3161, Mason's Minnesota Statutes of 1927, as amended by said Chapter 68, Special Session Laws of 1935-36. It will be noted from the above referred to statutory provisions that the relief provided for therein to veterans as such is limited to disabled veterans of all wars. We do not believe that the legislature at the time of the enactment of said Chapter 68 intended to include such veterans' relief. In other words, it seems to us that if the legislature intended, at the time of the enactment of said Chapter 68, to exclude the month or months during which such a veteran was receiving such relief in determining a veteran's place of settlement, it would have so stated in express terms. The provisions of said statutes with reference to aid to disabled veterans differ from the poor relief law. The conditions precedent to the two sorts of relief and the standards of need of the beneficiaries are by no means the same. Such relief to a veteran is based on disability.

Answering your specific inquiry, therefore, we are of the opinion that veterans' relief furnished pursuant to the above referred to statutory provisions is not poor relief within the meaning of said Section 3161, as amended. If we are correct in our conclusion, the month or months during which this veteran received such relief should not be excluded in determining his place of settlement.

You also inquire whether "the responsibility of an epileptic is on the basis of poor relief."

Although you do not so state, we assume that the child of this veteran will be committed to said institution for epileptics pursuant to the provisions of Section 4500, Mason's Minnesota Statutes of 1927, as amended. This section of the statute provides that if the person legally responsible for the support of any person admitted to such an institution shall fail or refuse to pay the sum therein provided for such support, the same shall be made a charge upon the county in which the person so admitted has a legal settlement for the purpose of poor relief, if such person has a settlement within the state.

It is manifest from the above quoted provisions of the statute that the responsibility for the care of such a person at such an institution is upon the county in which such person has a legal settlement for poor relief purposes in a case in which the person legally responsible for such support fails or refuses to pay the sum required by the statute.

DAVID J. ERICKSON,
Deputy Attorney General.

March 11, 1937. 339q

344

PAUPERS—Settlement—Designation of in county operating under town system—Old age assistance, not poor relief.

State Relief Agency.

You state that a recipient of old age assistance in Cottonwood County which operates on the township system for poor relief, has applied for poor relief in the form of medical and hospital care; that this person had a legal settlement for poor relief purposes in Delton Township in Cottonwood County until March 1, 1936; that on the latter date he moved to Dale Township where he resided until November 1, 1936, and that on November 1st he moved to the City of Windom in said county, where he has continued to reside until the present time.

You inquire:

> "Does the time that Mr. X received old age assistance from the county count toward his gaining legal settlement for poor relief purposes in another township?"

This question is answered in the affirmative. Old age assistance is not poor relief within the meaning of Mason's Minnesota Statutes 1927, Section 3161, as amended by Chapter 68, Laws 1935-36. We have assumed that the person in question was not an inmate of a public institution during the time that he received such old age assistance.

You also inquire which political subdivision or township is responsible for the medical care now necessary for the client. This question involves facts, some of which are not before us, and upon which we cannot pass. Moreover, this is a matter for the determination of the proper constituted town officials.

Speaking generally, we direct your attention to the controlling statutory provisions of Mason's Minnesota Statutes 1927, Section 3161, as amended by Chapter 68, Extra Session Laws 1935-36, and Chapters 102 and 138, Laws 1937, which, so far as here pertinent, read as follows:

> "Every person, except those hereinafter mentioned, who has resided one year continuously in any county, shall be deemed to have a settlement therein, if it has the county system; if it has the town system, he shall have a settlement in the town, city or village therein in which he has longest resided within such year. Every person who has resided one year continuously in the state, but not in any one county, shall have a settlement in the county in which he has longest resided within such year, if it has the county system; if it has the town system, his settlement shall be in the town, city or village therein in which he has longest resided within such year. The time during which a person has been an inmate of a hospital or nursing home for the care of the invalid or aged, whether public or private, and the time during which a person has been an inmate of a poorhouse, jail, prison, or other public institution, * * * and each month during which he has received relief from the poor fund of any county or municipality or from funds supplied by the state of Minnesota or the United States or any department or departments thereof, supplied as direct relief or in providing work on a relief basis and in lieu of direct relief shall be excluded in determining the time of residence hereunder."

The above quoted statutory provision has been construed on numerous occasions by our Supreme Court.

In the case of the Town of Smiley v. Village of St. Hilaire et al, 183 Minn. 533, 237 N. W. 416, the word "reside" and the term "reside" are construed as follows:

> "Term 'reside' within statute relating to relief of paupers, means where person has lived or existed longest within the one year immediately preceding the commencement of the proceeding; term 'reside' within statute relating to relief for paupers, does not refer to technical legal residence; particular word of statute may be used to express different meaning according to subject matter."

It will be noted from the above referred to decision that the place of settlement of an indigent person for poor relief purposes is where such

person has resided the longest period of time immediately preceding the application for poor relief, excluding therefrom the time during which poor relief was furnished. It is not necessary that the person in question reside continuously in the township or village for a period of one year before poor relief may be granted where the county in which such municipalities are located, is operating under the town system of poor relief. If such person has resided in three different municipalities during the year immediately preceding application for relief, then the place where such person resided the longest period of time would be the municipality charged with the responsibility of furnishing such relief. This is in accordance with the decision above referred to, and you should have no difficulty in applying the same to the facts as they actually exist.

DAVID J. ERICKSON,
Deputy Attorney General.

April 30, 1937. 339o-5

345

PAUPERS—Settlement—Determination of.

Mr. R. S. Wiggin, City Attorney.

You state that a certain family moved to the City of Minneapolis in November, 1929, and immediately applied for relief which they received until and including February, 1930—a period of four months; that this family thereafter was self-supporting from and including March, 1930, to and including November, 1930—a period of nine months, "whereafter said family again received aid until in April, 1931"—a period of five months; that thereafter this family again became self-supporting for a period of eight months, "that is until December, 1931" when they again went on relief and received such relief continuously thereafter for a period of about two and one-half years, when they moved to another county; and that "during the time they were self-supporting they at all times lived in the City of Minneapolis." You inquire "whether or not the months of each year during which the family was self-supporting should be added together."

We are of the opinion that this question should be answered in the affirmative. In addition to the cases of In Re Settlement of Johnson, 189 Minn. 161, 164, and Village of Grove City v. Town of Manannah, 182 Minn. 197, we also direct your attention to the case of Town of Smiley v. Village of St. Hilaire, 237 N. W. 416. Under the rules laid down by the Supreme Court in the above referred to cases, this office has heretofore expressed the opinion that a poor person receiving relief for a single month or for several months would not break the sequence of his settlement and would, therefore, not require him to reside in a particular municipality for an additional twelve months in order to establish a settlement therein.

A convenient way of dealing with your problem would seem to be to add to such year the time, if any, during which public aid has been furnished. If

during such time the self-supporting residence has been continuous in one county and such county has the county system that terminates the inquiry. If such county has the town system and the residence has not been continuous in any one municipality therein, the inquiry must be directed to ascertaining in which municipality therein the self-supporting residence has been longest during the period. If the residence during the period has been in more than one county, the inquiry must be directed to ascertaining in which of them the self-supporting residence has been longest during the period. If such county has the county system, that terminates the inquiry, but if it has the town system, the inquiry must be further directed to ascertaining in which municipality therein the self-supporting residence has been longest during the period.

Contrary to a more or less general misconception, the receipt of aid from the poor fund of a particular municipality does not stop the running of the year, the month or months during which such aid was received merely being excluded from the computation.

DAVID J. ERICKSON,
Deputy Attorney General.

August 13, 1937. 339o-2

346

PAUPERS—Settlement—Determination of.

Mr. J. Arthur Bensen, County Attorney.

You state that a resident of your county moved with his family to another county about April 1, 1936; that he has been self-supporting until the present time; that he has never applied for nor received any aid from your county or the county of his present residence; that on March first of this year he applied to the Re-Settlement Administration for subsistence; that, although he has been promised so-called subsistence aid by the Re-Settlement Administration, he has not yet received any; and that the other county has now notified him to "remove from their county."

You also direct attention to the 1936 Supplement to Mason's Minnesota Statutes of 1927, Section 3161, and inquire:

> "Is a man who receives a subsistence grant from the Federal Re-Settlement Administration to be considered a recipient of relief from a 'department of the United States?' "

In view of the fact that this man has not received any so-called subsistence aid from the Federal Re-Settlement Administration, we do not deem it necessary at this time to pass upon the question whether the receipt of such a Federal subsistence grant constitutes poor relief within the meaning of said Section 3161, as amended. We agree with your conclusion that since this man has not received any relief, federal, state or local, no deduction can

be made of any month, or months, in determining whether he has acquired a settlement in a particular municipality within the purview of said Section 3161. This is in conformity with the statute which specifically provides that "each month **during which he has received relief** from the poor fund of any county or municipality or from funds supplied by the State of Minnesota or the United States or any department or departments thereof, supplied as direct relief or in providing work on a relief basis and in lieu of direct relief shall be excluded in determining the time of residence hereunder."

We agree with your conclusion that this man cannot be removed from the county in which he is residing unless he has made application to the county board for relief in conformity with said Section 3173, to which you also direct attention. We assume that the county in which he is now residing is operating under the county system of poor relief. Moreover, under said section of the statute the removing county has no power to remove said person until they have determined "the place of settlement."

DAVID J. ERICKSON,
Deputy Attorney General.

April 7, 1937. 339a-4

347

PAUPERS—Settlement—Determination of—Dispute between two counties —Procedure for removal of poor person.

Mr. Frank F. Michael, County Attorney.

You refer to Section 3161-2, Mason's Minnesota Statutes of 1927, which provides for the determination of the place of settlement of a poor person whenever a dispute shall arise between two or more counties, or between a county and a political subdivision of another county, or political subdivisions of different counties, as to the place of settlement of such poor person, and inquire:

> "1. In the event such proceedings are had between two counties and the court finds that the settlement is in the other county, not where the action is pending, is it necessary at any time to give the person involved in the settlement any notice before demand is made that he remove to the county where the court found his settlement to be?"

This office has held that after the place of settlement of a poor person has been determined by the court, under said Section 3161-2, the proper procedure to follow in having such poor person removed to his place of settlement, as determined by the court, is that provided for under Section 3173, Mason's Minnesota Statutes of 1927.

In other words, the chairman of the board to which said person has made application for relief, should serve a written notice on such poor person ordering said person to remove to the place of his settlement as deter-

mined by the court, attaching to such notice to depart a copy of the court's order determining his place of settlement.

If said poor person does not then remove to the place of his settlement within a reasonable time, an order should be issued to the sheriff, as provided under Section 3173, requiring the sheriff to convey said poor person to the place of his settlement as determined by the court.

> "2. After the court has made its findings determining the settlement of the poor person is he entirely bound thereby though he never received notice and was not a party to the proceedings?"

Said Section 3161-2 does not provide for making said poor person a party to such action between said municipalities. Neither does it provide for serving any notice of the proceedings on said poor person and we are of the opinion that after the court has made its order determining the place of settlement of said poor person, as provided under said Section 3161-2, such poor person is bound by such order of the court "though he never received notice and was not a party to the proceedings."

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

May 12, 1938. 339o-2

348

PAUPERS—Settlement—Determination of—Federal Relief—Receipt of.

Yellow Medicine County Welfare Board.

You request a copy of an opinion which we rendered to you in July, 1935, relative to the settlement of a certain family then residing at Canby, Minnesota. You do not give us the date of this opinion. We assume, however, that you have reference to an opinion rendered to you under date of July 19, 1935. We are, therefore, enclosing a copy of said opinion herewith.

Your attention is directed to the fact that Section 3161, Mason's Statutes of 1927, upon which said opinion was based, was amended by Chapter 68, Extra Session Laws of 1935-1936, and by Chapters 102 and 138, Laws of 1937. Section 3161, as so amended, now reads in part as follows:

> "The time during which a person has been an inmate of a hospital, poorhouse, jail, prison, or other public institution, or under commitment to the guardianship of the State Board of Control or one of its state institutions as a feebleminded, delinquent or dependent person, and each month during which he has received relief from the poor fund of any county or municipality or from funds supplied by the State of Minnesota or the United States or any department or departments thereof, supplied as direct relief or in providing work on a relief basis and in lieu of direct relief shall be excluded in determining the time of residence hereunder."

It will be noted from the above quoted language of said Section 3161, as amended, that "each month during which he has received relief from the poor fund of any county or municipality or from funds supplied by the State of Minnesota or the United States or any department or departments thereof, supplied as direct relief or in providing work on a relief basis in lieu of direct relief" is excluded in determining the time of residence of such poor person pursuant to the provisions of said Section 3161, as amended.

As indicated, said opinion of July 19, 1935, was written prior to the enactment of said Chapter 68, Extra Session Laws of 1935-1936, as well as said Chapters 102 and 138, Laws of 1937. In other words, prior to the enactment of said Chapter 68 it was the view of this office that relief furnished from state or federal funds was not poor relief from the poor fund of any county or municipality of the state; that is, the time during which a person received either direct relief or work relief from state or federal funds was not excluded in determining the place of settlement of a poor person within the meaning of said Section 3161 prior to its amendment by said Chapter 68, Extra Session Laws of 1935-1936. See last paragraph on page three of said opinion dated July 19, 1935. However, since the amendment of said Section 3161 we have held that each month during which a person "has received relief from the poor fund of any county or municipality or from funds supplied by the State of Minnesota or the United States or any department or departments thereof, supplied as direct relief or in providing work on a relief basis and in lieu of direct relief" should be excluded in determining the time of residence of a poor person in a particular county or municipality.

DAVID J. ERICKSON,
Deputy Attorney General.

July 9, 1937. 339a-2

349

PAUPERS—Settlement—Determination of—Salary of C.C.C. boy.

Mr. Kenneth H. Dell, County Attorney.

You state that a family moved from Grant County into Douglas County; that a boy of such family is employed in a CCC Camp receiving $30.00 per month, of which $25.00 per month goes for the support of the family residing in Douglas County.

You direct attention to Mason's Minnesota Statutes of 1927, Section 3161, as amended by Chapter 68, Extra Session Laws 1935-1936, relating to settlement for poor relief purposes and inquire:

> "The question is whether or not the months during which the family receive a portion of such boy's salary are excluded for the purpose of computing time of residence under the poor law. Can the family obtain a residence under such circumstances for poor relief purposes while they are receiving such portion of the boy's money from the CCC Camp."

Section 3161, as amended, so far as pertinent, provides:

> "Each month during which he has received relief from the poor fund of any county or municipality **or from funds supplied by the state of Minnesota or the United States or any department or departments thereof, supplied as direct relief or in providing work on a relief basis and in lieu of direct relief** shall be excluded in determining the time of residence hereunder. * * *"

It can not be said that the mother or father of this boy, employed in a CCC Camp and receiving $30.00 per month of which $25.00 per month was turned over to the father and mother, was receiving relief from funds supplied by the "United States" or any department or departments thereof, supplied as direct relief or in providing work on a relief basis in lieu of direct relief.

As bearing on the question you have submitted, we direct your attention to the case of Town of Hagen v. Town of Felton, decided June 19, 1936, 267 N. W. 484, in which it was held that the fact that two sons in family worked for wages under federal emergency relief set-up did not affect question as to settlement for poor relief purposes as between two towns. In this case the court said:

> "The record in the case at bar shows no more than that the two oldest sons of the Vincents worked under the Federal Emergency Relief set-up and received wages. There is no showing as to how the money received was used. Nor does it appear that any part thereof had come from any allotment to the town of Felton, or that either son received any money of the federal government which had been allotted to either town, or even to Clay county."

Answering your specific inquiries, therefore, we are of the opinion that the month or months during which this family received a portion of such boy's salary are not to be excluded for the purpose of determining the settlement of said family under said Section 3161, as amended; and that said family "under such circumstances" may establish a settlement for poor relief purposes while receiving a portion of said salary so received by their son while employed at a federal CCC Camp.

DAVID J. ERICKSON,
Deputy Attorney General.

April 15, 1937. 339o-2

350

PAUPERS—Settlement—Determination of when no aid granted.

Mr. Sam G. Gandrud, County Attorney.

It appears from your letter that a man and his family have lived in Meeker County for more than one year since removing from another county; that his settlement for poor relief purposes is in one of two townships in

said county of Meeker; that he lived in township A from June 1, 1935, to April 1, 1936, a total of ten months "during which he received no aid from any source;" that he then lived in township B from April 1, 1936, to September 12, 1936, without receiving any aid, "but at which time he applied to the county relief worker for aid as a poor person;" that no aid was granted upon said application and no aid has been granted by any source up to December 23, 1936; and that the reason no aid was given on September 12, 1936, "when application was made was because the question was not determined as to the place of his settlement."

You inquire "whether or not the application for aid has any bearing upon the settlement of this family at this time in view of the fact that no aid was furnished pursuant to such application."

Section 3161, Mason's Minnesota Statutes of 1927, as amended, so far as pertinent, provides as follows:

> "Every person, except those hereinafter mentioned, who has resided one year continuously in any county, shall be deemed to have a settlement therein, if it has the county system; if it has the town system, he shall have a settlement in the town, city or village therein in which he has longest resided within such year. * * *"

This statute, as you indicate, has been construed in the case of Village of Grove City v. Township of Mannannah, 182 Minn. 197, 233 N. W. 875, and also in the case of County of Douglas v. Township of Dead Lake, 179 Minn. 251, 228 N. W. 929. It is true that the court in these cases refers to the year immediately preceding application for relief and that the question to be determined in such cases is as to the person's residence within the year preceding such application.

However, it does not follow that because application has been made and no relief granted thereunder that the pauper cannot continue to establish a settlement in a particular town. For instance, if a subsequent application is made after sufficient time has elapsed for the person in need to have acquired a settlement under the statute, the question would then be as to his status at the time of his second application, and the first application which was not acted upon by the board would have no bearing on the question. In other words, in the case to which you refer no relief having been furnished upon the application which was made on September 12, 1936, the status of the person in need is the same as if no application had been made.

Answering your specific inquiry, therefore, we are of the opinion that the application for aid which was made in September has no bearing upon the settlement of this family at this time in view of the fact that no relief was granted thereunder.

DAVID J. ERICKSON,
Deputy Attorney General.

January 27, 1937. 339o-5

351

PAUPERS—Settlement—Drouth relief—Time during which persons receive drouth relief not to be excluded in determining settlement under Section 3161, Mason's Minnesota Statutes, as amended by Chapter 68, Extra Session Laws 1935-36 and Chapters 102 and 138, Laws of 1937.

Mr. Kenneth H. Dell, County Attorney.

You state that a poor family has moved into your county from another county; that "the head of this family is farming, and has received pay during two months as and for drouth relief work which work was performed in road construction."

You direct attention to Mason's Minnesota Statutes, 1936 Supplement, Section 3161, and inquire "whether or not such maintenance during which he received drouth relief on such work relief basis is excluded in computing the time of residence under the poor law."

We do not believe that the time during which the person received "drouth relief" should be excluded in determining the person's settlement under said Section 3161 as amended. It will be noted that "drouth relief" is not mentioned in said section. It seems to us that if the legislature had intended to exclude the period of time during which a person receives so-called drouth relief it would have used language expressing such intent. Our court has frequently said that where a statute enumerates the things to be affected by its provisions, there is an implied exclusion of others. In such case there is a natural inference that its application is not intended to include persons or things excluded.

DAVID J. ERICKSON,
Deputy Attorney General.

April 19, 1937. 339o-4

352

PAUPERS—Settlement—Mothers' Pension—Does not stop time from running to establish settlement.

Mr. W. W. Bane, City Attorney.

You inquire:

> "I would greatly appreciate it if you would give me your opinion as to whether the receipt of old age assistance or old age pension prevents the recipient from establishing a residence for poor relief purposes while receiving such pension. In other words is the old age pension considered poor relief so as to prevent the recipient from establishing a residence while receiving same?"

We answer this inquiry in the negative. In connection herewith and for your information we enclose a copy of the former opinion of this office dated

August 4, 1936, addressed to Mr. William Russell, City Attorney, Moorhead, Minnesota.

You further inquire:

> "I would also appreciate it if you would give me an opinion as to whether persons receiving mother's pensions are to be considered as receiving poor relief, and thus prevented from establishing their residence for poor relief purposes while so receiving a mother's pension."

We answer this inquiry in the negative. In connection herewith and for your information we enclose a copy of the former opinion of this office dated June 26, 1933, addressed to Mr. F. B. Kalash, Village Attorney, Lakefield, Minnesota.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

December 10, 1937. 521t-2

353

PAUPERS—Settlement—Obtaining new settlement.

Mr. William O. McNelly, Attorney for Town of Lynn.

You state that a dispute has arisen between the board of supervisors of the Town of Lynn, McLeod County, and the board of supervisors of the Town of Cedar Mills, Meeker County, relating to the legal settlement of a poor family now requiring public aid; that this family was formerly a charge of Lynn Township, McLeod County, but for ten months has resided in the Cedar Mills Township, Meeker County, where this family was self-supporting and did not receive any aid from Lynn Township; and that this family recently moved into the city of Hutchinson, McLeod County, and is now destitute and has been given temporary aid by said city. You further state that both McLeod County and Meeker County have the town system of caring for the poor.

You inquire "whether the Town of Cedar Mills, Meeker County, having the town system, the family having lived in said town for ten months, or the Town of Lynn is now liable for the support of this family."

The question of the place of settlement of this poor family involves facts, many of which are not before us. It does not appear when this family moved to Meeker County from McLeod County, nor how long this family resided in Meeker County before returning to McLeod County. We assume, however, that this family resided in Meeker County for a period of ten months and then returned to McLeod County and that it is now residing in the city of Hutchinson in said county. We also assume that this family had its place of settlement in Lynn Township in McLeod County prior to the time that it moved to Meeker County.

Upon the basis of the above facts, we are of the opinion that this family has not acquired a settlement for poor relief purposes in Cedar Mills Town-

ship, Meeker County, and that it has its place of settlement in Lynn Township in the County of McLeod. In the case of Willmar v. County of Kandiyohi, 167 Minn. 178, to which you direct attention, the Supreme Court held that a person having a legal settlement in a municipality in one county must reside in another county for a year before he acquires a settlement in such other county for poor relief purposes.

In the case of Village of Grove City v. Township of Manannah, 182 Minn. 197, the court said:

> "For several years immediately prior to taking up his residence in Union Grove, Abitz had a settlement in Stearns county, Minnesota. Appellant's counsel argues that during the year following such removal into Meeker county, Stearns county remained his residence for the purpose of poor aid and that any subdivision in Meeker county that might furnish aid during that period could recover the same from Abitz's place of residence in Stearns county. In this he is correct."

Applying the rules of law laid down by the Court in the above referred to cases to the facts submitted in your inquiry, we believe that it necessarily follows that even where the township system is in effect in both counties that a family having a settlement in a subdivision of one county must reside for a year in another county before it can obtain a settlement in any municipality in such other county. The fact that both Meeker County and McLeod County are operating under the town system does not alter the rule laid down in the above referred to cases.

DAVID J. ERICKSON,
Deputy Attorney General.

January 30, 1937. 339o-5

354

PAUPERS—Settlement—Rural federal grants—Not poor relief within Section 3161, Mason's Minnesota Statutes of 1927, as amended.

Mr. Roy A. Hendrickson, County Attorney.

You direct attention to Mason's Minnesota Statutes of 1927, Section 3161, as amended, and inquire:

> "In a question involving legal settlement between one county and another where a recipient has received federal grants through the rural resettlement office, shall the months in which such payments are made be excluded in determining the time of residence under this act?"

Since the question you submit is partly one of fact we cannot undertake to give you a categorical answer. Although you do not so state we assume that the federal grant or grants to which you refer were furnished by the Federal Resettlement Administration. We also assume that these federal funds were furnished by said Resettlement Administration as advances to the recipient for purchase or lease of land, livestock, equipment, or in the

nature of a subsistence grant, or goods. The purpose of the furnishing of such federal funds is to enable individual families to be rehabilitated on their own farms or on nearby lands. The President described the duties of the Resettlement Administration in part as follows:

> "To administer approved projects involving re-location of destitute or low-income families from rural and urban areas, including the establishment, maintenance, and operation of communities in rural and urban areas; to make loans to help finance the purchase of farm lands, food, livestock, and necessary equipment by farmers, farm tenants, croppers, or farm laborers; to purchase land and devote it to the best possible use."

In other words, the purpose of the Rural Resettlement program is not to give mere temporary relief but the rehabilitation of worthy but destitute farmers, as well as the restoration of misused land to its proper use. That is, the aim of this program through such loans or grants is not relief, but to rehabilitate these farmers permanently.

Moreover, under the Federal Resettlement program our understanding is that the money spent by the government in administering said program is regarded as a loan to the recipient repayable over a long period of years; and that in all instances the government will be paid back the money it has spent or advanced to such recipients. We are of the opinion, therefore, that the months during which a person has received such a federal grant or loan from the Resettlement Administration should not be excluded in determining his place of settlement under said Section 3161 as amended. It seems clear that a recipient of such a grant or loan from the Federal Resettlement Administration is not receiving "relief from the poor fund of any county or municipality or from funds supplied by the State of Minnesota or the United States or any department or departments thereof, **supplied as direct relief or in providing work on a relief basis and in lieu of direct relief * * *.**"

As indicated, such a grant or loan is not to be regarded as poor relief but as a loan repayable to the government over a long period of years. If the legislature had intended to include such grants or loans within the meaning of said Section 3161, we believe that it would have so stated in express terms. It seems to us that the two systems—the Federal Resettlement program—and the furnishing of funds by the State of Minnesota or the United States or any department or departments thereof "supplied as direct relief or in providing work on a relief basis and in lieu of direct relief"—are so distinctly different in origin, purpose and process as to prevent interpretative enlargement of said Section 3161, as amended, to include the months during which a person has received such a grant or loan from the Federal Resettlement Administration. In order to give said section such meaning now, we would have to enlarge it by process of amendment. Such amendment is for the legislature rather than for this department.

DAVID J. ERICKSON,
Deputy Attorney General.

April 19, 1937. 339s

355

PAUPERS—Settlement—Wife and minor children—Same as husband.

Mr. Ray J. Quinlivan, City Attorney.

You state that A resided in the village of Murdoch, South Dakota, with his family, consisting of his wife, three daughters and two sons, and that "he had a settlement for poor relief in that village"; that in July, 1935, he moved to St. Cloud with his two boys and they remained with him until September, 1936, when the two boys returned to Murdoch; that A remained in St. Cloud and received no relief; that in July, 1937, the wife, three daughters and two sons came to St. Cloud; that they now live with A; that the wife was employed on WPA in South Dakota from November, 1935, until July, 1937; that there was no divorce and no separation other than the geographical separation of the family; that the father was doing what he could to support the family.

You inquire:

> "Has the family by reason of 'A's' residence in St. Cloud acquired a settlement in St. Cloud, it being conceded that 'A' has a settlement in this city?"

Assuming that A's settlement is in the City of St. Cloud, we are of the opinion that the settlement of A's wife and minor children is the same as that of the husband and father. The law authorizes the husband to determine the place of settlement for the family, and the presumption is that the settlement of a wife and minor children is the same as that of the husband and father. This rule is predicated upon the general legal proposition that it is the duty of the wife and children to live at the place selected by the husband and father, and that it is the husband's duty to support and care for his wife and children. Minnesota has adopted the common law rule that the settlement of a married woman is that of her husband. In the case of City of Willmar v. Village of Spicer, 129 Minn. 395, 152 N. W. 767, our Supreme Court said:

> "We hold that the law still is that the settlement of a married woman is where her husband resides, has his settlement."

See In re Settlement of Colden, 182 Minn. 221, 234 N. W. 7.

It does not appear from your letter that the wife and children were living apart from the husband because of any misconduct on his part since you state that "there was no divorce and no separation other than the geographical separation of the family," and that "the father was doing what he could to support the family."

DAVID J. ERICKSON,
Deputy Attorney General.

November 2, 1937. 339a-2

356

PAUPERS—Town system—Repeal of by special act of legislature.

Mr. Herman A. Senneka, City Attorney.

You state that "each town and village in Pope County has heretofore been required to support its poor by virtue of Chapter 252 of the Special Laws of Minnesota for 1887"; and that the legislature repealed said Chapter 252, Special Laws of 1887. You inquire:

> "Does the repeal of the special act return Pope County to the county system of poor relief?"

Prior to the enactment of Chapter 170, Laws of 1889, all counties in this state were operating under the so-called county system of poor relief, except in certain counties wherein the town system had been established by special acts of the legislature.

By the enactment of one of such special acts, Chapter 252, Special Laws of 1887, the system of poor relief was changed in Pope County from the county system to the town system, and, we assume that your county has been operating under said town system subsequent to the enactment of said Chapter 252, Special Laws of 1887.

We are of the opinion, therefore, that the repeal of said Chapter 252, Special Laws of 1887, by said Chapter 43, Extra Session Laws of 1937, has the effect of re-establishing the county system of poor relief in Pope County. If this was not the purpose of said Chapter 43, Extra Session Laws of 1937, it had no practical effect, and it is presumed that the legislature did not intend to enact meaningless legislation. See Pushor v. Village of Morris, 53 Minn. 325.

In the Morris case, supra, the court construed the effect of Chapter 249, Laws of 1893, which repealed Chapter 273, Special Laws of 1889.

It will be noted that Chapter 249, Laws of 1893, contains substantially the same language as that contained in Chapter 43, Extra Session Laws of 1937; and that the provisions of Chapter 273, Special Laws of 1889 and Chapter 252, Special Laws of 1887 are almost identical, except that Chapter 273 applies to Stevens and Grant Counties while Chapter 252 applies to Pope County.

It will also be noted that both Chapter 273, Special Laws of 1889, (relating to Stevens and Grant Counties and Chapter 252, Special Laws of 1887 relating to Pope County) were enacted prior to Chapter 170, Laws of 1889, which established the dual system of caring for the poor—namely, the county and town systems, and that both repealing acts were enacted subsequent to the enactment of Chapter 170, Laws of 1889.

The provisions of said Chapter 170, Laws of 1889, were consolidated and incorporated in the Revised Laws of 1905, Sections 1 and 15, being combined and carried forward into Section 1487 of said Revised Laws of 1905 and now embodied in Mason's Minnesota Statutes of 1927, Section 3160.

Although the revision commission made some changes in the language of said Sections 1 and 15 of said Chapter 170 at the time of incorporating the same into said Section 1487 of the Revised Laws, we do not believe that such change affects the construction placed upon the provision of said Chapter 170 by the court in the Morris case. The rule in this state seems well established that upon the repeal of a special law a general law becomes self operating which had been superseded by temporary special legislation. Pushor v. Village of Morris, supra, Heinssen v. State, 14 Colo. 228, 23 Pac. 995 and State ex rel. Attorney General v. Haas, 110 Minn. 11.

DAVID J. ERICKSON,
Deputy Attorney General.

August 24, 1937. 339a-5

357

PAUPERS—Town System—Separation of village from township—Liability for care of after separation.

Mr. Harry E. Burns, County Attorney.

You state that Stearns County is operated under the township system of caring for the poor; that a poor person "coming from one of the townships is severely injured so that he has to be hospitalized for a long period of time"; that before the hospital bill was presented to the township, the township was split up "into a township and village."

You inquire:

> "Is the village, which was part of the township at the time the poor person received this hospitalization, liable for a share of the hospital expenses?"

You do not inform us where this person had his settlement for poor purposes at the time of the hospitalization which was furnished prior to the separation of the village from the township; nor do you inform us whether such separation of the village from the township includes separation for election and assessment purposes. If the village is not separated from the town for election and assessment purposes, it is the duty of the town to support the poor person in question out of the town poor fund which is contributed to by the owners of the taxable property within the village as well as within the township. If this person's settlement is in that portion of the town outside of the limits of the village, the town is liable for such hospitalization and the village is not. On the other hand, if the village is separated from the township for election and assessment purposes and if this poor person's residence and settlement under our poor laws is now in the village, the village is liable for the hospitalization furnished subsequent to the separation and the township is liable for that portion of the hospitalization furnished prior to such separation.

DAVID J. ERICKSON,
Deputy Attorney General.

March 4, 1937. 339a-5

358

PAUPERS—Transients—Claim for reimbursement for medical treatment of.

Mr. T. O. Streissguth, County Attorney.

You state that one John Severine, a resident of Iowa, boarded a freight train at Marshalltown, Iowa, on July 1, 1937, intending to ride the box cars from Marshalltown to some point in Western Minnesota where he intended to find work in the harvest fields; that while the freight train was switching at Waseca, Minnesota, he remained in the box car and was severely injured while the freight crew was making a flying switch; that his injuries consisted of a fractured hip; that he tried to call for help while still in Waseca but could not attract any one's attention and the freight train continued on westerly through Mankato and on to New Ulm; that at Mankato he likewise was unable to attract any one's attention but when he arrived at New Ulm he succeeded in doing so; that he was thereupon removed to one of the local hospitals of New Ulm and given immediate medical and hospital care and that he is still a patient at said hospital.

You further state that when Severine became injured in the County of Waseca "the responsibility for his care and hospitalization became fixed notwithstanding in an injured condition he was transported against his wishes from Waseca into Blue Earth County and finally into Brown County."

You inquire:

> "As between the County of Waseca and the County of Brown, where does the primary responsibility rest for the expenses incurred by the County of Brown in granting such medical and hospital care?"

You do not state as to whether or not the two counties in question have the county or township system for caring for the poor, but for the purpose of answering your inquiry this is not important. The township or county in which the accident occurred and the injuries were received would not be liable. If the county where the medical and hospital services were furnished was on the township system, the municipality where the medical attention was furnished would be primarily liable, and recovery might then be had of the county in which that municipality was situated. See Subdivision 2, Section 3186, Mason's Minnesota Statutes of 1927. The municipality or county where the injuries were received is not liable for such medical services by reason of that fact alone. However, it was the legal as well as the moral duty of the public authorities in either county when applied to to furnish this transient necessary care and medical attention. That fact, however, does not give to the municipality or county in which the medical services were performed any right of recovery against the municipality or county in which the injuries were received. This, for the reason that the person in question had no settlement for poor relief purposes in the county in which such injuries were received. It will be noted that the above referred to section of the statute provides that upon the payment of such expenses incident to the furnishing of such relief the county may recover the same from the place of legal settlement of such person if he has a settlement within the state.

It seems clear, therefore, that primarily it is the duty of the municipality or county in which such poor person is found to care for him, with right of recovery only in the event that such person has a settlement in some other municipality of the state.

The fact that the person in question was accidently and without fault on the part of the county of Waseca disabled or injured in that county would not seem to create any liability on its part to the county in which such medical services were furnished. The person in question was not a resident of that county and it owed him no duty except that if while he remained in that county application for aid or notice of his condition was given to the authorities in that county it would be their duty to care for him while in that county. However, no application for aid was made while he was in the county of Waseca and his condition was not brought to the attention of the authorities of that county while he was there. This is a case where the so-called law of humanity requires that prompt aid be given to a sufferer. But this is no ground for recovery. Charity, whether granted by public authorities or private persons, is usually something done for which no recompense is expected or claimed. Each county stood in that respect upon an equal footing. Each county was under obligation to care for the unfortunate while he was within its borders. Whichever county was called upon and did care for him would be without remedy of recompense, because the person in question had no settlement in this state. We know of no case where recovery has been allowed to one municipality against another for the care of such an injured person in need of aid except upon the ground that the person aided had a legal settlement in the county or municipality sought to be charged.

Pursuant to your request, we herewith enclose copy of an opinion dated February 7, 1933, addressed to the office of the County Attorney of Hennepin County.

DAVID J. ERICKSON,
Deputy Attorney General.

August 11, 1937. 339a-6

359

PAUPERS—Transients—Claim for aid furnished.

Mr. W. S. Foster, Village Attorney.

You state that, "It has frequently occurred during the past three or four years that poor transients, either traveling on foot or by automobile would find themselves stranded in our village, possibly with a broken down car and no gasoline and no place to sleep on a winter night," that you have been unable to find any provision in the law "which warrants a Village Council in providing food, lodging or gasoline to afford temporary relief to these transients"; and that "on humanitarian grounds, the village has occasionally expended a few dollars in caring for these cases."

You also state that your county is operating under the county system of caring for the poor and that the "County Commissioners" seem averse to caring for these cases.

You inquire "as to the proper manner of handling them."

Although you do not so state, we assume that the "poor transients" referred to have no settlement in the state for poor relief purposes.

The question of whether certain persons are paupers and the extent of relief to which they are entitled involves the exercise of discretion on the part of the county board in a county operating under the county system of poor relief. So far as we are aware there is no machinery provided by law for compelling a county board to act in such case when it refuses to do so. This is particularly true in a case where the extent of the relief to which such persons are entitled involves the exercise of discretion on the part of the governing body in such county. It might be that in a given case the situation would become so acute that it could be said an emergency existed which would justify the village counsel or private individuals furnishing relief to such poor transients and collect from the county for the relief so furnished. Recovery has been sustained by the Supreme Court in an emergency where medical attention is furnished even without the knowledge or consent of the town board. (Robbins v. Town of Homer, 95 Minn. 201.) For example, if a poor transient family were in a situation where the members thereof were threatened with immediate starvation or freezing, and the county board in such a county refused to act, the village council of the municipality wherein such family was stranded might furnish the necessary relief and then have a right to recover from the county under the doctrine in the case above cited.

In some of the cases the courts have referred to the "law of humanity" which requires the public as well as individuals to render assistance under various circumstances, irrespective of statutes. We take it that if the situation is such that the "law of humanity" is or becomes operative, either the village or the county or both may furnish necessary relief to such poor transients. This, however, is a matter for the determination of the local authorities in the exercise of their official judgment and discretion after taking into consideration all the surrounding facts and circumstances relating to such poor transients.

DAVID J. ERICKSON,
Deputy Attorney General.

April 12, 1937. 339o-6

360

PHARMACISTS—Aspirin compounds not proprietary medicines.

Mr. Edward J. Prochaska, Secretary,

Minnesota State Board of Pharmacy.

You state:

"We are finding an abuse very prevalent, especially in beer parlors

all over the State, in the sale of preparations known as Aspirin Compounds. These Compounds are usually a combination of Aspirin with different drugs, such as Acetanilid, Phenacetin and Caffeine, either one or two combined with the Aspirin. The same are being called by different names, to wit: Asperline, Aspertain, Aspercyn, etc."

You ask whether the retail sale of Aspirin Compound Tablets by other than a registered pharmacist is contrary to law.

We answer your question in the affirmative, subject to the recognized exceptions contained in the Pharmacy Act.

Section 16 (a) of Chapter 354, Laws of 1937, makes it unlawful
"for any person to compound, dispense, vend or sell at retail, drugs, medicines, chemicals and/or poisons in any place other than a pharmacy, except as hereinafter provided."

Section 27 (a) of Chapter 354 exempts physicians, dentists and veterinarians from the operation of the act. Section 27 (d) contains further exemptions from the act as follows:

"Nothing herein shall apply to or interfere with the manufacture, wholesaling, vending, or retailing of non-habit forming, harmless proprietary medicines when labeled in accordance with the requirements of the State or Federal food and drug act; * * *"

Section 27 (e) provides for the licensing of stores in municipalities where there is no drug store, in which stores certain drugs may be sold.

The question is whether aspirin compounds are proprietary medicines within the meaning of Section 27 (d).

It is our opinion that they are not proprietary medicines and consequently do not come within the exception stated in Section 27 (e). In the case of State v. Zotalis, 172 Minn. 132, 214 N. W. 766, our supreme court held that aspirin was not a proprietary medicine. The court said:

"Aspirin is a coal tar product commonly kept in drug stores and is used and sold for medicinal purposes. It is a drug or medicine within the statute. It is not a proprietary or patent medicine."

The aspirin compounds referred to in your letter are mere subterfuges to evade the decision of our court in the Zotalis case. A very excellent statement is found in the cases referred to in your letter in which cases Judge Poirier of the Municipal Court of Minneapolis held that aspirin compounds are not proprietary medicines. Judge Poirier said:

"The sale of preparations of the type of aspirin under a different name or aspirin compounds, I consider a subterfuge which nullifies the fundamental purposes of the Minnesota Pharmacy Law, and it was not the intent of the Legislature to permit the sale of U.S.P. drugs or adulteration of same with drugs, which adulterations, in some cases are dangerous to health.

* * * * *

"Acetanilid, phenacetin, drugs sometimes combined with aspirin in these tablets, are recognized as heart depressants and the indiscriminate sale of it is often dangerous to the health of our citizenry. We must protect public health."

One of the fundamental reasons for the rigid requirements of the pharmacy law is found in the following statement of the court in the case of State v. Woolworth Co., 184 Minn. 51, 237 N. W. 817:

"But the examination of the quality of medicines sold is not the sole purpose of having a pharmacist in charge. Many poisonous drugs and medicines may be sold in original packages. The pharmacist knows what drugs are poisonous. He is required to keep a record of sales of numerous poisonous preparations. If attentive to his duties, he will in some degree guard against mistakes and misuse. He must in the first instance determine whether an article called for is a poison requiring registry of the sale. He should know whether an article sold is a standard preparation made according to the U.S.P. formula or an adulterated and harmful preparation."

DAVID J. ERICKSON,
Assistant Attorney General.

June 2, 1937. 337c-1

361

PHARMACISTS—Hydrogen Peroxide not a patent medicine.

Mr. Edward J. Prochaska, Secretary,

State Board of Pharmacy.

You ask whether or not hydrogen-peroxide is exempt from the application of the pharmacy law as a patent or proprietary medicine.

We answer your question in the negative.

Laws of 1937, Chapter 354, Section 16 (a) provides that:

"It shall be unlawful for any person to compound, dispense, vend or sell at retail, drugs, medicines, chemicals and/or poisons in any place other than a pharmacy, except as hereinafter provided."

Section 27 (d) exempts "non-habit forming, harmless proprietary medicines when labeled in accordance with the requirements of the State or Federal food and drug act" from the provisions of Chapter 354. Consequently such medicines can be sold notwithstanding the provisions of Section 16(a) above quoted.

The term "drug" as used in Chapter 354 means:

"all medicinal substances and preparations recognized by the United States Pharmacopeia and National Formulary or any revision thereof,

and all substances and preparations intended for external and internal use in the cure, mitigation, treatment or prevention of disease in man and other animal, and all substances and preparations, other than food, intended to affect the structure or any function of the body of man or other animal." (Section 1 (d).)

The term "medicine" means:

"any remedial agent that has the property of curing, preventing, treating or mitigating diseases, or that is used for that purpose."

Hydrogen-peroxide, within the above definitions, is a drug. The pharmacopoeias and dispensaries unequivocally deal with its medicinal or therapeutic, or in other words, its "drug" qualities. The question that then arises is whether this drug or medicine is a proprietary medicine. We do not think that it is. Hydrogen-peroxide is prepared in accordance with a formula contained in the United States Pharmacopoeia, a standard work giving the formulas and ingredients of drugs and medicines. There is no secret about its manufacture or its ingredients. Any manufacturer can make exactly the same preparation under the United States Pharmacopoeia formula. Consequently, it cannot be considered to be a patent or proprietary medicine. See State v. F. W. Woolworth Company, 184 Minn. 51, 237 N. W. 817.

Your files are herewith returned.

ROY C. FRANK,
Assistant Attorney General.

May 20, 1938. 337c-3

362

PHARMACISTS—Poisons sold for medicinal purposes.

Mr. Edward J. Prochaska, Secretary,

State Board of Pharmacy.

You state that the sale of poisonous and harmful medicines through channels other than licensed pharmacists is becoming quite prevalent. These preparations are being sold in cafes, beer parlors, by wagon peddlers and in various other business places and by various persons. One of these poisons is known as "KREO," it being similar to "Compound Solution of Cresol."

Our opinion is requested as to the correct interpretation of the pharmacy law relative to the sale of poisonous medicines that might be classed as patent or proprietary medicines.

Section 16 (a) of Chapter 354, Laws of 1937, provides that:

"It shall be unlawful for any person to compound, dispense, vend or sell at retail, drugs, medicines, chemicals and/or poisons in any place other than a pharmacy, except as hereinafter provided."

The exceptions referred to in Section 16 (a) are found in Section 27 of Chapter 354. Subsection (a) of Section 27 provides that the restrictions contained in 16 (a) shall not apply to "a person duly licensed in this state to practice medicine, dentistry or veterinary medicine" and permits such a person to compound or use drugs, medicines, chemicals or poisons in his practice and to furnish such articles to a patient in a course of treatment. Subsection (c) of Section 27 permits the sale of drugs, chemicals or poisons for commercial purposes and also permits the sale of insecticides, common household preparations and other drugs, chemicals and poisons sold exclusively for nonmedicinal purposes. Subsection (d) excepts non-habit forming, harmless proprietary medicines when properly labeled.

None of the exceptions above stated apply to "KREO" or other poisons used for medicinal purposes. This preparation is labeled "poison" and is sold as an antiseptic disinfectant for the "Sick Room, Minor Cuts and General Household Use." It cannot come under the exception stated in Subdivision (c) of Section 27 since it is sold for medicinal purposes. It cannot come under the exception stated in Subsection (d) of Section 27 since it is not a harmless proprietary medicine.

We, therefore, advise you that the sale of poisons used for medicinal purposes is contrary to law unless sold in a pharmacy or used and furnished by licensed physicians, dentists or veterinarians as provided in Subsection (a) of Section 27.

The purpose of this law is clearly set forth in a memorandum prepared by Judge Poirier of the Minneapolis Municipal Court, and in view of the soundness of his statement we set it out in this opinion as follows:

> "The sale of poisonous medicines or drugs by persons not trained in the field of public health is certainly a menace to the public welfare. A great deal of concern is being shown all over the United States because of abuses in the patent and proprietary medicine field relative to the sale of preparations based to a much greater degree from the standpoint of making profits than for the beneficial remedial effects to the buyers of these products. This public sentiment is reflecting itself in Congress today, and will no doubt result in the elimination of some of the worst types of abuses.
>
> "The medical and pharmaceutical professions, I well realize, are opposed to these many abuses and have been endeavoring to co-operate with the Federal Pure Food and Drug Department in a program to eliminate these practices.
>
> "A great deal of public money is spent in training doctors and pharmacists and society should get the benefit of their trained services and protection from the sale of preparations such as poisons or medicines that might be harmful."

ROY C. FRANK,
Assistant Attorney General.

March 26, 1938. 337c-2

363

PRISONS—Training School for Boys—Transportation expense.

Mr. Downer Mullen, Secretary, State Board of Control.

It appears that a certain boy was committed to the State Training School at Red Wing by the district court of St. Louis County. He was bound over to the district court by the juvenile court of the same county. The sheriff of St. Louis County now presents his claim for mileage and expenses to the superintendent of the training school.

You inquire:

> "Will you kindly advise if the Sheriff of St. Louis County is entitled to receive payment from the State of Minnesota for taking this boy to the State Training School?"

From the facts stated it appears that the boy referred to was committed to the State Training School under the provisions of Mason's Minnesota Statutes of 1927, Section 9947. In our opinion the expense of transporting said boy is to be borne by St. Louis County. Under the system of government in force in this state the several counties are primarily charged with the burden of administering the criminal laws of the state and, in the absence of legislation to the contrary, must bear the costs of transporting a person convicted of a criminal offense to the place of commitment. Mason's Minnesota Statutes of 1927, Section 10826 specifically provides for the payment by the state of the expenses incurred in transporting prisoners to the Minnesota State Prison and to the Minnesota State Reformatory, but we do not find any provision of law imposing upon the state the burden of transporting persons committed to the State Training School. In the absence of such provision, the burden of paying such expenses must fall on the county of commitment.

ROY C. FRANK,
Assistant Attorney General.

April 16, 1937. 345d

364

PUBLIC UTILITIES—Franchise—Exclusive—Construed as not exclusive.

Mr. Emil A. Wegner, Village Attorney.

You state that the Village of Howard Lake was incorporated pursuant to Chapter 21, Special Laws of 1878, and is operating under Chapter 139, Laws of 1875; and that said Ordinance No. 43 "grants to the Northern States Power Company for a period of twenty years permission to erect and maintain in said village transmission lines and an electric distributing system for the furnishing of electrical energy to the village and to its inhabitants."

You submit three questions which will be restated and answered in the order set forth in your letter.

> "1. Does the above referred to Ordinance prohibit the village from installing or constructing its own electric light and power generating and distributing system for furnishing electrical energy to the Village and to the inhabitants thereof?"

Ordinance No. 43, which was adopted by the Village Council of your village on November 5, 1936, by its terms grants to the "Grantee" named therein the right and privilege of erecting, enlarging, operating, repairing and maintaining in, upon and across the streets, alleys and public grounds of said village electric transmission lines and electric distributing system for the purpose of transmitting and furnishing electric energy for light, heat, power and other purposes for public and private use in and to said village and the inhabitants thereof for the period of twenty years.

Section 4 of said ordinance provides that nothing therein contained "shall be construed as giving to said Grantee, its successors or assigns, any exclusive privilege in, on, over or across any of the streets, alleys or public grounds of said village."

We find no provision in said ordinance whereby the village agreed or obligated itself either to abstain from erecting and maintaining its own transmission lines and electric distributing system or whereby it agreed for said period of time from granting to any other party the right to use the village streets for the purpose of transmitting and furnishing electric energy and power to the village and its inhabitants. In other words, said ordinance by its terms does not limit or prohibit the village, for the period of twenty years, either from granting to any other person or corporation than the grantee named therein the privilege of supplying electric light and power and maintaining an electric light and power system nor from itself exercising the right of establishing such a system and supplying electric light and power to the village and its inhabitants.

The rule of law is well established that if there is any ambiguity or reasonable doubt arising from the terms used by the legislative or granting body, as to whether an *exclusive* franchise has been conferred or authorized to be conferred, the doubt is to be resolved against the corporation or individual claiming such grant. See Long v. City of Duluth, 49 Minn. 280. In other words, unless the municipality clearly provides in its contract or ordinance for such service, that it will not itself acquire and operate a similar municipal public utility, the courts will not find by implication that it has done so, for the reason that the rule of strict construction would prevent and for the further reason that a finding to the contrary would preclude the municipality from a further exercise of any control of the situation, although it had not expressly agreed to preclude itself from continuing to regulate and control the question. That is, unless there can be found in the ordinance in question words clearly depriving the village of Howard Lake of the right to build, own and operate its own electric light and power system, the courts will not by implication give such effect to the ordinance. As indicated, our supreme court in the Duluth case, supra, said

that the privilege conferred by such an ordinance must be strictly construed against the grantee, and whatever was not unequivocally granted is withheld. See also Knoxville v. Knoxville Water Company, 212 U. S. 1. The village not having bound itself by said ordinance not to build and operate an electric light and power system of its own, the legislature having authorized it to do so by Section 1229, Mason's Statutes of 1927, an ordinance adopted pursuant to such legislation authorizing the construction by the village of such a municipal plant would not impair the obligation of the contract conferred upon the power company by said Ordinance No. 43. The fact that the competition of the village in the operation of its own electric light and power system may lessen the value of the grantee's plant in said village does not amount to the taking of property without due process of law, within the meaning of the federal constitution nor to the taking of property without just compensation within the meaning of the constitution of the State of Minnesota. Helena Water Works Company v. Helena, Montana, 195 U. S. 383.

As indicated, therefore, since the right to exclude competition by such a franchise ordinance operates to the benefit of the privately owned public utility, such an ordinance will not be deemed exclusive if there is any other equally reasonable construction possible; nor will the grant of such a franchise by a municipal corporation in itself, unless it is so stipulated, exclude the municipality from furnishing municipal public utility service such as electric light and power any more than it will restrict the municipal corporation from granting similar franchise rights to other corporations. In other words, the grantee of such a franchise, which is not clearly exclusive, acquires no right by virtue of the grant to object to the issue of similar franchises to others or to the exercise of the power vested in the municipal corporation itself to own and operate its own utility systems, since, as before stated, no power to grant exclusive franchises will be found in municipalities of this state by implication; for the same reason no franchise granted by such a municipal corporation will be held to be exclusive by implication. Unless, therefore, the village expressly excluded itself in the granting of such franchise by said Ordinance No. 43, it may enter the field itself by constructing and operating its own electric light and power system pursuant to the authority vested in it by said Section 1229. For cases supporting the above conclusion see Detroit Citizens St. R. Co. v. Detroit Ry., 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. 732; Knoxville Water Co. v. Knoxville, Tennessee, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. 224; Blair v. Chicago, Illinois, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. 427; Milwaukee Elec. R. & C. Co. v. Railroad Commission of Wisconsin, 238 U. S. 174, 59 L. ed. 1254, 35 Sup. Ct. 820; Larson v. State of South Dakota, 278 U. S. 429, 73 L. ed. 441, 49 Sup. Ct. 196.

As indicated from the language of the ordinance, no words of direct expression or intention to grant an exclusive franchise are to be found in said ordinance; nor does it appear from the same that exclusiveness was a part of the consideration for the contractual obligation. Nor is there any expression by apt words to show that the village intended to exclude itself from exercising the privilege of establishing and maintaining an electric light and power system of its own. In fact, the language in Section 4 of

said ordinance, "Nothing in this Ordinance contained shall be construed as giving to said Grantee, its successors or assigns, any exclusive privilege * * *," clearly shows that said ordinance does not confer an exclusive contract. The village not having granted an exclusive franchise by said ordinance, we are of the opinion that it may establish its own electric light and power generating and/or distributing system for furnishing electric energy to the village and the inhabitants thereof pursuant to the provisions of said Section 1229.

"2. If you find the Village has the power to construct its own distributing system for furnishing electrical energy to the village and to the inhabitants thereof may the village purchase such electrical energy at wholesale and distribute same through such village owned distributing system?"

This question is answered in the affirmative. Sections 1252 and 1253 of Mason's Statutes of 1927 expressly authorize all villages in the state to contract with any person, firm or corporation or municipal corporations "for the purchase of electric energy for municipal purposes and to be distributed and supplied by such municipality to the inhabitants thereof."

"3. May the Village Council purchase such electrical energy to be distributed through its own distributing system from a corporation or individual other than the grantee named in Ordinance No. 43?"

This question is also answered in the affirmative. See Sections 1252 and 1253.

DAVID J. ERICKSON,
Deputy Attorney General.

November 18, 1937. 624c-6

365

PUBLIC UTILITIES—Light and power—Transmission lines and poles along public highways.

Mr. John H. McLoone, County Attorney.

You state that there has been organized in your county the Steele-Waseca Cooperative Electric; that this organization is preparing to erect their poles, etc., and to install their lines; that a number of their lines will be placed along state aid and county aid roads; that the board of county commissioners of Waseca County "have taken the position that the Steele-Waseca Cooperative must place their poles on the 32 foot line (32 feet from the center line of the road)"; that the right-of-way is 66 feet; that the "Cooperative takes the position that this action of the commissioners is in effect legislating them off the road because of the fact that it is impossible for them to obtain easements from every property owner along the road"; that the "cross arms will extend a distance of four feet out from either side of the pole and if the pole is placed on the 32 foot line part of the cross arm will extend over the adjoining landowner's property and an easement

is necessary"; and that "if they were allowed to place the poles on the 28 foot line, which would be in the ditch, the trouble could be avoided."

You inquire "as to the legality of the action of the commissioners and as to how far they can go along this direction."

The right of any water power, telegraph, telephone, * * * light, heat or power company to use the public highways of the state is granted by the provisions of Section 7536, Mason's Minnesota Statutes of 1927, with which you are no doubt familiar.

It will be noted from the above referred to section of the statute that it does not require the granting of a permit from any governmental subdivision as a condition precedent to installing electric light or power lines upon the public highway, except in case of cities and villages. As to roads outside of cities or villages an electric light or power company has the right to install lines upon such public highways, irrespective of whether they are town, county or state roads, provided that the installation is so made as not to interfere with the safety and convenience of ordinary travel over such roads, and provided, further, that the installation is done in accordance with the reasonable regulations, if any, made by any town through which such public highways extend. In our opinion, therefore, subject to the above limitations, it is not necessary for such a light company to secure a permit from the county and the various townships through which its lines will extend.

As indicated, the statute above referred to gives the right to make the installation, subject only to the condition that the line shall be so located as not to interfere with the safety and convenience of ordinary travel along the public highways. In other words, we are of the opinion that such a cooperative electric light company may construct its lines on such public highways so as to have all of the installation on the right-of-way of the public roads. It follows that if it is necessary to place cross arms on the poles, the poles may be placed far enough in from the edge of the right-of-way so as to enable such company to have such cross arms within the limits of the right-of-way, subject only to the condition that the line shall be so located so as not to interfere with the safety and convenience of ordinary travel along the road. It will be noted that the statutory limitation relates only to interference with the safety and convenience of ordinary travel along or over the right-of-way. The county board has no power to inject any other limitation than that contained in the statute.

DAVID J. ERICKSON,
Deputy Attorney General.

July 30, 1937. 624c-14

366

SANITORIUMS—District—Term "free patients" limited to residents of district unable to pay.

Mr. Downer Mullen, State Board of Control.

You set forth several problems and questions based thereon. We set them forth and discuss them in the order in which they appear in your letter.

1. "Ordinarily, patients from Benton County are hospitalized at the State Sanatorium because of the fact that Benton County does not belong to any organized County Sanatorium district. However, in this case, the patient wished to be hospitalized at Fair Oaks Lodge Sanatorium in Wadena County and the Superintendent of the Sanatorium has requested State Aid at the rate of five dollars per week for this patient who is unable to pay for her care.

"* * * is it permissible to pay five dollars per week State Aid to Fair Oaks Lodge Sanatorium Commission for the maintenance of this person who is unable to care for herself?"

There are two classes of persons who may be treated at a county tuberculosis sanatorium. One class consists of those residing within a sanatorium district, the other of those residing in the state but outside of the sanatorium district. Section 710, Mason's Minnesota Statutes of 1927, makes provisions for persons belonging to both classes. This section authorizes the county sanatorium commission to fix the amount to be charged for the care, treatment and maintenance of each patient, and provides that "when a patient is unable to pay said charges and has no kindred legally liable therefor from whom payment can be secured, said patient may be admitted without charge or a patient by whom or for whom continued payments cannot be made may become a free patient." Then follows a provision with reference to persons residing outside of the district, providing that such persons may be admitted to a county sanatorium "upon payment of a weekly sum to be fixed by the county sanatorium commission" and upon the approval of the advisory commission of the Minnesota Sanatorium for Consumptives. Section 708 of Mason's Minnesota Statutes of 1927 provides that:

"For the maintenance of each free patient treated in the sanatorium the sum of five dollars ($5.00) per week shall be paid to said county or group of counties by the state treasurer out of funds appropriated under this act, * * *."

This office has heretofore held that the term "free patient" as used in Sections 708 and 710 refers exclusively to persons residing in the sanatorium district. Such persons may be admitted to the sanatorium without any charge being made. Where persons not residing in the district are admitted a charge is made either against the person, his responsible relatives or the municipality wherein such person has his pauper settlement. Consequently, such person is not a "free patient," even though he may be a pauper patient. Not being a free patient the provisions of Section 708 relating to the payment of state aid are not applicable.

We, therefore, must answer your question in the negative.

2. "Closely related to this question is the similar situation in which an indigent person from Ramsey County, an organized Sanatorium district, wishes to be hospitalized in a Sanatorium in Hennepin County, another organized district.

"If Ramsey County is willing to pay for the cost of care in the Hennepin County Sanatorium, with the exception of five dollars per

week, would it be permissible for the Board of Control to pay five dollars per week for the maintenance of a Ramsey County resident in a Hennepin County Sanatorium * * *?"

We answer this question in the negative. The reasons set forth to substantiate our answer to your first question are equally applicable to this question.

3. "Also closely related to these two problems, is the question of the definition of a 'free patient.' Presumably, when a patient is unable to pay charges for care and has no kindred legally liable therefor from whom payment can be secured, he is considered a 'free patient.'

"If, however, the County Commissioners of the County in which he resides offer to pay certain charges for Sanatorium care in another County, does this change the patient's status as a free patient in the County in which he wishes to receive care?"

We believe that our discussion under one of this opinion sufficiently answers this question. However, for the sake of clarity, we will elaborate our answer. Your assumption as to what constitutes a free patient is not wholly correct. When a patient is a resident of a sanatorium district and is unable to pay the charges for his care and has no responsible kindred, he is a free patient. However, if the patient is a resident of a county not included in the sanatorium district and is unable to meet the charges fixed by the Commission and has no kindred liable for the payment thereof, his place of pauper settlement, as defined by Mason's Minnesota Statutes of 1927, Section 3161, and laws amendatory thereof, is liable for and must pay such charges. Consequently, such person can never be a free patient within the meaning of the law. Accordingly, your assumption must be limited to residents of the sanatorium district.

Your question, of course, is answered in the negative. It is immaterial whether the board of commissioners offer to pay the charges. The fact remains that there is a fixed liability for said charges.

ROY C. FRANK,
Assistant Attorney General.

February 18, 1937. 556a-7

367

SECURITIES—Agreement construed.

Hon. S. Paul Skahen, Commissioner of Securities.

You submit a form of agreement by S. V. R., Inc., a licensed dealer under the terms of the Securities Act of the state, which provides, in substance, for the deposit of certain funds with a stock exchange house in the name of the investor, and appoints one H. as exclusive agent to trade this

account on a margin basis upon the payment of an initial fee of $25.00, together with 25% of the net profits of all trading transactions had under the agreement.

You inquire whether the contract is an investment contract within the provisions of Chapter 21-B, Mason's Statutes of 1927, Section 3996-1 (3).

We are of the opinion, from the analysis of the contract submitted under the previous rulings of this office, that when such a contract is offered to the public generally it is a profit sharing or participating agreement or scheme and a security under the definition of said statute.

FRANK H. OSTERLIND,
Assistant Attorney General.

April 26, 1938. 616a-5

368

SECURITIES—Blue Sky Law—Agreement construed.

Mr. S. Paul Skahen, Commissioner of Securities.

You inquire whether a purported investment, management, stock, bond, debenture, note, warrant or commodity trading agreement submitted to you by Messrs. Blank and Company, constitutes a security requiring registration pursuant to the provisions of the Minnesota Securities Act, Chapter 218, Mason's Minnesota Statutes of 1927 as amended.

It is our opinion that the purported investment management contract submitted herewith which Messrs. Blank and Company propose to offer to the public for the purpose of speculating in the stock and commodity markets with money and securities of the public pursuant to which profits, if any, are liberally shared with the self-styled agents issuing such contracts and the losses borne entirely by the public, is an "investment contract" or an "interest in, or under a profit sharing or participating agreement or scheme," or both as defined by statute.

An attempt to state a fixed and rigid rule by which to determine whether that which is offered to the public as a security or profit sharing or participating scheme which may not be sold without a license, would be to aid the unscrupulous in circumventing the law. We adhere to the rule set forth in the early Minnesota case, State v. Gopher Tire Company, 146 Minn. 56, wherein the court said:

> "It is better to determine in each instance whether a security is in fact of such a character as fairly to fall within the statute."

The intention of the legislature was stated in the title of the amended enabling act approved April 22, 1933, Chapter 408, Section 1, which amended the title of the original act, Laws 1927, Chapter 66, and which now reads:

"An act to protect investors by regulating sales and purchases and attempted sales and purchases within the State of Minnesota of stock, bonds * * * investment contracts, interests in or under profit sharing or participating agreements or schemes."

The public policy of the state has been declared. The state has an interest in the welfare of its people. The legislature intended to guard and protect the earnings and savings of its people from the ravages of speculation, confidence games, profit sharing or participating agreements or schemes and devices.

The right to issue the contract submitted is a question of public concern in which the state is interested. It is within a valid exercise of the police power of the state to regulate the issuance of such contracts. Those who have an honorable and legitimate plan of investment to offer the people, should neither fear nor resist the regulatory power of the state.

Your attention is called to the fact that apparently no provisions of law have been enacted in this state establishing standards of training, experience, skill and ability relating to the qualifications of a "professional trader," or "market operator."

FRANK H. OSTERLIND,
Assistant Attorney General.

June 1, 1937. 616a-5

369

SECURITIES—Blue Sky Law—Insurance policy.

Hon. Frank Yetka, Commissioner of Insurance.

Hon. S. Paul Skahen, Commissioner of Securities.

You state:

"The reason that this request is made by the Commissioner of Insurance and the Commissioner of Securities is due to the fact that the policy of insurance upon which your opinion is requested involves both questions—that of insurance as well as securities.

"The Department of Insurance has before it a policy of insurance (for $10,000.00) which is being sold in this State by a Company licensed to do business in the State of Minnesota, which contained the following provisions:

"'ADDITIONAL ENDOWMENT INSURANCE BENEFITS

"'The Company further agrees to pay Three Hundred and no/100 Dollars to the Insured on the 1st day of September, 1940, provided all premiums to and including the sixth shall have been

paid; or immediately on receipt of due proof of the prior death of the Insured to pay said sum to the then designated Beneficiary.

" 'It is agreed that when the benefits according to this provision shall mature as an Endowment the sum designated may be:

" '1. Paid to the Insured in cash; or

" '2. Left to accumulate with the Company at 3½% per cent interest compounded annually and subject to withdrawal in cash at any time or payment with the proceeds of the policy; or

" '3. If so requested in writing by the insured at any time prior to the date the articles of incorporation of the Company are amended, changing it to a stock company, applied to the purchase of a Founder's Certificate, par value in the amount of $100.00 and the excess Endowment over and above said par value shall be transferred to the Company's surplus for the benefit of the certificate holders.

" 'The amount of all Founder's Certificates shall be carried as a separate and distinct liability and whenever the amount of such Certificates outstanding shall equal $100,000 the Directors shall take the necessary action to change the Company to a Stock Company and stock in the said Company will be issued in exchange for all Founder's Certificates and of an equivalent Par Value.

" 'Until such time as the change to a stock basis shall be made the Board of Directors may at their discretion pay interest on all outstanding Founder's Certificate in an amount not to exceed 6 per cent per annum.

" 'Unless the Insured shall otherwise elect in writing the sum provided in this Additional Endowment Insurance Benefits provision shall be paid in cash, according to the first option.'

"* * * no registration of said sales has been made by said Company and no permission nor license to sell the policies with the option clause has been granted to said Company by the Department of Commerce.

"We wish to call your attention to an opinion of the Attorney General, dated December 17, 1931, entitled 'Insurance sales of stocks, bonds, etc.,' addressed to 'Honorable Garfield W. Brown.' " (Opinion File No. 253-b-5.)

You ask:

"Do the provisions of said policy relating to the option for the acquisition of stock constitute a violation of Section 3766 of Mason's Minnesota Statutes and other laws of the State of Minnesota relating to insurance?"

In my opinion the foregoing question should be, and it is, answered in the negative. Said Section 3766 prohibits such advantages, distinctions, favors, etc., as are **"not specified in the policy."**

You further ask:

"Is the option clause for the acquisition of stock, as set forth in said policy, of such a nature as would require the Company to register same with the Securities Commissioner and as would require a license for the sale and subscription thereof from the Commerce Commission?"

In my opinion the foregoing question should be, and it is, answered in the affirmative. Under such option clause the "benefits" are "applied to the purchase of a Founder's Certificate, par value in the amount of $100.00 * * * and stock in the said Company will be issued in exchange for all Founder's Certificates and of an equivalent Par Value." Clearly the transaction herein described and contemplated relates to a "security" within the purview of Subdivision 3, Section 3996-1, Mason's Minnesota Statutes 1927, and is a sale within the provisions of Section 3996-4, Mason's Minnesota Statutes 1927. There is a present exchange of money for the acquisition of rights which eventually are reflected in the issuance and ownership of corporate stock. In State v. Swenson, 172 Minn. 278, a contract selling an interest in a "profit sharing or participating agreement or scheme" was held to be a security within the meaning of the so-called blue sky law. Therein are cited other Minnesota cases holding various contracts to be "investment contracts" and within the purview of the blue sky law. The proposal of the insurance company herein deals specifically, and in so many words, with corporate interests and stocks.

You further state:

"The Company proposes henceforth on new policies to be issued in this State to add the following provisions:

"'The Company agrees that it will, within three years from the date hereof, and prior to maturity of this endowment, make proper application, as provided by the laws of the State of Minnesota, for registration, as provided by such laws, of any and all securities to be issued as hereinbefore provided. If and in the event, such application should be rejected and such securities should not be registered, then this option for purchase of a Founder's Certificate shall thereby be deemed abrogated and the Insured shall have only Options 1 and 2, above set forth.'"

You further ask:

"Would the addition of such a provision to the policy change the situation or statue of the policy to any extent?"

In my opinion the foregoing question should be, and it is, answered in the negative. It seems to me that the alternative proposition is simply a shortening of the time within which the original proposal would have been performed and completed.

HARRY W. OEHLER,
Assistant Attorney General.

March 19, 1937. 249a-17

370

SECURITIES—Oil and gas lands—Participating certificates—Syndicate agreements.

Hon. S. Paul Skahen, Commissioner of Securities.

You state that a number of persons, in excess of three, who desire to acquire lands or interests therein for the purpose of speculating in the production of oil and gas therefrom and for the acquisition of such lands, leases or royalty interests desire to contribute to the joint enterprise certain amounts of money. The interest of each contributor in the properties acquired or the profits made therefrom either by subsequent sale, development, production or operation would be in proportion to the amount of money invested by each as to the whole of said fund. A written agreement, known as a syndicate agreement would be executed and the subscriptions of each member would be noted therein and the division of the whole into units at a stated value would be specified.

You inquire:

1. "Would such an instrument under such circumstances be construed as a security and subject to registration where no properties had been acquired or contracted for by any of the individual members or the syndicate as a whole prior to the execution of the syndicate agreement, the same being a contribution by each individual for the purpose of forming a fund to acquire?"

2. "If a member of the syndicate is the owner of the properties to be acquired or the interests therein, and the syndicate is organized for the purpose of taking over such interest and operating the property, or selling the same, or if such properties or interests therein are owned by a third party under the same conditions, and such owner was a party to the agreement, would such syndicate agreement then constitute a security under the statute?"

3. "If a syndicate were formed under the same conditions for the purpose of developing properties already owned by one of the members or a third person under such agreement, would the same be a security within the definition of the statute?"

4. "If a syndicate were formed as indicated in any of the above instances and additional interests therein were sold to parties other than the original syndicate members, would such interests constitute a security and require registration before sale?"

The sale of oil and gas lands and interests therein are governed by the provisions of Chapter 21-B, Mason's Minnesota Statutes of 1927, Section 4000-1 to 4000-10 inclusive, or Laws of 1927, Chapter 68, Sections 1 to 10. That act provides in Section 4000-1:

"That no person shall sell to any person in this state any oil or gas lands, or any lands represented to contain or to be a prospect for

oil or gas, or any interest therein or thereunder or royalties therefrom, unless and until such lands, interest or royalties shall have been first registered for sale by the department of commerce (commerce commission) of this state created and existing under Chapter 426, Laws of 1925, or its successors in authority."

Persons voluntarily associating themselves in a joint venture of acquiring oil leases, lands or interests therein, whether as tenants in common, partners or otherwise, are not subject to the provisions of Laws 1927, Chapter 68 (4000-1 to 10). Hanneman v. Gratz, 170 Minn. 38.

It would likewise be true that the incorporators of a corporation contributing the capital thereto, having for its purpose the acquisition of oil and gas lands, leases or interests therein, would not be required to register or would not be subject to the provisions of the act. However, if such corporation would thereafter endeavor to sell its shares to the public or to persons not incorporators, in repeated and successive transactions, such sales would come within the provisions of the securities act and we believe this would apply to the sale of pre-organization certificates or agreements. The difficulty of determining who constitutes original incorporators would be a question of fact.

If, however, any person, firm or corporation having already acquired oil or gas lands, leases, royalties or interests therein, seek to raise additional capital for the development thereof, by the sale of shares, certificates of interest or other agreements to the public generally, we believe that it will be necessary to register such certificates of participation, or interest, syndicate agreements, common law trust, certificates or shares of stock or other vehicles of sale before they are offered to the public for purchase in other than isolated transactions. Under this construction it is our opinion that your first question should be answered in the negative.

It would seem that the question of whether or not persons voluntarily associating themselves in a joint venture whether by partnership agreement, syndicate agreement or common law trust for the purpose of making the original investment contemplated for the acquisition of certain oil or gas lands, interests or royalties therein by entrusting their funds to one or more of the associates as trustees for the benefit of all that registration would not be necessary assuming, of course, under the facts in each case that there is no intent to violate the terms of the securities act and of the oil and gas lands act. The oil and gas lands act is a supplemental act to the securities act.

We have heretofore stated that in the sale of securities we believe, following the doctrine of State v. Gopher Tire Co., 146 Minn. 156:

> "It is better to determine in each instance whether a security is in fact of such a character as fairly to fall within the statute."

Where, however, a person owning oil or gas lands or interests therein, or royalties therefrom, seeks to organize, or is a party to a plan or scheme to organize a corporation, firm, trust syndicate, common law trust or syndicate of unassociated persons for the purpose of disposing of his property,

it is conceivable that before such sale can be effected or certificates or other evidences of sale of an interest in such property is offered to the public for sale for the purpose of procuring associates, that it may be subject to registration. Other security acts have provisions in them which fix the maximum number of associates, corporators or partners who may be sold such participating interests, shares or certificates without requiring registration. In the absence of such regulatory provisions in our statute it would seem that the question can not be determined by the number of participants.

It would seem that questions two and three are almost identical as they relate to the sale of oil or gas lands and interests therein or royalties therefrom presently owned by a person, firm or corporation interested in disposing of a part thereof for the purpose of procuring further funds for exploitation, or development in which the buyer as well as the seller would profit in the event there were any profits. It would seem that the terms of each of such proposed operations, development or exploitation agreement would be required to be scrutinized and examined before it could be determined that a sale had been made in violation of the provisions of the act. We believe that in each instance the question is one of fact to be determined by all of the circumstances surrounding them. We believe this is as close as we can answer your second and third questions.

In answer to your fourth question, we are of the opinion that, speaking generally, sales of additional interests to persons other than those who were parties to the original syndicate would constitute the sale of securities and require registration except in so far as such a sale might be an isolated sale and not made in the course of repeated or successive sales under the exemption of Section 4000-7, Mason's Minnesota Statutes of 1927.

FRANK H. OSTERLIND,
Assistant Attorney General.

August 25, 1938. 616d-8

371

SECURITIES—Registration of by application—By notification.

Mr. S. Paul Skahen, Commissioner of Securities.

You state that a newly created corporation having no earning record of its own acquires and continues to operate the business, property and assets of three other companies each of which have been in continuous operation for more than five years and each of which have shown net earnings after deducting charges during a period of not less than three years next prior to the close of each of their last respective fiscal years and that each of the acquired companies would be able to meet the requirements of either (a), (b) or (c) of Subsection 2 of Section 3996-6, 1936 Supplement to Mason's Minnesota Statutes of 1927, relating to the manner of registration of securities by notification.

You inquire whether a newly organized company may, under the provisions of Subsection 2, avail itself of the earning record of the companies acquired and register its own securities by notification.

Section 3996-6, relating to registration of securities by notification provides in its first paragraph:

> "Whenever any securities required to be registered by the provisions of this Act fall within any of the following subsections of this section, any person entitled to have same registered may, in lieu of making application for registration as provided in Section 5 hereof, notify the commission of his intention to sell such securities, which notification shall be on forms prescribed by the commission, shall be signed and sworn to by the person giving the notice, and shall contain the following information:"

Subsection 2 of said section provides:

> "Securities issued by any person owning a property, business, or industry which has been in continuous operation not less than five years, and which has shown during a period of not less than three years or more than ten years next prior to the close of its last fiscal year preceding the offering of such securities, average annual net earnings, after deducting all prior charges, not including the charges upon securities to be retired out of the proceeds of sale, and assets (not including patents, copyrights, secret processes, formulas, good will, trade marks, trade brands, franchises, and other like intangible property), as of the date of the close of its last fiscal year preceding the offering of such securities together with the proceeds of the sale of such securities accruing to the issuer as follows:"

The securities contemplated being registered would not be the direct and immediate obligations of the three acquired companies nor is there any certainty that a merger would prove advantageous or that the conduct of those businesses under one new management would be entirely successful nor continue the previously established and proven earnings record of the individual companies. The future operation, management and earnings of such merged business can only be determined by the lapse of time. The earning power of the new company relative to its new financial structure remains to be established. Although the question is not free from doubt, we believe securities of the new company should be registered by application rather than by notification. One of the principal differences between registration of securities by application and notification is that in the first instance the powers of investigation and discretion of the commissioner are exercised.

You further inquire upon the same statement of facts where the newly organized company acquires by purchase all, or a majority interest of the stock of each of the three operating companies whether the new company can then avail itself of the earning record and the fact that each of those companies have been in business for five years prior to the time of registration in order to register the securities of the parent or holding company by notification.

This question in the absence of statute, would seem to be closer than the preceding one, but the statute appears to have expressly covered the point. The final paragraph of said Subsection 2 provides:

> "For the purpose of registering under this subsection securities of any issuer owning more than 50% of the outstanding voting stock of a subsidiary company, such issuer shall be deemed to be the owner of the business of the subsidiary company, and the earnings of the subsidiary company applicable to the payment of dividends upon all stock of the subsidiary company owned by such issuer shall be considered as earnings of such issuer."

While on the basis of ownership it may well be said that acquisition of the property assets and business constitutes a more complete ownership than acquisition of more than fifty per cent of the stock of the three operating companies still in the latter instance the companies retain their corporate entities and have individual existence and separate managements, even though the holding company may have voting control of the stock of each of them. The public know they are purchasing an interest in a holding company. In any event the latter situation has apparently been expressly covered by legislation authorizing registration of securities by notification while the former question of a co-mingling of the property, business, management and assets of the three operating companies into one new company under one management does not appear to have been expressly covered by legislation and the law can only be clearly stated by construction or implication.

In distinguishing between these two situations we have in mind the fundamental purpose of the legislation and the intention of the act to protect the investing public and we feel constrained to rule that as a matter of public policy no implied intention to permit registration by notification ought to be read into the law. The statute, relating to the right to register and issue securities in this manner, we believe, should be strictly construed particularly where registration by notification is not the only avenue open to owners or applicants for the registration of securities. Under the statute in question registration of securities of the newly formed company may be accomplished in the usual manner, by application. The additional protection afforded to investors by requiring registration of such securities by application is reserved and at the same time this ruling will not work any undue hardship upon persons who may be justly entitled to register their securities.

FRANK H. OSTERLIND,
Assistant Attorney General.

September 23, 1937. 616b-1

372

SECURITIES—Sale and lease of vending machines.

Hon. S. Paul Skahen, Commissioner of Securities.

You state that a company owning a certain type of merchandise vending machines offers to sell to the public generally in Minnesota a number

of these machines for an agreed consideration evidenced by a bill of sale. Simultaneously or shortly thereafter the investor or purchaser of the vending machines enters into a lease of the machines so purchased for a stated term with another company which agrees to place or locate, stock, service and operate the machines belonging to the purchaser or investor on a percentage basis, and divided twenty per cent of the deposits taken from the machines to the investor or purchaser as rental and eighty per cent of the deposits in the machines to the managing company, or lessee, for locating, stocking, servicing and operating the machines. You state that the machine selling company and the managing or operating company, the lessee, are controlled by the same persons. The investor, or purchaser, of the vending machines does not take physical possession of the machines but receives a bill of sale and a duplicate of the lease.

You inquire whether such a transaction constitutes the sale of a security as defined by the provisions of Mason's Minnesota Statutes of 1927, Section 3996-1, Subdivision 3. You also inquire if the bill of sale or lease is an investment contract or an interest in or under a profit sharing or participating agreement or scheme required to be registered as a security.

Section 3996-1, Subdivision 3, Mason's Minnesota Statutes of 1927, provides:

> " 'Security' shall mean and include any stock, share, bond, note, debenture, commercial paper, evidence of indebtedness, investment contract. Interest in or under a profit sharing or participating agreement or scheme, or beneficial interest in a trust or pretended trust. Any interest in any security shall be deemed a security."

Our Supreme Court in State v. The Gopher Tire & Rubber Company, 146 Minn. 52, at page 55, said:

> "The purpose of the statute is to protect the public against imposition. It is a new form of regulatory law which, in the course of a few years, has swept over 33 states. It has been said that its popular name indicates the evil at which it is aimed, that is, speculative schemes having no more basis than so many feet of blue sky, * * *."

The court further stated:

> "* * * that it is intended to put a stop to the sale of shares in visionary oil wells, non-existent gold mines and other 'get-rich-quick' schemes calculated to despoil credulous individuals of their savings."

What seems to us of utmost importance is the general principle of law which our court has established for the purpose of determining under the facts in any given situation whether that which is offered to the public as a security falls within the law. It was stated in State v. The Gopher Tire & Rubber Co., supra:

> "It is a matter of common knowledge that, in issuing stocks and securities, the hope of future profits has been capitalized, and that prop-

erty and rights of uncertain worth have been treated as having proved values. To lay down a hard and fast rule by which to determine whether that which is offered to a prospective investor is such a security as may not be sold without a license would be to aid the unscrupulous in circumventing the law. It is better to determine in each instance whether a security is in fact of such a character as fairly to fall within the scope of the statute."

In State v. Robbins, 185 Minn. 202, it was held that two related contracts one of which was for the sale of muskrats and the other for the breeding, care and management of the animals and the sale of the animals, their increase or their pelts for the interest of the purchaser on a profit sharing basis, constituted a sale of a security as defined by the blue sky law, Mason's Minnesota Statutes of 1927, Section 3996-1 to Section 4000.

In Kerst v. Nelson, 171 Minn. 191, 213 N. W. 904, 54 A. L. R. 495, 496, the court held that a contract with a purchaser of land providing for the cropping and management thereof by the seller and a division of the profits with the seller, the purchaser to make good any deficits or losses was an enterprise within the spirit of the law as well as the letter. The court said:

"The law is entitled 'an act to prevent fraud in the sale of securities,' etc. In defining the term 'securities,' the Legislature has said that it shall include any investment contract and any interest in a profit-sharing or participating agreement or scheme. See Sec. 1, Paragraph 3. We think the contract in question is covered by this definition."

The court in Kerst v. Nelson further stated as its reason for the conclusion:

"In view of the ingenuity of those who seek to induce men and women to put their money into far-off speculative enterprises over which the investor has little or no control, and in view of the paternalistic character of Blue Sky Laws, it should be the policy of the courts to refrain from hampering the state officials in the performance of their duties by placing a narrow construction on such laws."

This view was also declared in State v. The Gopher Tire & Rubber Co., supra, where the court said:

"It is a proper and needful exercise of the police power of the state and should not be given a narrow construction, for it was the evident purpose of the legislature to bring within the statute the sale of all securities not specifically exempted. The commission is better qualified than the average investor to ascertain whether any real values lie behind mere paper evidences of value. It has power, in making its investigation, to compel a full disclosure of the facts upon which to base an intelligent judgment. Schemes devised to get the money of prospective investors are innumerable. Many of them, though not fraudulent, are unsound or visionary."

There are innumerable authorities supporting the position here stated which, for brevity, we do not cite. In each instance the facts must be care-

fully analyzed having in mind the purpose of the law as well as the construction placed upon its provisions by the decisions of the court.

It is our opinion that in the instant case the sale and lease of the vending machines as stated herein would constitute the sale of a "security," an "interest in, or under a profit sharing or participating agreement or scheme" within the meaning of Mason's Minnesota Statutes of 1927, Section 3996-1, Subdivision 3, and that both the bill of sale and the lease, the evidences of the scheme, are required to be registered before they may be offered for sale to investors in this state.

FRANK H. OSTERLIND,
Assistant Attorney General.

September 27, 1937. 616d-26

373

SECURITIES—State agency—Issue of by—Registration.

Mr. S. Paul Skahen, Commissioner of Securities.

You request a construction of the language of Section 3996-2, Subdivision 1, Mason's Minnesota Statutes of 1927, as amended, relating to exemption from registration of certain securities, which provides:

> "(1) Any security issued or guaranteed by the United States or by any state or territory or insular possession thereof, or by the District of Columbia, or by any political subdivision or agency of a state, territory, or insular possession, or by the Dominion of Canada, or any province or any political subdivision thereof, having the power of taxation or assessment."

You inquire whether the words, "having the power of taxation or assessment" as used in the foregoing subsection should be construed so as to require the registration of securities issued by an agency of a state or political subdivision thereof, such as a utility commission created and existing by law or under a home rule charter of a city and which has authority to issue securities, such as debentures, certificates of indebtedness, or warrants, and which political agency or public utility commission does not possess independent and general powers of taxation or assessment but does possess power to provide for the payment of principal and interest from the operating revenues resulting from the activity in which such agency or commission may be engaged.

It is our opinion that your question should be answered in the negative and that the provisions of Sections 3996-4-5-6 and 7 of the Securities Act with respect to the registration of securities, should not apply to the securities authorized by law or charter provision to be issued by such a political subdivision, agency or commission referred to herein.

FRANK H. OSTERLIND,
Assistant Attorney General.

December 15, 1937. 616b-4

374

STATE—Boards—Board of Control—Dependent children—Desertion—Unless desertion occurs in Minnesota warrant will not issue.

State Board of Control, State Office Building.

In your letter you present the following facts for our consideration:

> "A mother and her children have been deserted by the father of the children in another state. They have moved to Minnesota and have resided here for one or more years. The father is not dead, or physically or mentally disabled, and the mother has applied for aid for the children as dependents on the ground that the father is absent from the home."

and ask:

> (1) "May the mother institute an action in the courts to cause the arrest of the father because of desertion and abandonment, it being understood that such desertion did not occur in the state of Minnesota?"

We answer this question in the negative. The father cannot be charged with the commission of a criminal offense in the State of Minnesota unless the offense was committed in said state.

> (2) "If a warrant may not be issued for the arrest of the father in the state of Minnesota, are the children entitled to aid in the state of Minnesota under the provisions of this act?"

We also answer this question in the negative. Chapter 438, Laws of 1937, provides for the payment of certain aid to promote the welfare of dependent children. Subdivision (c) of Section 1 defines a dependent child to be one "under the age of eighteen years who is regularly attending school, if physically able and above the minimum school age, or who is under compulsory school age, or who is physically unable to attend school, or who is over compulsory school age, but through physical or mental disability is unable to be employed, or who is over compulsory school age and unemployed, but is of such intelligence and mental capacity as to make further schooling inadvisable in the opinion of the county agency and his unemployment is without fault on his part, and who is found to be deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, * * *."

From the facts stated in your letter, the father is not dead or is not physically or mentally disabled. The sole ground that the mother has advanced in her application for aid is the absence of the father from home. The term "continued absence from the home" as used in Subdivision (c) above quoted is explained in Subdivision (d) of said Section 1 where the parent "is an inmate of a penal institution under a sentence which will not terminate within three months after the date of such finding, or a fugitive after escape therefrom, or where there is and has been for three months past an outstanding warrant for his arrest on a charge, or after conviction,

for the crime of abandoning in this state such child or abandoning in this state his wife while pregnant * * *." You will note that in order to entitle a mother to support under the provisions of Chapter 438 on the ground that her husband is continually absent from the home, she must show that he is an inmate of a penal institution under a sentence which will not terminate within three months after the date of the court's finding or that he is a fugitive after escape therefrom, or that a warrant is outstanding and such warrant charges the husband with having abandoned the applicant in this state. Since the facts show that the abandonment did not occur in the State of Minnesota a warrant could not be issued in this state and consequently there are no facts stated in your letter which would entitle the applicant to aid.

ROY C. FRANK,
Assistant Attorney General.

October 20, 1937. 840a-6

375

STATE—Boards—Electricity—Certificate of inspection after re-connection.

State Board of Electricity, State Office Building.

You state:

"Mr. J. E. Lynch, Vice President of the Minnesota Power & Light Company at Duluth has asked me to submit the following question to the State Board of Electricity for interpretation so that they may be guided accordingly:

"The question relates to a residence which has been vacant for some period of time. When the last owner moved out the company disconnected its service. The house has been sold to another man who will occupy same, and he requests the power company to reconnect the service. The company feels that the provisions of Section 5879 'paragraph 2' may prevent them from connecting service to this house until they have secured an affidavit or certificate of inspection. The following questions arise:

"1. Is the Power Company required to obtain a certificate of inspection before they can re-connect this house for service, assuming that there was no inspection available when the house was originally wired some years ago?

"2. The City of Duluth now has inspection service on new work but the ordinance does not provide for reinspection of old work. Would the local ordinance and lack of reinspection permit the Power Company to connect the service to the old wiring, without having to obtain a certificate of inspection or an affidavit of compliance?

"3. Suppose this situation arose in a town served by this company where there is no local ordinance or inspection? Would the company be required to secure an affidavit before re-connecting service?

"4. Suppose the new owner of the house offered to furnish an affidavit that he wired the house or has inspected the wiring himself, and is willing to certify that it complies with the requirements of the law. Could the Power Company accept such an affidavit or any other form of release from the owner which would permit them to re-connect the service?"

You request our opinion relative to the questions presented by the letter of the Minnesota Electrical Council.

Mason's Minnesota Statutes of 1927, Section 5879, as amended by Laws 1937, Chapter 314, provides in part:

"All electrical wiring, apparatus and equipment for electric light, heat and power shall comply with the rules and regulations of the Railroad and Warehouse Commission, the State Fire Marshal and/or the Industrial Commission of the State of Minnesota under the authority of the state statutes and in conformity with approved methods of construction for safety to life and property. The regulations as laid down in the National Electrical Code and in the National Electrical Safety Code as approved by the American Engineering Standards Committee shall be prima facie evidence of such approved methods; * * *.

"No electrical installation shall be connected for use until proof has been furnished to the person, firm or corporation supplying electrical energy for such installation that the regulations above recited have been complied with. Proof of such compliance shall consist of a certificate furnished by a municipal or other recognized inspection department or officer, or if there is no such inspection department or officer, it shall consist of an affidavit furnished by the **Contractor or other person doing the wiring, certifying that there has been such compliance.**"

The law does not specifically provide that the provision which requires a certificate of inspection shall apply to connections where the electrical wiring, apparatus and equipment has been installed and used prior to the enactment of said Chapter 314, and not altered thereafter. It seems to us that if the legislature had intended the language above quoted to apply to a case where a building in which there is electrical wiring, apparatus and equipment is re-connected it would have expressly so provided. If a certificate is required, and such a re-connection is made in any case, it would be required in all cases. It is our opinion that the provision requiring a certificate of inspection was intended to apply to cases where connections are made with new installations, or where existing systems of wiring, apparatus and equipment have been altered and are thereafter re-connected.

This disposes of the first question submitted, and the conclusion reached makes a consideration of the other questions unnecessary.

WILLIAM D. GUNN,
Special Assistant Attorney General.

November 26, 1937. 188d

376

STATE—Boards—Electricity—Railroad companies hiring master electricians.

The State Board of Electricity, 28 State Office Building.

You inquire:

1. Whether railroads are required to have a master electrician in their employ.

2. Whether journeymen electricians employed by railroads are required to be licensed as electricians.

3. Whether "men doing signal work, such as men on crossings, etc., which is strictly electrical," may be licensed.

Mason's Minnesota Statutes of 1927, Section 5873 as amended, reads as follows:

"No person shall operate as an electrical contractor unless such person be licensed as a Master Electrician. No individual, firm, copartnership or corporation shall engage in business as Electrical Contractors unless they have a licensed Master Electrician in their employ.

"No person shall work as a Journeyman or Special Electrician unless such person be licensed as such by the State Board of Electricity, except that a person who shall furnish evidence satisfactory to the Board as having the required experience as herein set forth, may make written application and pay the required fee to the State Board of Electricity, and may work as a Journeyman or Special Electrician until the next following examination, of which he shall be notified."

Mason's Minnesota Statutes of 1927, Section 5877 as amended, reads as follows:

"Employees of public service corporations or municipal utilities distributing or selling electrical energy for light, heat or power, for operating street railway systems, or telephone or telegraph systems, shall not be required to hold licenses while doing electrical work on or in connection with property owned, leased or operated by any such municipality or corporation. Provided, however, that the rules and regulations of the railroad and warehouse commission, the State Fire Marshal, and of the Industrial Commission of Minnesota and all local municipal ordinances governing such work shall be observed."

We answer your three questions as follows:

1. Unless a railroad company engages in business as an electrical contractor, it is our opinion that it is not required to employ a master electrician. However, if a master electrician is employed by a railroad company, we believe, for the reasons stated in answer to your second question, that he should be licensed.

2. The language of said Section 5877 is ambiguous. A railroad company is a public service corporation. However, while there is some question whether the words "distributing or selling electrical energy for light, heat or power, for operating street railway systems, or telephone or telegraph systems," modify the term "public service corporations" as well as the term "municipal utilities," it is our view that the legislature intended the qualifying phrases to modify both terms. It is our opinion, therefore, that journeymen electricians employed by railroads are required to be licensed as electricians. An exception to this may occur in a case where the railroad company operates telephone or telegraph systems.

3. The terms "journeyman electrician" and "special electrician" are defined in Mason's Minnesota Statutes of 1927, Section 5872 as amended. This section reads in part as follows:

> "The term 'Journeyman Electrician' for the purpose of this act shall be construed to mean a person having the necessary qualifications, training, experience, and technical knowledge to wire for, install and repair electrical apparatus and equipment in accordance with the standard rules and regulations governing such work.
>
> "The term 'Special Electrician' for the purposes of this act shall be construed to mean a person having the necessary qualifications, training and experience in wiring for, installing or repairing special classes of electrical apparatus or equipment; or making minor alterations, extensions, and repairs to existing electrical systems in cities, towns or villages under the third class."

Unless "men doing signal work," also install or repair electrical apparatus or equipment, it is our opinion that they are not required to be licensed as electricians.

WILLIAM D. GUNN,
Special Assistant Attorney General.

September 2, 1938. 188

377

STATE—Boards—Electricity—Registration and licensing requirements.

The State Board of Electricity, State Office Building.

You submit certain questions that will be stated and answered in the order in which they appear.

> 1. "Would not it be necessary for anyone bidding or contracting for R. E. A. to hold a master license or to at least have a master electrician in their employ? And, should not they have licensed journeymen to do this work for them?"

By the use of the letters R. E. A. we understand that you have reference to the Rural Electrification Administration established under authority of the federal government.

Section 1 of Chapter 314, Laws 1937, defines the term "Electrical Contractor" as follows:

> "The term 'Electrical Contractor' for the purposes of this act shall be construed to mean any person, firm, co-partnership, corporation, association or combination thereof, who undertakes or offers to undertake with another to plan for, lay out, supervise and install or to make additions, alterations and repairs in the installation of wiring apparatus and equipment for electric light, heat and power for a fixed sum, price fee, percentage or other compensation."

Section 2 of said Chapter 314 provides in part:

> "No person shall operate as an electrical contractor unless such person be licensed as a Master Electrician. No individual, firm, copartnership or corporation shall engage in business as Electrical Contractors unless they have a licensed Master Electrician in their employ."

Said Section 2 also provides that no person may work as a journeyman electrician unless such person is licensed by the State Board of Electricity. The only exception is that a person who shall furnish satisfactory evidence that he has the required experience may obtain a temporary license until the next examination. Another exception is found in Section 6 of the act which provides in part as follows:

> "Employees of public service corporations or municipal utilities distributing or selling electrical energy for light, heat or power, for operating street railway systems, or telephone or telegraph systems, shall not be required to hold licenses while doing electrical work on or in connection with property owned, leased or operated by any such municipality or corporation."

The last paragraph of Section 8 reads as follows:

> "Any person who shall engage for a valuable consideration in the business of installing or repairing electrical wire or apparatus without having complied with the laws respecting registration and license, or who shall violate any of the provisions of this Act shall be guilty of a misdemeanor."

In our opinion a person or corporation contracting with the R. E. A. is neither a public service corporation nor a municipal utility within the meaning of Section 6 hereinabove quoted. The exceptions above referred to are the only ones we find in the act. In so far as the state law is concerned, it is clear that a person contracting with the R. E. A. is an electrical contractor and must be licensed as a master electrician, and that no individual, firm, co-partnership or corporation may take an electrical contract from the R. E. A. unless they have a licensed master electrician in their employ. It is also clear that installing, repairing and wiring should be done by licensed journeymen, unless the work is of such a nature that the person doing it may be licensed as a special electrician.

It might be argued that the state may not require persons or firms, entering into contracts with the R. E. A., to comply with the state law for

the reason that such a requirement would be an unlawful interference with the operations of a federal instrumentality. It is our opinion that such a requirement is not inconsistent with the principles of immunity inherent in the constitutional relation of the state to the federal government, and that the state may require "anyone bidding or contracting for R. E. A. to hold a master license or to at least have a master electrician in their employ." It is also our opinion that the electricians employed by such contractors who do work that is usually done by licensed journeymen, should be required to have a license.

2. "Is not it compulsory for linemen working for private contractors or industries other than public utilities and municipalities to be licensed journeymen?"

We answer your second question by stating that if linemen working for private contractors perform the duties of a journeyman electrician as defined in the act, such linemen should be licensed journeymen.

3. "Would it be possible to issue special licenses to electricians working in the mines and making such licenses effective there only? Also, would it be permissible, and under what conditions could special licenses be issued in any city above the 3rd class? In other words, would it be possible to curtail their activities so that they would not interfere with the regularly licensed journeymen?"

Section 1 of said Chapter 314 defines the term "Special Electrician" as follows:

"The term 'Special Electrician' for the purposes of this act shall be construed to mean a person having the necessary qualifications, training and experience in wiring for, installing or repairing special classes of electrical apparatus or equipment; or making minor alterations, extensions, and repairs to existing electrical systems in cities, towns or villages under the third class."

Section 3 of said Chapter 314 provides in part:

"An applicant for a 'Special Electrician's' license shall furnish evidence in writing that he has had at least two years' experience in some special class of electrical work, and shall pay an examination fee of Two Dollars. Such special class of electrical work shall be specified on his license."

If an electrician working in a mine has the necessary qualifications and does electrical work of a special nature, such as installing or repairing special classes of electrical apparatus or equipment, such electrician may be licensed to do such special work. If the same class of special work is done in other industries, we question the authority of the board to provide that the licensee may only work in a mine. However, such special electrician may only do the special class of electrical work specified on his license.

It is our opinion that in cities above the third class a special license may only be issued to an electrician who does work of a special nature as defined

in the act. In other municipalities, electricians who do work of a special nature, and electricians who make minor alterations, extensions and repairs to existing electrical systems, may receive special licenses.

WILLIAM D. GUNN,
Special Assistant Attorney General.

July 9, 1937. 188c

378

STATE—Boards—Health—Water works and sewage system—Plans and specifications—Preparation and acceptance of.

Mr. A. J. Chesley, M. D., Executive Officer, Department of Health.

Your letter to Attorney General William S. Ervin received at this office on April 19th has been referred to the undersigned for attention.

Therein you direct attention to Regulation 200, adopted by the State Board of Health pursuant to Section 5345 of Mason's Minnesota Statutes of 1927, which provides "that no system of water supply or sewage disposal for public use, shall be constructed or materially altered or extended until the plans for it have been submitted to and approved as relates to their sanitary features by the State Board of Health." You state that officers of municipalities and public institutions submit plans and specifications of systems of water supply or sewage disposal for public use in conformity with said Regulation 200, and which plans have been examined and approved or disapproved by the State Board of Health; that some of the departments of the federal and state governments require that plans for water supply or sewage disposal in connection with buildings constructed by such departments or constructed subject to their approval regardless of whether such construction of said buildings comes under the provisions of the board's Regulation 200; and that the board has examined such plans and specifications and in regular session approved or disapproved the same. You also direct attention to Mason's Minnesota Statutes of 1927, Section 5697-2-9, as amended by Chapter 404, Laws of 1933, relating to the registration of architects, engineers and land surveyors.

You inquire:

1. "In cases where the State Board of Health regulation No. 200 requires it and plans submitted were not prepared by an engineer properly qualified and authorized as provided for in Section 5697-2 of the statutes, may the Board regardless of the fact that the construction may be of a minor character, accept, examine and approve or disapprove such plans?"

2. "May the Board properly receive, examine and act upon such plans covering installations, alterations or extensions, submitted to it

by governmental or state departments or officials, the submission of which is not required by said regulation No. 200, and which plans are not prepared by an engineer properly qualified and authorized as provided for in Section 5697-2 of the statutes?"

Your first two questions are answered in the affirmative. The question as to whether the board should or should not accept such plans when not prepared by an engineer registered pursuant to said Section 5697-2, Mason's Minnesota Statutes of 1927, involves a question of policy rather than a question of law. In other words, the question of acceptance, approval or disapproval of such plans relates to the procedure of the board itself. In each case coming before the board it will proceed as it may consider that its duty requires and each case will, accordingly, be handled and disposed of by the board upon its own merits.

Generally speaking, the essential test of any particular plan so far as the board's approval or disapproval is concerned, is whether or not it will endanger the public health. Regulation No. 200 by its own terms requires the approval of the board only so far as it relates to the sanitary features of the plan submitted to it. The board could not properly take any other matter into consideration in making its decision, since the general scope of the board's authority is limited by law to matters affecting public health. The board cannot by regulation extend the scope of its own authority so as to enable it to pass upon questions of engineering or other matters outside of the domain of public health. This would infringe upon the sphere of municipal governing bodies and other authorities charged with the administration of public affairs. The above is in line with opinions to you under dates of April 22, 1927, and June 28, 1933.

Answers to your third and fourth questions are unnecessary in view of what we have said in response to questions numbered one and two.

Speaking generally, we may say that the board would not be committing an illegal act in accepting such plans. We assume that the board in accepting or rejecting such plans will exercise its best judgment. A public officer who is charged with duties which call for the exercise of his judgment or discretion cannot be punished for the honest exercise of his judgment within his jurisdiction.

DAVID J. ERICKSON,
Deputy Attorney General.

June 3, 1937. 225m

379

STATE—Boards—Investment—State Board of—State loans—Bonds—Issuance of—Election authorizing—Rate of interest—Posting of notices of.

State Board of Investment Building.

We note that you have examined said bond proceedings and have found no irregularities with reference thereto except as follows:

1. The resolution of the City Council calling the bond election does not determine or recite that it is expedient to issue bonds.

2. The rate of interest is fixed at 4% by the resolution, notice and ballot, but the city proposes to issue bonds drawing a lower rate.

3. The published notice of election does not give the location of the several polling places within the city.

With reference to the failure of the resolution of the City Council to recite that it deemed it expedient to issue said bonds, permit us to state that we have heretofore held that this is not fatal so long as the resolution otherwise complies with the charter and statutory provisions relating to the issuance of such bonds. See opinion to you under date of October 1, 1937, in re application of Independent School District of St. Louis Park, Hennepin County.

With reference to the sale of said bonds at 3% interest instead of 4% as called for in the "resolution, notice and ballot," we are of the opinion that the city by resolution may reduce the rate of interest from 4% to 3%. Although we do not find that our Supreme Court has ever passed upon this question, the rule seems to be well established that bonds issued by a municipality "may be made to bear a lesser rate of interest than that authorized by the vote of the people or otherwise." See McQuillin on Municipal Corporations, Vol. 6, Section 2431, p. 123; Omaha Nat. Bank v. Omaha, 15 Neb. 333, 18 N. W. 63 and Town of Martinez v. Johnson, Town Clerk (Cal. June 17, 1927), 257 Pac. 853.

As to the published notice of the election not giving the location of the several polling places within the city, we are of the opinion that this was not required by the terms of the home rule charter of the City of South St. Paul. In other words, Sections 1 and 4 of the city charter with reference to the conducting of a special election in said city merely provides that such an election may be called upon giving "notice of the time and place of holding such election * * * by the city recorder of the city at least 15 days prior to such election by posting notices thereof at each polling place in the city." The transcript of the proceedings submitted shows that three copies of the notice of said election were posted in each voting precinct of the city. In addition to such posting, notice of said election was also published in the South St. Paul Daily Reporter as evidenced by the affidavit of the publisher of said paper.

We believe that such posting and publication of the notice of said election substantially complies with the charter provisions relative thereto.

We are, therefore, of the opinion that said proceedings relative to the issuance of said bonds substantially conform with the city charter and applicable statutory provisions and that said bonds when issued by virtue of such proceedings will be prima facie valid.

DAVID J. ERICKSON,
Deputy Attorney General.

October 13, 1937. 928a-8

380

STATE—Boards—Poultry Improvement Board—Only one class of licenses.

Mr. W. K. Dyer, Poultry Improvement Board.

You request our opinion as to whether or not said law will

> "permit the board to take advantage of Section Nine, to make a ruling providing for two classes of examinations; one of which will cover the elementary knowledge of the applicant in culling for production only, the second will provide for a more technical examination to determine the qualifications of the applicant relative to his fitness in culling breeding stock for hatcheries."

The arrangement suggested by your question would necessarily call for the issuance of two forms of licenses, one for cullers for production only, and the other for cullers of breeding poultry stock. With this thought in mind we answer your question in the negative. The law provides for one form of license to be uniformly granted. Section 1 of Chapter 226 as amended by Chapter 91, provides that:

> "Any persons who, * * *, shall cull poultry flocks, * * *, for production or for standard of perfection or merit; and any person who shall, for compensation or without compensation, engage in or purport to be engaged in the culling of poultry, or holds himself out as a culler of poultry and who, at the same time is engaged in the purchasing of or bartering for poultry either for himself or as the agent of another, **shall be deemed to be a poultry flock inspector."**

Section 2 as amended by Chapter 91 then provides that a poultry flock inspector must be licensed. No distinction is made between different classes of poultry flock inspectors. They must all have the same kind of license.

You further ask:

> "If question one is answered in the negative, will you please advise, if in your opinion, the intent of the law provides that this board shall limit the examination of applicants to their qualifications for culling for the purchase of poultry for marketing purposes and not require a specific knowledge of birds, types and qualifications for hatchery purposes."

Section 5 of Chapter 226 states that the examinations "shall be in such form as the board shall determine." The board is given a wide discretion as to the questions to be asked during the examination. However, the intent of the law must be that the applicant for a license must be qualified to cull for 1. production, and 2. standard of perfection or merit, since the license granted gives him the right to cull poultry for either production or standard of perfection or merit, or both.

ROY C. FRANK,
Assistant Attorney General.

July 2, 1937. 293b-16

381

STATE—Boards—Soldiers Home Board—Rules and by-laws—Adoption of. Minnesota Soldiers Home Board.

Your letter to Attorney General William S. Ervin, dated August 4, has been referred to the undersigned for attention.

Therein you direct attention to Section 4350 of Mason's Minnesota Statutes of 1927, relating to the adoption and enforcement of rules and by-laws by the Soldiers Home Board and inquire:

1. "Can a majority of the board, at a regular or special meeting, amend or repeal rules and by-laws which had been previously adopted by the Soldiers Home Board?"

2. "If the answer should be in the affirmative, may I also ask whether 'majority' would refer to a majority of the board members, or to a majority of the members present at said regular or special meeting?"

Section 4350 so far as pertinent, reads as follows:

"The board shall adopt and enforce rules for the government of the home, and proper by-laws for the conduct of its business and, with the approval of the governor, it may also make rules not inconsistent with this chapter, respecting the admission, maintenance and discharge of inmates, and the disbursements of the funds under its control."

It will be noted from the language of the above quoted section of the statute that it does not prescribe the proportion of the members of the board required for the purpose of passing a resolution or by-law or for the transaction of other similar business. In the absence of such a provision in the statute the common law rule is applicable and a majority of the board, when duly met, constitute a quorum for the transaction of business, and the vote of a majority of those present, there being a quorum, is all that is requisite for the adoption or passage of rules and by-laws, or motion, or the doing of any other act which the board has power to do. In other words, there being no statutory restriction, a majority of the board is a quorum, and a majority of the quorum may act. That is, if all the members of the board, or if all have been duly notified, and the minority refuse or neglect to meet with the others, a majority of those present may act, provided those present constitute a majority of the whole number. The major part of the whole board is necessary to constitute a quorum and a majority of the quorum may act to amend or repeal rules and by-laws whether previously adopted or not. The rule seems well established that a quorum fixed by law, whether under the principles of the common law or express statutory provision, cannot be altered by the action of the board or body without express statutory authority, and that a general power conferred upon such board or body to adopt and settle its rules or by-laws does not authorize it to declare that any number other than that fixed by common law or fixed by statute shall constitute a quorum.

DAVID J. ERICKSON,
Deputy Attorney General.

August 9, 1937. 394k

382

STATE—Boards—Soldiers' Home—Trustees' fees.

Mr. Kimon Karelis, Secretary, Minnesota Soldiers' Home Board.

You refer to Mason's Minnesota Statutes of 1927, Section 4349 which reads in part as follows:

> "They shall receive as compensation for their services in attending meetings of the board and meetings of any committee thereof the sum of ten dollars ($10.00) per day for each such meeting day so attended and in addition thereto actual expenses incurred in attending such meeting. * * *"

You submit the following question:

> "May a Trustee, as a member of the Soldiers' Home Board, charge the statutory Per Diem allowance of ($10.00) Ten Dollars per day plus mileage and other necessary expense while investigating relief applications referred to said Trustee or Trustees by the Secretary to the Soldiers' Home Board for the purpose of investigating such applicants in order to determine if the applicants are eligible for relief?"

The statute above referred to provides for the payment of compensation and actual expenses to trustees for services in attending meetings of the Minnesota Soldiers' Home Board and any committee thereof. The investigation of relief applications by a trustee under the circumstances outlined in your letter is not "services in attending meetings of the board and meetings of any committee thereof." In our opinion a trustee as a member of the Soldiers' Home Board may not charge the statutory per diem allowance of $10.00 per day plus mileage and other necessary expense while investigating relief applications referred to such trustee by the secretary of the Soldiers' Home Board.

WILLIAM D. GUNN,
Special Assistant Attorney General.

March 23, 1938. 3941

383

STATE—Commissions—Administration and Finance—Bids—Device for sale by one vendor only.

Hon. L. A. Johnson, Superintendent, Department of Public Property.

You state that for more than three years a certain insurance company which writes the insurance on the boiler in the power house at the capitol has repeatedly demanded that certain protective drums and rings be installed in the masonry work of the boilers in the state capitol and finally threatened cancellation of their insurance policy if these protective devices should not be installed. You further state that these protective devices are manufactured

and are for sale by one company only, that they are covered by patents and that there is no substitute device for sale by any other company.

You inquire whether under this statement of facts it was necessary, in order to comply with the law, to advertise for bids before purchasing these protective devices.

In our opinion where an article is to be purchased which can be purchased from one party only there is no object in advertising for bids. The only purpose of advertising for bids is to stimulate competition. There can be no competition where there is but one possible bidder. The situation is very nearly parallel with that which exists when the state or a political subdivision thereof purchases land. With reference to such a purchase this office has held that there need be no advertising, inasmuch as advertising could serve no useful purpose. To advertise in such a case could only result in a waste of public money.

In our opinion, in purchasing an article which is for sale by one vendor only, for which there is no substitute device and with reference to which there could be no competition between vendors, the commission of administration and finance is not required to advertise for bids.

Having answered the question in this manner, there is no need for considering the further question whether the purchase in question was an emergency purchase.

MATTHIAS N. ORFIELD,
Deputy Attorney General.

August 11, 1938. 980a-11

384

STATE—Commissions—Administration and Finance—Notice required before letting contracts for labor and materials for construction of buildings for state teachers' colleges.

Hon. Elmer A. Benson, Governor.

You inquire whether the commission of administration and finance, in letting the contracts for materials for the construction of the Bemidji State Teachers' College, complied with the law requiring public notice to be given before such contracts are let. For the sake of brevity the commission of administration and finance will hereafter in this opinion be referred to as "the commission."

It is important to note at the outset that the manner of construction of the building for the State Teachers' College at Bemidji, except as to certain special portions, such as plumbing and heating, has necessarily been different from the usual procedure. Ordinarily, before the construction of a state building is commenced, the commission advertises for bids covering either the entire building or certain types of construction work, such as plumbing,

heating, etc. As to major portions of the construction work this procedure could not be followed in this case because, as authorized by Chapter 62 of the Extra Session Laws of 1937, the commission has arranged for federal aid in connection with such construction and the ordinary labor is being furnished by W. P. A. The major portion of the building accordingly is being constructed by day labor and the only thing the state must provide is plumbing, heating and similar installations, requiring expert labor, the necessary materials and certain professional services, such as the services of an architect. This is important because the kind of notice required before letting construction contracts involving labor and materials differs somewhat from the notice required before entering into contracts for purchasing materials alone.

I am informed that most of the purchases of materials for this building were made by the commission after notice had been posted for a few days in the office of the commission and after a letter calling for bids had been mailed to a considerable number of interested bidders. Whether these letters were sent to all interested bidders or not is not material in determining the validity of the notices, as will appear from the discussion which follows. I am also informed that with respect to a few contracts such as contracts for plumbing, heating and temperature control there was published notice in a well known trade paper published in Minnesota to which the building trade resorts for information as to building contracts. There was, however, no publication in the county where the building is located before letting such contracts for labor and materials.

A brief summary of the history of the legislation pertaining to this matter will serve to clarify the discussion which follows. We should commence with the board of control because its powers and duties have in a large measure, as will be more fully developed hereafter, been transferred to the commission. The board of control was created by Chapter 122 of the Laws of 1901, which act as amended is found in Mason's Minnesota Statutes of 1927, Sections 4398 to 4450. From the time of its creation the board was given complete control over certain state institutions and the financial management of certain other state institutions, including the state normal schools, which are now known as state teachers' colleges. The original act provided that the board of control should make specific rules as to the manner in which supplies shall be purchased and contracts made for the several state institutions, "so as to insure competition and publicity." The act provided further that any person desiring to sell supplies to a state institution might file with the chief executive officer thereof and with the secretary of the board of control a memorandum giving his name and address and thereupon he became entitled to compete in the furnishing of supplies. In this manner the board of control built up a list of interested bidders in each field of purchase and whenever bids were desired, such interested bidders, and others known to the board, were notified by the board by letters setting forth full information with reference to the amount and character of the supplies on which bids were desired, and asking for bids. This method of giving notice by letter to interested bidders was in this manner set up by statute and has, I am informed, been followed by the board of control con-

tinuously for thirty-seven years, from 1901 to the present date. From the information available it appears that there has ordinarily been no published notice in connection with the purchase of supplies during this period. The board of control during these thirty-seven years has given effect to the legislative mandate, "to insure competition and publicity," in the manner stated, by mailing letters asking for bids to all known interested bidders.

I consider next the provisions of the board of control act of 1901 with reference to the required notice in connection with the letting of contracts for the erection and repair of buildings. We should note that contracts of this character differ very materially from contracts for the purchase of supplies and materials alone, in that the former involve labor as well as materials and require a much longer period of time for completion of the contract and therefore additional safeguards. The pertinent provision of the act of 1901, as amended, now Section 4432 of Mason's Minnesota Statutes of 1927, reads as follows:

> "All contracts for the erection or repair of buildings or the improvement of the grounds of any institution mentioned in this chapter shall be let by the board to the lowest responsible bidders, upon public notice such as the board may deem proper; but any and all bids may be rejected, and new proposals received upon like advertisement. All plans and specifications shall be prepared under the direction of the board, and a certified check for such proportion of the cost as the board may specify in the advertisement shall accompany each bid."

It will be noted that the excerpt from the statute quoted above specifically requires that such contracts shall be let "upon public notice such as the board shall deem proper" and refers to the notice as an advertisement. The words "public notice" are not defined in the statute but the Supreme Court of Minnesota in its decision in the case of Casey v. Central Electric and Telephone Co., 279 N. W. 263, which was rendered on April 22, 1938, has clarified the meaning of the term. In that case the court interpreted the meaning of a statute requiring that all village contracts involving an expenditure of $100 or more, if not to be paid from road or poll taxes, should be let to the lowest responsible bidder after public notice. The court held that the notice required was public notice in a qualified newspaper. The act of 1901 requires the giving of public notice and would, I believe, be interpreted by the courts in substantially the same manner.

Pursuant to the requirements of this act the board of control, from 1901 to 1925, gave advertised notice before letting construction contracts involving labor and materials.

Chapter 119 of the Laws of 1905 which, as amended, is Sections 3140 to 3146 inclusive of Mason's Minnesota Statutes of 1927, divested the board of control of a large portion of its authority over the normal schools but specifically reserved for the board of control full authority over "the erection and construction of new buildings, the purchasing of fuel and the placing of insurance on buildings and contents." Section 7 of said Chapter 119, as amended, which is Section 3146 of Mason's Minnesota Statutes of 1927, provides in part as follows:

"The board shall not let any contract for the erection and construction of new buildings that may hereafter be constructed without first publicly advertising for at least two weeks in some legal newspaper published in the county, where the work is to be performed, for separate sealed bids for general construction, plumbing, heating, ventilating work required in the construction of such buildings, and for separate sealed bids covering the entire work required in such construction in which advertisement, the time and place shall be fixed for the opening of such bid, and that all such bids, shall be opened publicly, and a record of the same, giving the name of the bidder, the classification of the work or material bid upon, and the amount of the bid, shall be made and filed with the secretary of said board as a public record, and that no such contract shall be made and entered into except with competent and responsible contractors and builders who can furnish a good and sufficient bond as required by law."

This amendment altered materially the manner of giving notice of the letting of contracts for labor and material for buildings for normal schools. A careful reading of the paragraph quoted, however, will reveal that no contract referred to therein is a contract for the purchase of materials alone. The bids to be called for are bids for "general construction," "plumbing," "heating," "ventilating work" and for "the entire work required in such construction." We note further that the statute provides that no such contract shall be entered into "except with competent and responsible contractors and builders who can furnish a good and sufficient bond." It is therefore my opinion that the provisions of this statute are applicable to contracts for labor and materials but are not applicable to contracts for the purchase of materials alone. The Bemidji Teachers' College building is being constructed in part by W. P. A. labor, in part by contracts for labor and materials and in part by contracts for materials alone. It follows that the requirements for notice contained in this act are applicable to some of the Bemidji contracts, namely, to those for labor and materials, but not to those for materials only. The latter are covered by another statute.

The Reorganization Act of 1925 created the commission of administration and finance. Under the provisions of this act said commission succeeded to the rights, powers and duties of the state board of control in relation to the erection and construction of state buildings, and the purchase of fuel, supplies and materials for state institutions, except that supplies, materials, furnishings and equipment to be used in the institutions under the control of said board shall be purchased by the board under the supervision of the commission. The purchase of fuel and of supplies, equipment and materials for the erection of state buildings is specifically entrusted to the commission.

In so succeeding to these rights, powers and duties of the board of control, the commission, except as otherwise provided by the reorganization act, became subject to the provisions of the act defining the rights, powers and duties of the state board of control with reference to the letting of contracts and the making of purchases.

As pointed out above, the Reorganization Act of 1925 transferred to the commission some of the rights, powers and duties of the board of control

with reference to the making of purchases for state institutions, including specifically in such transfer of power the construction of state buildings and the purchasing of supplies, equipment and materials for the construction of state buildings. The commission thereupon became subject to the requirements of law with reference to the giving of public notice in connection with such construction, except as the former law was modified by the pertinent provisions of the Reorganization Act, which I now examine. Section 53-10 of Mason's Minnesota Statutes of 1927 provides that the commission **"may** make rules, regulations, and orders regulating and governing the manner and method of purchasing, delivering, and handling of, and the contracting for supplies, equipment and other property for the various officials, departments and agencies of the state government and institutions under their control." This section provides further that such rules, regulations and orders **"shall"** be uniform so far as practicable, **"shall"** be of general or limited application and **"shall"** include the following provisions:

(1) The advertisement for and the receipt of bids for supplies and other property;

(2) The purchase of supplies and other property without advertisement or the receipt of bids, where the amount involved will not exceed five hundred dollars when, in the judgment of the commissioner of purchases, it is expedient;

(3) The purchase of supplies and other property without competition, in cases of emergency requiring immediate action;

(4) The purchase of certain supplies, equipment, and other property by long or short term contracts, or by purchases or contracts made at certain seasons of the year, or by blanket contracts or orders covering the requirements of one or more departments, offices, and commissions;

(5) The time for submitting estimates for various supplies, equipment, and other property;

(6) Regulations to secure the prompt delivery of commissary and other necessary supplies;

(7) Standardization of forms for estimates, orders, and contracts;

(8) Standardization of specifications for purchasing supplies, equipment, and other property;

(9) Standardization of quality, grades, and brands to eliminate unnecessary number of commodities or of grades or brands of the same commodity;

(10) The purchase of supplies and other property locally upon permission, specific or otherwise, of the commissioner of purchases;

(11) The use and disposal of the products of state institutions;

(12) The disposal of obsolete, excess, and unsuitable supplies, salvage, waste materials, and other property, and the transfer of same to other departments, offices and commissions;

(13) The storage of surplus supplies, equipment, and other property not needed for immediate use;

(14) The testing of commodities or supplies or samples thereof;

(15) Hearings on complaints in respect to the quality, grade, or brand of commodities or supplies;

(16) The waiver of rules in special cases.

In the interpretation of this act the use of the word **"may"** in the material quoted above in the expression, "The commission **may** make rules, regulations and orders," is troublesome. Does the language employed mean that the commission **may** make rules, if in its discretion it deems it advisable to do so, or does it mean that it **shall** make rules? Ordinarily, the use of the word "may" in a grant of power implies that the power given may or may not be exercised according as the grantee of such power may deem proper. But this is not always the case. The context may be such that it becomes apparent that the meaning of **"shall"** is intended although the word used is **"may."** In the present case I believe the context is such that the meaning of the word **"may"** should be held to be mandatory. It will be noted that while said Section 53-10 provides that the commission "may" make rules, regulations and orders with reference to the manner of making contracts, it further provides that such rules, regulations and orders "shall" be uniform, as far as practicable, "shall" be of general or limited application and "shall" include the above-stated provisions. There would be little purpose in stating with such great particularity what shall be contained in rules, regulations and orders that need never be adopted.

In connection with purchasing and contracting for supplies, the requirements for publicity include the following:

(1) The advertisement for and the receipt of bids for supplies and other property and the stimulation of competition with regard thereto;

(2) The purchase of supplies and other property without advertisement or the receipt of bids, where the amount involved will not exceed five hundred dollars when, in the judgment of the commissioner of purchases, it is expedient.

The specific authorization to purchase "supplies and other property" "without advertisement" "where the amount involved will not exceed five hundred dollars when, in the judgment of the commissioner of purchases, it is expedient," in my opinion indicates that there should be "advertisement" in cases where the amount involved is more than five hundred dollars.

But while I am of the opinion that "advertisement" is necessary where the amount of a purchase by the commission exceeds $500, except in certain cases referred to in the statutes, it is proper to point out that the interpretation of the meaning of the words "may make rules, etc." presents sufficient difficulty so that the justices of the supreme court of a sister state in the case of State v. Bunting Tractor Co., 77 Pac. (2d) 464, in Idaho case, in interpreting a statute nearly identical in the material interpreted with the

Minnesota act, disagreed, the majority holding that "may" was mandatory and meant "shall" and the minority holding that it meant "may."

An examination of several hundred purchase orders in the records of the department of administration and finance executed at various times from the date of the creation of the commission in 1925 indicates that it has been the administrative practice to look upon the requirements for public notice to which we have called attention above as discretionary. I find, for example, that on August 27, 1928, the commission purchased certain steel equipment for lookout towers for $2622.54; that on September 14, 1928, it let a contract for the installation in the State Capitol of 169 window cleaners anchors for $634.00; that on August 29, 1928, it purchased structural steel for the St. Cloud Reformatory for $1100.00; that on April 9, 1929, it purchased a tractor, cultivator and other machinery for the rural credit department for $1785.35; that on August 22, 1928, it purchased steel shelving for the State Capitol Library for $1197.00; that on September 6, 1929, it purchased manual training department equipment for the State Teachers' College at Duluth for $628.70; that on August 21, 1929, it purchased metal piping for the State Fish Hatchery at St. Peter for $938.07; and that on March 25, 1930, it purchased a Dodge sedan for the highway department for $1160.00. Although in each of these cases and numerous other cases the amount involved was in excess of $500.00, the only public notice of which I can find a record was notice by letter to interested bidders. I am informed that no published notice was given. In view of the practice of making purchases in amounts above $500.00 without advertised notice, which appears to have been followed by the commission for thirteen years, it may be contended that the law should now be interpreted in accordance with this administrative practice. It is true that administrative practice of long standing is entitled to consideration in interpreting a law of doubtful meaning, but I am of the opinion that the meaning of the present act is sufficiently clear so that the administrative interpretation, although of long standing, would not be followed by the courts. I believe that the letter and the spirit of the law requires advertised notice (except in certain excepted cases) wherever the amount of a purchase is in excess of $500.00.

For the reasons set forth hereinbefore I conclude:

1. That the purchases of materials only in amounts of $500.00 or less, without published advertisement, were valid with respect to the method of giving notice.

2. That the purchases of materials only involving more than $500.00 made by the commission were let after sufficient notice where advertised notice was given and were let after insufficient notice where the notice given was only by letters to interested bidders and by posting notices in the office of the commission.

3. That the contracts for labor and materials advertised in a trade paper were let after insufficient notice because of failure to comply with Section 3146 of Mason's Minnesota Statutes of 1927, which requires advertised notice in a newspaper published in the county where the building is constructed.

You inquire further as to the status of contracts that have been let without the giving of sufficient notice. The following situation may exist:

1. The contract may be fully executed, that is, the construction work may have been completed and the consideration paid or the materials may have been delivered and incorporated in the building and the consideration paid.

2. The contract may be wholly unexecuted.

3. The contract may have been executed in whole or in part by the contractor or vendor and the material may not have been used or may have been used in whole or in part but not paid for or paid for in part only.

In my opinion the status of the several classes of Bemidji State Teachers' College contracts is as follows:

1. The contracts for materials only, in an amount of $500.00 or less, let without published advertisement were valid with respect to the method of giving notice, for no published advertisement is required in such cases when, in the judgment of the commissioner of purchases, it is expedient not to advertise.

2. The contracts for materials only, which were let after notice had been given by published advertisement in a trade paper, were valid with respect to the method of giving notice.

3. The contracts for materials only, in an amount in excess of $500.00, which were let after notice had been given by posted notice and by mailing letters asking for bids, were invalid because the notice given was insufficient in not complying with the requirements of Section 53-10 of Mason's Minnesota Statutes of 1927, requiring advertisement for bids where the amount of the purchase exceeds $500.00.

4. The contracts for labor and materials let after advertisement in a trade paper published in Minnesota were invalid because the commission failed to make publication in a qualified newspaper in the county in which the Bemidji State Teachers' College is located, as required by Section 3146 of Mason's Minnesota Statutes of 1927.

The rights of the vendors and contractors under contracts let and purchases entered into after insufficient notice are as follows:

1. Where the contracts for construction work involving labor and materials have been let after insufficient notice and the contracts have been executed in whole or in part and payments have been made in full or in part and where materials purchased after insufficient public notice have been used in whole or in part and payments have been made in full or in part the State is entitled to recover from the contractor or vendor the excess of the amount paid, if any, over the value to the state of the benefits received. See Fargo Foundry Co. v. Village of Callaway, 148 Minn. 273, and Wakely v. County of St. Louis, 184 Minn. 613.

2. Where the contracts for construction work involving labor and materials have been let after insufficient notice and the contracts have been

completed and the contractor has not been paid and where materials purchased after insufficient public notice have been used and payment has not been made, the contractor or vendor cannot recover. A vendor who has performed his contract cannot recover the reasonable value of the materials or of the labor and materials furnished because the state cannot be sued without its consent and such consent has not been given. In such a case the state legislature is the only body possessing power to authorize payment to be made.

3. Where materials have been delivered under an invalid contract and not used and payment therefor has not been made, the contractor or vendor is still the owner of such materials and may deal with them as he sees fit.

You inquire further as to what action should be taken by the state with reference to any contract found by me to have been let after insufficient notice.

With reference to fully executed contracts the Supreme Court of Minnesota in the case of Village of Pillager v. Hewett, 98 Minn. 265, has held that where a municipality has received a fair consideration no recovery can be had. The village of Pillager, acting under a statute requiring the giving of public notice before such a contract could legally be let, entered into a contract for the construction of a bridge without giving public notice. The contract price was a reasonable price. The bridge was constructed and accepted by the village and the contract price was paid in part by cash and in part by the delivery to the contractor of the bonds of the village. Thereafter the bridge was carried away by a flood, such carrying away being due solely to flood conditions and not to any imperfection in the construction of the bridge. The village thereupon sued the contractor for the return of the money paid and the bonds delivered. It will be noted that this was a fully executed contract. The court held that in a situation where the contract was fully executed and the village had received a fair consideration for the money paid the village was not entitled to a return of such money. The court said:

> "It may be conceded that the defendant could not have maintained an action on the contract to recover the contract price for the bridge, although he had fully performed the contract on his part; for upon the grounds of sound public policy the doctrine of ultra vires is applied with greater strictness to municipal than to private corporations. This, however, is an action, in the nature of an action for money had and received, which is based upon equitable principles, to recover back the consideration paid by the plaintiff to the defendant for building a bridge which was accepted by it, and which fully complied with the terms of the contract. The fact that the bridge was afterwards carried away by a flood is not material, for it was not due to any fault of the defendant or any one else. After the acceptance of the bridge it became public property, which from its nature could not be restored to the defendant, and, of necessity, the plaintiff would retain and enjoy the benefits thereof so long as it stood. The defendant in good faith received the money and bonds in payment of the bridge which he had

built for the plaintiff. The consideration for such payment was full and fair, and, in equity and good conscience, it ought to have been made by the plaintiff. Such being the case, it would be most inequitable and unconscionable to compel the defendant to return the money and bonds paid to him under the circumstances found by the trial court, and we hold that the plaintiff cannot maintain this action to recover them."

To the same effect is the case of Farmer v. City of St. Paul, 65 Minn. 176, which held that the House of Good Shepherd, which over a period of twenty-five years for a fair consideration had provided board and lodging for female prisoners, could not be held to an accounting for the money received merely because the city could not legally enter into a contract of this character.

However, where a state or its governmental subdivisions has failed to receive a full and fair consideration it may recover the difference between the consideration paid and the value of the benefits.

I have indicated above the status of the various classes of contracts. I will take such appropriate legal action with reference to each invalid contract as may be necessary to protect the interests of the state. Any contracts improperly let and wholly or partly unexecuted should forthwith be cancelled. In case construction work has been performed under an invalid contract and not paid for or not paid for in full or material has been delivered under an invalid contract and has been used and has not been paid for or not been paid for in full, no payment or further payment can be made unless and until authorized by the legislature.

You further ask me to state in what manner the commission must proceed in giving notice of the purchase of materials and the letting of contracts. I have set forth above the provisions of Section 53-10 of Mason's Minnesota Statutes of 1927 with reference to this matter. The commission should forthwith make rules, regulations and orders governing the manner of purchasing and contracting for supplies, equipment and other property for the various officials, departments and agencies of the state government and institutions under their control, such rules, regulations and orders to be made in accordance with the requirements of said Section 53-10. I need not repeat the many requirements of the statute but do call special attention again to the requirement that all purchases of "supplies and other property" in amounts in excess of $500.00 can be made only after published advertisement.

Contracts for labor and materials not affecting new buildings for state teachers' colleges are governed by Section 4432 of Mason's Minnesota Statutes of 1927, as amended by the Reorganization Act. Such contracts can be let by the commission only after "public notice such as the board may deem proper," which, in my opinion, means published advertisement in a paper reasonably suited to the purpose of bringing the matter to the attention of interested bidders. This notice, of course, may be supplemented by additional notice of such character as the commission may deem proper.

Contracts for labor and materials for the construction of new buildings for state teachers' colleges can be let by the commission only after first

advertising for at least two weeks in some legal newspaper published in the county where the work is to be performed for separate sealed bids for general construction, plumbing, heating and ventilating work and for separate sealed bids covering the entire work required in such construction. This advertisement must fix the time and place for the opening of the bids. Such bids shall be opened publicly. No contract may be made except with competent responsible contractors and builders who can furnish a good and sufficient bond.

WILLIAM S. ERWIN,
Attorney General.

July 23, 1938. 980a-11

385

STATE—Commissions—Railroad and Warehouse—Weighing of livestock.

Minnesota Railroad & Warehouse Commission.

You ask:

> "Does Chapter 216, Laws of 1935, empower the Railroad and Warehouse Commission, at packing plants or slaughter houses where the average daily number of livestock slaughtered or handled is 250 head or more, such livestock having already been purchased or acquired, by such packing plants or slaughter houses, at places within the State of Minnesota other than a public stockyard as defined by Laws of 1919, Chapter 461, to appoint such weighers as may be necessary for weighing such livestock, and collect established fees for same?"

It is my opinion that your question should be, and it is, answered in the affirmative.

Section 1, of said Chapter, provides so far as here material, that "the terms 'packing plants' and 'slaughtering houses' shall mean plants, houses and places of business where livestock purchased or acquired at places within the State of Minnesota are slaughtered."

Section 2, of said chapter, provides so far as here material, that "The railroad and warehouse commission shall appoint at packing plants, slaughtering houses and concentration points where the average daily number of livestock slaughtered or handled is 250 head or more, such weighers as may be necessary for weighing livestock, provided that no weighers shall be appointed at packing plants or slaughtering houses at which the only livestock slaughtered or handled is purchased or acquired at a public stockyards as defined by Laws 1919, Chapter 461."

In the light of the foregoing quotations it would appear that the authority of the Railroad & Warehouse Commission to appoint weighers at such packing plants or slaughter houses is determined, not by whether or not stock is there purchased, but by whether or not "the average daily number of livestock slaughtered or handled is 250 head or more."

The provisions of said chapter, as a whole, reflect a legislative intent to bring, so far as words may do so, all weighing, at least for slaughter purposes on a large scale, within the provisions of said act.

HARRY W. OEHLER,
Assistant Attorney General.

February 17, 1937. 371b-10

386

STATE—Executive Council—State Relief Agency—Notice required before making purchases.

Mr. H. J. Aufderheide, State Relief Agency.

You inform us that the state relief agency is now expending money, primarily under authority of Chapter 89, Extra Session Laws of 1937, but also in part under authority of Chapter 51, Laws of 1935, and Chapter 101, Extra Session Laws of 1935-1936.

You inquire whether the recent opinion of the attorney general with reference to the required notices in connection with purchases made by the Commission of Administration and Finance is applicable to the State Relief Agency.

Chapter 89 of the Extra Session Laws of 1937 declares:

"WHEREAS, A general emergency exists affecting the public health, public safety and general welfare of the people of the state:" Chapter 51 of the Laws of 1935 and Chapter 101 of the Extra Session Laws of 1935-1936 contain similar declarations of emergency.

Chapter 89 of the Laws of 1937 appropriates certain money to the Executive Council for public relief purposes including direct relief of various kinds and work relief of various kinds. Said Chapter 51 and 101 make appropriations for nearly the same purposes. We are informed that the purchases made by the State Relief Agency include purchases for direct relief and also materials for various W.P.A. projects for which the state and local communities provide so-called sponsor's contributions by purchasing materials, and W.P.A., a federal agency, provides the labor. We are informed further that not any of these projects can be started until it has been approved by the proper federal authority at Washington. Cooperation with federal authorities is authorized by the statutes referred to above. As soon as a project has received federal approval, materials must be provided within a few days or large numbers of men employed by W.P.A. will be out of employment. The men on W.P.A. rolls are in such financial circumstances that they must either be given direct relief or work relief. If work is not available they must nevertheless be supported. It is apparent that when men and women are on the verge of starvation relief must be given promptly.

Presumably because of these considerations the legislature has not in any of these relief statutes included any provision requiring public notice to be given prior to the making of purchases for relief purposes. These statutes appear to be complete in themselves. They are subsequent in time of enactment to the Reorganization Act and in our opinion they are not subject to the requirements for notice contained in said act.

It is our opinion that purchases may be made under the statutes referred to in such manner and upon such notice as the Executive Council may direct or as the Relief Agency under authority of the Executive Council may determine.

MATTHIAS N. ORFIELD,
Deputy Attorney General.

August 8, 1938. 928c-17

387

STATE—Industrial Commission—Safety Division—Enforcement not vested exclusively in Railroad and Warehouse Commission.

Industrial Commission of Minnesota, Department of Labor and Industry.

You state:

> "The Safety Division under the Industrial Commission makes inspections on railroads under this section and notifies them of violations. We understand that the Railroad and Warehouse Commission also makes such inspections."

You ask:

> "* * * whether violations found by our inspectors shall be submitted direct by this department to the Attorney General for prosecution or shall the Railroad and Warehouse Commission make such submission."

It is my opinion that violations found by your inspectors may be submitted direct to the Attorney General for prosecution. The substance of said Section 4732 was originally Chapter 15, Laws 1887, which, unlike many other acts contained in Chapter 28, Mason's Minnesota Statutes, 1927, did not vest enforcement, exclusively or otherwise, in the Railroad and Warehouse Commission.

HARRY W. OEHLER,
Assistant Attorney General.

June 24, 1937. 371b-8

388

STATE—Lands—Acquisition by Executive Council—State-Relief Agency.

Mr. Herman J. Aufderheide, Administrator, State Relief Agency.

You call attention to Chapter 459, Laws of 1937, and request an interpretation of this law, particularly with reference to the legal effect of the powers of the Executive Council in connection with the leasing, renting, sale or other disposition of lands and improvements thereon, acquired under the State Relief Acts in connection with work relief projects when such lands or any part thereof are not presently needed for the purpose or purposes for which same were acquired.

Chapter 459 passed in the 1937 legislative session is very brief and reads as follows:

> "An act authorizing the executive council to lease, rent, sell or dispose of lands and improvements, which have been acquired in certain cases, and providing for the disposition of funds received in such case. Be it enacted by the Legislature of the State of Minnesota:
>
> "Section 1. Executive Council to acquire and dispose of lands. In all acquisitions of lands, made by the Executive Council, involving flood control, water supply, water diversion, control of erosion, reforestation, afforestation and recreation and not presently needed for such purpose or purposes, which may be or have been purchased or acquired under the terms of House File No. 182 and/or under Laws 1935, Chapter 51 and/or Extra Session Laws 1935-1936, the Executive Council is hereby authorized to lease, rent, sell, or otherwise dispose of or deal with, upon such terms and conditions as it may deem advisable, any and all of the lands, buildings or improvements thereon so acquired.
>
> "Section 2. Receipts to be credited to improvement fund.—Any sum or sums of money received from such leasing, sale or disposition of said lands or improvements thereon shall be credited to the $2,500,000 fund created by House File No. 182 and re-allocated and expended in the same manner and for the same purposes for which said fund was created.
>
> "Section 3. This act shall take effect and be in force from and after its passage.
>
> "Approved April 24, 1937."

You have also made inquiry in the event that it is held that this law is operative, as to the mechanics or method of effecting transfer of the lands, buildings or leases.

You will note particularly that Sections 1 and 2 of Chapter 459 make specific reference to lands which may be or have been purchased or acquired under the terms of House File 182 and/or Laws of 1935, Chapter 51, and/or Extra Session Laws, 1935-1936, the last mentioned laws being the relief acts.

An examination of the records and of House File 182 discloses that at the time of the passage and approval of Chapter 459, Laws of 1937, House File 182 was the proposed new state relief bill which was generally expected to be passed in one form or another during the regular 1937 session. However, House File 182 was not passed at the regular session but a special session in 1937 was called during the summer months for the primary purpose of passing a state relief bill, and as a result of the special session Chapter 89 of the special session laws, 1937, being the present state relief act, was passed and was approved on July 24, 1937. Said Chapter 89 as passed and House File 182 of the regular session which was not passed, are both state relief measures and both have the same characteristics of a general, complete emergency relief act and are direct and cover the same matter; so in principal as well as in subject matter, House File 182 and Chapter 89 of the 1937 special session are for all practical purposes the same. Unquestionably at the time of the enactment of Chapter 459, the legislature had fully intended to pass a state emergency relief act and wished to tie Chapter 459 into the act to be passed, as well as the former relief act of 1935 and the relief act of the special session of 1935-1936. The intent, therefore, of the legislature, appears to the writer to be clear, and that the selling or leasing of lands or improvements thereon, not presently needed for work relief projects and which were acquired or would be acquired under the new relief act, as well as the two prior relief acts, would be a matter for the Executive Council to administer.

The courts have long held in substance that an act should be held effective and constitutional if at all possible to reconcile the act with the Constitution and the legality of the subject matter. The general provisions of Chapter 459 might well have been incorporated in the relief act as passed by the 1937 special session, and it is further brought to your attention that there was no specific repeal in the special session of Chapter 459, thereby indicating an intention of the legislature that the terms of Chapter 459 would likewise be applicable to the last enacted relief act, as well as the two prior state relief measures.

In the case of Congdon v. Congdon, 160 Minn. 343, the court said:

> "We must construe a statute with reference to the object it was intended should be accomplished by it. In order to learn this object it is proper to consider the occasion and necessity of the enactment. That construction must be applied that will best advance its object."

In State ex rel. v. St. Paul, M. & M. Ry. Co., 98 Minn. 380, it is stated that:

> "A rigid and literal reading would in many cases defeat the very object of the statute and exemplify the maxim that 'the letter killeth, while the spirit keepeth alive.'"

The operation of statutes is often extended, by construction, to matters of subsequent creation and applied to conditions that accrue after their passage, as well as to those that existed before.

In Minn. and Pac. R. R. Co. vs. H. H. Sibley, 2 Minn. 1, it is held:

> "In construing a law, the history of its passage is often of great assistance; if it be an amendment, the court will recur to the condition of the law prior to the amendment, and consider the occasion, necessity, and object of the change.

In J. F. Mushel vs. C. G. Schulz and others, 139 Minn. 234, the court said:

> "In construing a statute, we may, in case of doubt, take into account the object or purpose of the act, the events leading up to it, the history of the passage of the act through the legislature, and modification made during its course."

In Minnie Heim vs. American Alliance Insurance Company of New York, 147 Minn. 283, the court said:

> "The statute is a remedial one, and, therefore, it is to be construed literally for the suppression of the mischief it was designed to do away with, it was enacted to promote beneficial public objects and, therefore, a broad construction is to be given to it."

The writer is familiar with the land acquisition activities under the State Relief Acts in furtherance of work relief projects, and in some of the acquisitions, particularly the Lac qui Parle Project which extends into four counties and covers a great amount of acreage, it was found in the condemnation proceedings and negotiations that in many cases where large areas of land were taken, leaving only small portions of land under private ownership, that the State could obtain entire tracts at the same consideration as the smaller acreages and in such cases the entire tracts were acquired.

Some of the lands, particularly in the Lac qui Parle Project, will be subjected to flowage or flooding only periodically and in some of such cases, I understand that leases could be negotiated for use of the land to private parties for a consideration, subject to the State's flowage rights, and in other cases the parcels of land not actually needed could perhaps be sold to an adjacent owner at a fair consideration.

One of the problems presented by the vast land acquisition is that of buildings of various natures which are situated upon the lands acquired, particularly the larger areas. Some means should be made available to sell and dispose of these structures or have same razed and the salvage realized. Chapter 459 would give this right if this chapter is valid.

In view of the history of House File 182, the passage of Chapter 459, and the subsequent enactment of Chapter 89 of the Special Session Laws of 1937, a similar measure, and construing the legislative intent, I am of the opinion that Chapter 459 is an act enabling the Executive Council to sell or dispose of the excess lands, buildings and other improvements, particularly with the view in mind of the preservation of the emergency relief funds.

Section 2 of Chapter 459 provides that any funds received from such leasing or sale or disposition of lands and structures would be credited to the fund created by House File 182 and be re-allocated and expended in the same manner and for the same purposes as such fund was created. Under Chapter 89 of the relief bill, a fund is set up for the purposes described therein. For the reasons hereinabove stated, I am of the opinion that any sums realized from the sale or leasing or disposition of the excess lands and improvements may be credited to the funds allocated for land acquisition as to such projects. This, I believe to be proper inasmuch as the sale or leasing represents salvage or decrease of the purchase price of land acquisitions and the moneys realized should properly be credited and supplement such fund.

Under Chapter 459, the Executive Council is expressly authorized to sell, lease, rent or dispose of such excess land and buildings. I believe it would be proper, and it is recommended, that the Executive Council by resolution designate you or some other person or persons as its agent to handle such sale, leasing and disposition of the excess lands. The leases, bills of sale or deeds, of course, will have to be executed in writing and the Executive Council may well, if it desires, by motion or resolution, authorize the Governor and the Secretary of the Executive Council or other persons, to execute such instruments as may be necessary to effect such transfers.

ORDNER T. BUNDLIE,
Assistant Attorney General.

March 16, 1938. 928c-13

389

STATE—Lands—Conveyances—Relinquishment.

Hon. Elmer A. Benson, Governor of Minnesota.

Pursuant to a request of April 7, 1937, from the Department of Conservation, we enclose herewith a quit-claim deed relinquishing to the United States of America any right, title or interest the State of Minnesota may have to the lands in question.

It appears that the United States deeded the tract in question to an Indian allottee. Later the State of Minnesota selected the same land and received a swamp land patent from the Government, which patent to the State is void.

The grantees of the Indian allottee desire to perfect their claim of title and request the State of Minnesota, through the Department of Conservation, to relinquish to the United States any interest the State may have in this tract.

You are authorized to convey the tract pursuant to the terms of Section 6528, Mason's Minnesota Statutes of 1927. Your official act in the

premises should be attested by the Secretary of State pursuant to the requirements of Section 4 of Article 15 of the Constitution of the State of Minnesota. The form of deed submitted herewith has been prepared by this office and conforms substantially with the provisions of Sections 8203 and 8204, Mason's Minnesota Statutes of 1927, and we approve the same as to form and legality.

The facts have been briefly restated in the quit-claim deed submitted herewith and we recommend the execution thereof.

FRANK H. OSTERLIND,
Assistant Attorney General.

April 17, 1937. 700e

390

STATE—Lands—Forfeiture—Right to redeem before re-entry by state.

Mr. R. J. Knutson, County Attorney.

You refer to Mason's Minnesota Statutes of 1927, Section 6291, which provides that when the rights of a purchaser of state land become forfeited by failure to pay the amount due, the purchaser, his heirs or assigns, before resale at public auction of such land, may pay the amount of interest then due, costs, interest at 12% on such interest and costs, and that such payment shall operate as a redemption of the rights of the purchaser. You also refer to Section 2 of Chapter 39 of Extra Session Laws of 1933, which adds to said Section 6291 the following language:

> "The provisions of this section shall not apply to state lands sold after January 1, 1934."

You inquire:

> "1. Does Sec. 2 of Chap. 39, Ex. Sess. 1933, remove all right of redemption of lands sold after January 1, 1934, where the annual interest is not paid on June 1 or within six days thereafter?
>
> "2. If lands sold after January 1, 1934, may still be redeemed,
>
> "a. For how long a time does the right of redemption continue?
>
> "b. Shall 12% penalty still be collected and by what law shall the treasurer guide himself in computing the amount of redemption money?"

We answer your first question in the negative.

2. a. In our opinion, in the case of state lands sold after January 1, 1934, the right of redemption continues until a reentry is made when the Commissioner of Conservation reappraises, advertises and publicly offers such land for sale. See Extra Session Laws of 1933, Chapter 39, Section 1.

2. b. In our opinion, the 12% penalty required by Mason's Minnesota Statutes of 1927, Section 6291, may not be collected if the land is sold after January 1, 1934. The answer to the question as to which law the treasurer shall guide himself by in computing the amount of redemption money is one that in the first instance might properly be presented to the Commissioner of Conservation. The answer to this question depends to some extent upon the kind of land covered by the certificate of sale. In general, the purchaser in default should be required to pay the amount due under his certificate of purchase.

WILLIAM D. GUNN,
Special Assistant Attorney General.

December 16, 1937. 700a-8

391

STATE—Lands — Eminent domain — Exercise of by municipality — State lands.

State Board of Control, State Office Building.

You state that the township of Fergus Falls desires to widen and improve a roadway "running east and west between the State Hospital land on the north and the Maryland Dairy on the south, west of State Highway No. 52"; that the center of the present roadway is not on the boundary or line between the land above described; that the center of said roadway is 21.7 feet to 27 feet north of the boundary line on the state land; that many years ago when the state acquired this parcel of land the road in question was not in existence; that the hospital built a road "on the south edge of their land for their own convenience for farming operations"; that later the general public "began using the roadway when the country to the westward became settled, and consequently the township now claims that this roadway has become public property through usage"; that the township now desires to widen this roadway to 66 feet; that this will mean that the state will have from 54.7 feet to 60 feet of roadway on its lands for a distance of 2,249 feet, while the Maryland Dairy farm to the south will lose a strip only from 6 to 11.3 feet wide; that it is also proposed in building this road to straighten out several bad curves in the roadway "in the extreme west end of the hospital land"; that the old road at this point would be abandoned and a new rounding curve would be built; that this would be a slight advantage to the state, as it would mean that some land, including a small slough now cut off from the present roadway, could be fenced in and pastured.

You inquire whether the township can claim the state land upon which the old roadway was built by adverse possession.

The above question is answered in the negative. The rule seems well established that title to public lands, state or federal, cannot be acquired by adverse possession. This for the reason that in the absence of legisla-

tion providing otherwise the statute of limitations does not run against a state and, therefore, title to public lands cannot be acquired by adverse possession. See Dunnell's Digest, Section 110, Section 9186 of Mason's Minnesota Statutes of 1927, and Murtaugh v. Chicago, M. & St. P. Ry. Co., 102 Minn. 52.

You further state that if the township cannot claim this road by adverse possession then it is "taking too much of the State land and not enough of the land belonging to the Maryland Dairy Department."

You then inquire whether the township has the right to take from 54 feet to 60 feet of the state hospital lands for such road purposes.

Your second inquiry resolves itself into the proposition of whether the lands which have been set aside pursuant to legislative authority for a particular state purpose may be taken by a municipality such as a township by condemnation proceedings for a purpose other than that for which the lands were originally set aside.

The general rule seems to be that property already devoted to a public use cannot be taken for another public use which will totally destroy or impair or interfere with the former use unless the intention of the legislature that it should be so taken has been manifest in express terms, or by necessary implication, mere general authority to exercise the power of eminent domain being in such case insufficient. However, the above rule against taking state property by right of eminent domain without special authority where such property is already devoted to a public use "is generally held not to apply where the second use does not materially or seriously interfere with the first use, or where the second use is not inconsistent and the two uses may be enjoyed together without serious injury to or interference with the first use." Minnesota Power & Light Co. v. State, 177 Minn. 343; 10 R. C. L. 201; 202; 20 C. J. Sec. 90, 91; In Re St. P. & N. P. Ry. Co., 34 Minn. 227. In the latter case the Supreme Court held that where certain land owned by the University but not in use for the purposes of the University was held liable "to be appropriated in the same manner as lands of private persons." The distinction between used and unused state lands was further referred to in University v. St. P. & N. P. Ry. Co., 36 Minn. 447.

Then in School District v. State, 124 Minn. 271, wherein it is said that state lands are not subject to appropriation in condemnation proceedings, except when the right to so acquire them is expressly or by necessary implication granted by the legislature. This case involved condemnation of state school lands by a school district, and Chapter 53, Laws 1872, was construed and held to grant, by necessary implication, the right to acquire such school lands for public purposes and it was further held that the right so granted was carried forward in the statutory revision of 1905 and thereby in effect extended to all corporations entitled to exercise the right of eminent domain, including school districts, towns, cities and villages.

It was further held that rights acquired in such condemnation proceedings are equivalent to and answer every purpose of a public sale, and

that the statutes, which by implication grant the right, are not in violation of Article 8, Section 2, of the Constitution, which prescribed the method and terms of sale of state school and swamp lands.

The then statute provided that in cases where the "enterprise" was located upon or through school or University lands, or any other lands belonging to the state, such notice (of hearing in condemnation) should be served upon the Secretary of State, and that the commissioners should award damages to the state in like manner as to private persons or corporations.

The court said (p. 275):

> "So that in the light of the act of 1872 and its application in the decisions referred to, the conclusion necessarily follows, as we view the question, that the right of condemnation of state land was granted by that statute by necessary implication. **We so hold.**"

We assume that the state hospital lands have already been set aside and are devoted to a public use. Assuming such is the case, in addition to the above general rule, the following legal rules may be applicable; lands already devoted to a public use may be taken for another public use; (In re St. P. etc. Ry. Co., 34 Minn. 227, supra; University v. St. P. etc. Ry. Co., 36 Minn. 447, supra; State v. District Court, 77 Minn. 248) but where the second use is inconsistent with the first use, or would materially impair it, authority to take for the second use must be granted expressly or by necessary implication, and such implication never arises except as a necessary condition to the beneficial enjoyment and efficient exercise of the power expressly granted, and then only to the extent of the necessity; (Milwaukee, etc. Ry. Co. v. Faribault, 23 Minn. 167; St. Paul N. D. Co. v. St. Paul, 30 Minn. 359; Minneapolis W. Ry. Co. v. Minneapolis, etc. Ry. Co., 61 Minn. 502; N. W. etc. Co. v. Chicago, etc. Ry., 76 Minn. 334; Chicago, etc. Ry. Co. v. Minneapolis, 115 Minn. 460; Board of Water Commissioners v. Roselawn Cemetery, 138 Minn. 458; See 12 A. L. R. 1502; Note 37 L. R. A. (n. s.) 101; 25 How. L. Rev. 563) where the second use would not materially impair the first use authority to take it may be implied from a general grant; (Minneapolis etc. Ry. v. Hartland, 85 Minn. 76; St. Paul etc. Ry. v. Minneapolis, 35 Minn. 141) **whether a second use would be inconsistent with or impair a first use is a judicial question**; (Milwaukee etc. Ry. v. Faribault, 23 Minn. 167; In re St. Paul etc. Ry., 34 Minn. 227; Minnesota Power & Light Co. v. State, supra, page 350).

It, therefore, appears that the answer to your second inquiry may and likely will involve the determination by the courts, of questions of fact, as distinguished from questions of law. In other words, it may depend on the evidence, and the extent of inconsistency of uses and the impairment of the first use by the second use, may have to be ascertained by the court or jury, as facts.

In view of the decision in the Minnesota Power & Light case, supra, to the effect that when it becomes necessary for public service corporations, counties, towns or municipalities to run railways, highways or other lines

through state parks or other state lands of a similar nature that general or special legislative authority should be obtained, it seems to us that it is very doubtful as to whether the township has authority to condemn the hospital lands in question for highway purposes, except pursuant to a legislative enactment.

DAVID J. ERICKSON,
Deputy Attorney General.

August 26, 1937. 700d-12

392

STATE—Lands—Leasing of.

Mr. E. V. Willard, Commissioner of Conservation.

You state that you have received a number of inquiries relative to leasing tax forfeited lands for hay and agricultural purposes in the Red Lake Game Preserve, created under Chapter 258, Laws of 1929. You state that inasmuch as these lands are specifically exempted from the operation of Chapter 386, Laws of 1935, and there is no provision under Chapter 210, Laws of 1935, whereby these lands can be leased, you desire to be informed whether or not Section 2 of Chapter 258, Laws of 1929, vests in the Department of Conservation the right to lease hay and agricultural lands in said area.

We desire to call your attention to that portion of Section 2 of Chapter 258, Laws of 1929, which states:

> "The department shall also make and enforce such rules and regulations not inconsistent with the laws of the state concerning the burning of grass, timber slashings and other inflammable matter, and the clearing, development and use of lands in said preserve and hunting ground as may be necessary and advisable to prevent destructive forest fires and grass fires which would injure the use and development of said area for the preservation and propagation of wild life therein and for the proper protection of the forest and wooded areas thereof."

It is our opinion that pursuant to the language above quoted authority is vested in the Department of Conservation to lease hay and agricultural lands within said area for the accomplishment of the purposes stated, reserving, however, to the State the right to sell such leased lands after classification as provided by law.

In the consideration of the subject we have in mind a former opinion of this office dated August 13, 1936, and addressed to Mr. R. J. Knutson, County Attorney of Roseau County, in which it was pointed out that pursuant to the provisions of Section 2 of Chapter 407, Laws of 1931, the Department of Conservation was authorized to make all necessary rules and regulations for the sale of merchantable timber from lands acquired by the state within such conservation area when "in the opinion of such Depart-

ment, the same may be sold and removed without damage or injury to the purposes of such project," and wherein it was also stated that said Section 2 authorizes the Department of Conservation to lease such lands so classified as suitable for agricultural purposes. The authority granted by Section 2 of Chapter 407, Laws of 1931, was not as clearly nor as broadly stated as the provision which we have hereinbefore quoted as it appears in Section 2 of Chapter 258, Laws of 1929.

For your convenience a copy of the opinion of August 13, 1936, is herewith enclosed.

FRANK H. OSTERLIND,
Assistant Attorney General.

March 15, 1937. 700d-18

393

STATE—Lands—Tax forfeited lands—Repurchase by owner.

Minnesota Tax Commission.

You refer to us a letter addressed to you by A. Elleraas, county auditor of Norman county in which he inquires whether an owner of land lost to the state for taxes in order to take advantage of Section 5 of Chapter 485 of the Laws of 1937, must comply with the requirements of all of the subdivisions of said Section 5, namely: subsections (a), (b), (c) and (d).

It is our opinion that an owner desiring to repurchase land under said Section 5 must establish by affidavit accompanying his application the facts set forth in each of said subsections.

MATTHIAS N. ORFIELD,
Deputy Attorney General.

May 20, 1937. 525

394

STATE—Lands—Trust fund land—Sale of.

Mr. Herman C. Wenzel, Commissioner of Conservation.

You give information as follows and ask the following questions:

"We will appreciate your opinion on the following question:

"Section 6463 Mason's Minnesota Statutes for 1927 provides 'All state lands bordering on or adjacent to meandered lakes and other public waters and watercourses and the live timber growing or being thereon hereby are withdrawn from sale.

" 'Of all such lands bordering on or adjacent to meandered lakes and other public waters and watercourses and so withdrawn from sale, a

strip two rods in width, the ordinary high water mark being the water side boundary thereof, and the landslide (Land side) boundary thereof being a line drawn parallel to the ordinary high water mark and two rods distant landward therefrom, hereby is reserved for public travel thereon, and wherever the conformation of the shore line or conditions require, the auditor shall reserve a wider strip for such purposes.'

"Example: X is the holder of a state land certificate on a tract bordering a meandered lake. He is delinquent in interest on the certificate since 1925. It has not reverted to the state. The land has been reappraised as provided by law.

This presents the following questions:

"1. Does Section 6463 apply to interest delinquent state trust fund lands as well as to unsold and reverted state trust fund lands?

"2. If interest delinquent state trust fund lands are thus withdrawn from sale, how is the state to re-acquire title to these lands, inasmuch as Section 6285 Mason's Minnesota Statutes provides that before a re-entry is made by the state, the lands must be

Re-appraised,
Re-advertised and
Publicly offered for sale?"

It is our opinion that Section 6463 does not prevent the state from bringing about the reversion of interest-delinquent state trust fund land in the only manner possible, namely, by offering it for sale. The purpose of said Section 6463 was to conserve for public use state land bordering on public waters. The opposite of this result would be attained if we were to hold that the state may not take steps to recover the title to such land by offering it for sale.

It cannot have been the intent of the legislature to prevent the cancellation of its own land contracts in the only manner permissible under the terms of such contracts.

Answering your first question in the manner indicated your second question does not arise.

MATTHIAS N. ORFIELD,
Deputy Attorney General.

August 17, 1937. 700d-28

395

STATE—Legislature—Under facts stated, member would be employe and not officer.

Mr. Harold R. Atwood, Minnesota Railroad and Warehouse Commission.

In your letter you state:

"Under Chapter 185, Session Laws 1925 and Chapter 170, Session Laws 1933, the Minnesota Railroad and Warehouse Commission is

charged with the duty and responsibility of enforcing the above-mentioned laws.

"In enforcing these laws the Commission employs truck and bus inspectors working under a Supervisor. These men are paid out of a fund collected by the assessment of license fees in accordance with the law. The principal duties of these inspectors are to police the State, check the licenses, routes and rates, and in general, obtain compliance with the law."

You ask our opinion on the following question:

"Is it your opinion that under Section 9, Article 4 of the Constitution of the State of Minnesota, a member of the Legislature would be ineligible for one of the above-named positions?"

We answer your question in the negative. An extensive examination of cases, textbooks and law dictionaries fail to reveal to us a definition sufficiently definite and complete to be of great practical value as a rule whereby a particular person may be classified as an employe as distinguished from an officer. The courts have quite generally recognized their inability to formulate such a rule and have invariably resorted to the practice of deciding each case upon its own individual merits. The courts in considering the question have usually found it convenient and advisable to determine the existence or absence of those characteristics that are necessary to constitute one an officer. In other words, the determination of the question of whether one is or is not an officer answers the question of whether or not he is an employe. We feel that we may best answer your question by following the same method and will state as far as necessary the elements and characteristics that make one an officer as distinguished from a mere employe.

It may be generally accepted that one of the essential elements of a public office is that the incumbent shall exercise some portion of the sovereign power of the state in his own right by reason of the fact that the state either by constitutional or statutory provision has delegated to him the power and duty of exercising some governmental function as the agent of the state. In other words, his right to exercise the sovereign power must be directly vested in him by the state and must be free from the control and direction of any other person. To negatively illustrate, where the state vests such power in one holding a particular state position, with authority to exercise the same through another person, subject to his control and direction, the latter person is an employe and not an officer. He is the agent of such person and not of the state; he acts for or in behalf of the person to whom such power was delegated by the state and not in his own right as an agent of the state.

It will be noted that the persons to be employed by your commission are acting under the direct supervision and control of the commission. The commission acts as the agent of the state and it is charged under the statutes cited in your letter with the duty and responsibility of enforcing said statutes. In turn the commission employs certain persons to act as

inspectors under the general supervision of a supervisor who, in turn, is responsible to your commission. The inspectors must necessarily be classified as employes. Their salaries as well as their tenures of office are determined by your commission and not by the statute itself. The decisions of our Supreme Court are not particularly helpful in determining your question.

In the case of State ex rel. v. Sutton, 63 Minn. 147, it was held that a member of the legislature may not be appointed to the office of district inspector of boilers. The statute in force at the time specified the duties of district boiler inspector, giving him a definite term of office and providing for his compensation. You will note that this is very different from the facts set forth in your letter.

State ex rel. v. Dahl, 69 Minn. 108, involves a question of whether a court reporter appointed by a judge of the district court holds an office within the meaning of the constitutional provisions prohibiting a member of the legislature from holding an office under the state. The court indicates in the opinion that a court reporter is not an officer but a mere employe.

A number of rulings have been issued by this office during the past years on this particular question. Under date of August 11, 1917, it was held that an appraiser under Laws 1917, Chapter 162, was an officer within the meaning of the constitutional provision. However, reference to Chapter 162 discloses that the appraiser was required to take an oath of office and give a bond and that his duties were minutely set forth.

It was held on May 24, 1921, that a member of the legislature may be appointed as district weed inspector. On March 18, 1926, it was held that a member of the legislature may be appointed as special counsel in the liquidation of a bank. On April 17, 1922, it was held that a member of the legislature may act as a local weed inspector. On April 29, 1929, it was held that a member of the legislature may act as district appraiser for the Rural Credit Department.

We have given this matter our serious consideration and have reached the conclusion as above stated. That is, a member of the legislature acting in the capacity as set forth in your letter would not be an officer, but would be a mere employe, and as such would be eligible for one of said positions.

ROY C. FRANK,
Assistant Attorney General.

October 8, 1937. 280h

396

STATE—Officers—Governor—Approval of acts passed during the last three days of the legislative session.

Hon. Elmer A. Benson, Governor of the State of Minnesota.

You inquire how much time the governor may take to approve, sign and file in the office of the secretary of state acts passed during the last three days of the session.

Section 11 of Article 4 of the state constitution contains the following provision pertinent to the question you ask:

> "If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislature, by adjournment within that time, prevents its return; in which case it shall not be a law. The governor may approve, sign, and file in the office of the secretary of state, within three days after the adjournment of the legislature, any act passed during the last three days of the session, and the same shall become a law."

In asking your question we assume that you are using the word "passed" in the same sense as it is used in the provision quoted from the constitution. Inasmuch as the meaning of the term as used in that provision is material to your inquiry we shall first consider what that meaning is. This matter was definitely settled by the State Supreme Court in the case of Burns v. Sewell, 48 Minn. 425. That case involved the validity of the approval of an act passed by the legislature on April 19 and enrolled and sent to the governor on April 22. The legislature adjourned on April 23. The governor approved the bill on April 24. It was objected that the bill was not passed by the legislature within the last three days of the session and that therefore, the governor could not approve it after the session ended. If the term "passed" had been used in the ordinary sense that would have been true. But the Court held that the term as used here includes passing by the legislature, enrollment, signing by the presiding officers of the two houses and delivery to the governor. The Court said:

> "What in this clause is the meaning of the word 'passed'? Ordinarily a bill is said to have passed one of the houses when the final vote in its favor in that house has been taken and announced. Is that the sense in which the constitution is to be understood when speaking of the passage of bills, not by one house, but by the legislature, with reference to action upon them by the governor? For that purpose, is a bill deemed to be passed so long as the house in which it is has control over it, and may reconsider its action upon it? We think not. Section twenty-one (21) of the article provides: 'Every bill having passed both houses shall be carefully enrolled, and shall be signed by the presiding officer of each house.' When that is done the bill is in condition to be sent to the governor for his action upon it. It is then to be deemed as passed for that purpose. That the word 'passed', as used in the constitution, may sometimes include the enrollment and signature by the presiding officers and sending to the governor, is apparent from section twenty-two (22) of the article, which provides that no bills shall be passed on the day of adjournment, and continues: 'But this section shall not be so construed as to preclude the enrollment of a bill, or the signature and passage from one house to the other, or the reports thereon from committees, or its transmission to the executive for his signature,'—provisions wholly unnecessary if the word could not include those things. The inconvenient consequences that might arise from using the word in section eleven (11) to indicate merely the final vote upon a

bill are so manifest as to furnish a strong presumption that it is not used in that limited sense. It must happen at every session that the final vote on many bills is taken more than three days before the day of adjournment, but which bills it will be impossible to have enrolled and signed, so that they may be sent to the governor, until less than three days remain. In such cases, if the time of passing them is to be computed from the vote, many of them must be lost for want of time on the part of the governor to examine them while the legislature is in session. We think that bills enrolled during the last three days of the session are within the meaning of the clause authorizing the governor to sign them within three days after the adjournment."

We have the further question whether Sundays and holidays are to be excluded in reckoning the period of three days. This question also has received a judicial answer. In the case of Stinson v. Smith, 8 Minn. 366 (Gil. 326), it appears that a bill was passed by the legislature on March 7 and delivered to the governor on the same day, that the legislature adjourned March 8 and that the bill was signed by the governor on March 12, Sunday intervening. The Court held that Sundays are to be excluded, saying:

"We are satisfied, however, that the intent and spirit of the instrument require a different construction; and that the purpose of the framers of the constitution was to give the governor three full working days, after the adjournment, for the consideration and filing of bills. Such time is expressly granted during the session of the legislature; and as the clauses occur in close connection, treating of the same subject matter, it does not seem unreasonable to hold that the exception of Sunday applies to the latter, although not repeated in terms. If it was thought proper to grant the executive three full working days for the consideration of bills during the session of the legislature, it is difficult to see why the same time should not be granted for the same purpose after the adjournment of that body. And indeed the reason is very much stronger for granting such time in the latter case, since it is notorious in the history of legislative bodies that a far greater number of important bills are usually passed during the last three days of the session, than within the same length of time, at any period previous during the session. We think, therefore, the referee committed no error in holding this objection not well taken."

In the recent case of State ex rel. Putnam v. Holm, 172 Minn. 162, the Court held that holidays may not be excluded in reckoning the three-day period.

Summarizing we express the opinion.

1. That the governor has three days after the legislature adjourns to act on any enrolled bill delivered to him on any of the last three days of the session.

2. That in reckoning these three days Sundays are to be excluded.

3. That in reckoning these three days holidays are not to be excluded.

MATTHIAS N. ORFIELD,
Deputy Attorney General.

April 23, 1937. 213c

397

STATE—Personal property—Sale of.

Hon. Herman C. Wenzel, Commissioner of Conservation.

You state that the State of Minnesota has become the owner of a certain fish reduction plant, together with certain machinery and equipment contained therein, located at Warroad, Minnesota, which was originally established as a Minnesota Rural Rehabilitation project, financed with funds granted to that corporation by the Federal Government through grants made to the Governor under the National Recovery Act of 1933 or 1935.

The building stands upon leased ground and presumably the right to remove the building has been reserved in the lease and the building and its contents, machinery and equipment, can be considered as personal property for the purposes of this opinion.

There are two sections of the statute which apparently are applicable to the sale of personal property of the state, both of which are contemporaneous acts.

The first is Section 58-1, Mason's Minnesota Statutes of 1927, which provides that personal property belonging to the state for which there is no immediate use, may be sold, exchanged or otherwise disposed of with the consent of the governor as follows:

> "The official having custody and possession of such property shall apply in writing to the governor for his consent to sell, exchange or otherwise dispose thereof, and in his application shall describe the property and shall state the terms or conditions upon which it is desired to dispose of the same."

Under this section the Governor is then required to refer the application to the purchasing agent of the State Board of Control for his recommendation, and thereafter if the Governor finds that there is no immediate use for such property and that the best interests of the state will be subserved by the sale, exchange or other disposition of such property, he may order that such property be sold, exchanged or otherwise disposed of, and in his order may provide for such terms and conditions as in his judgment will be for the best interests of the state. Any moneys received from the sale of personal property belonging to the state shall be paid into the state treasury

and accredited to the general revenue fund. This section was amended and re-enacted by virtue of said amendment on April 25, 1925.

On the same date the legislature enacted the reorganization act, Laws 1925, Chapter 426. Article 111, Section 3, provides, in part:

> "The commission (of administration and finance) shall have the power to supervise and control * * * the sale, disposition, use, or storage of all property belonging to the state; * * *."

We believe a safe course of procedure would be to have the department or the official having the custody and possession of the property in question apply in writing to the Governor for his consent to sell, exchange or otherwise dispose of the same, and that instead of referring the question to the purchasing agent of the State Board of Control, as provided for in Section 58-1, it should then be referred to the Commission of Administration and Finance, which may provide for the sale, disposition, use or storage of said personal property by and with the approval and consent of the Governor pursuant to the provisions of said Section 53-6.

We have examined the provisions of Chapter 459, Laws 1937, wherein the Executive Council is authorized to lease, rent, sell, or otherwise dispose of or deal with, upon such terms and conditions as it may deem advisable, any and all of the lands, buildings or improvements thereon in relation to certain definitely described projects enumerated in that act. The fish meal grinding project referred to in your letter does not fall within any of the classes referred to in that act. For that reason we believe that Chapter 459 is not applicable to this particular situation.

We do not believe the provisions of the emergency relief acts are applicable to the sale of so much of the personal property, machinery and equipment as may not be needed by the Conservation Department in converting said plant into a fish hatchery.

FRANK H. OSTERLIND,
Assistant Attorney General.

August 4, 1938. 928c

398

STATUTES—Construction—Correction of mistakes and errors.

Mr. Charles A. Fortier, City Attorney.

You inquire:

> "Does Chapter 138 of the Laws of 1937 repeal by implication Chapter 102 of the Laws of 1937?"

Section 3161, Mason's Minnesota Statutes of 1927, as amended by Chapter 385, Laws of 1933, and Chapter 68, Extra Session Laws of 1935-36, provides as follows:

"Every person, except those hereinafter mentioned, who has resided one year continuously in any county, shall be deemed to have a settlement therein, if it has the county system; if it has the town system, he shall have a settlement in the town, city or village therein in which he has longest resided within such year. Every person who has resided one year continuously in the state, but not in any one county shall have a settlement in the county in which he has longest resided within such year, if it has the county system; if it has the town system, his settlement shall be in the town, city or village therein in which he has longest resided within such year. The time during which a person has been an inmate of a hospital, poorhouse, jail, prison, or other public institution, or under commitment to the guardianship of the State Board of Control or one of its state institutions as a feebleminded, delinquent or dependent person, and each month during which he has received relief from the poor fund of any county or municipality or from funds supplied by the State of Minnesota or the United States or any department or departments thereof, supplied as direct relief or in providing work on a relief basis and in lieu of direct relief shall be excluded in determining the time of residence hereunder, except that a ward of the state public school shall have the legal settlement of the family with whom he has resided for two or more years, under a written contract with the state public school providing for his care, education and treatment as a member of such family. Every minor not emancipated and settled in his own right shall have the same settlement as the parent with whom he has resided. Provided, that every minor not emancipated and settled in his own right and living apart from his parents and not supported by his parents shall, after receiving aid and support from others uninterruptedly for a period of two years, acquire the settlement of the person with whom he has resided for a period of not less than two years."

At the 1937 session of the legislature said Section 3161, as amended by said Chapter 385, Laws of 1933 and Chapter 68, Extra Session Laws of 1935-36 was again amended by Chapter 102, Laws of 1937. Said Chapter 102 provides in part as follows:

"**The time during which a person has been an inmate of a hospital, old age home, or nursing home for the care of the invalid or aged whether public or private** * * * shall be excluded in determining the time of residence hereunder * * *."

The underlined portion of the above quoted provisions of said Chapter 102 is the new matter which was added by the legislature when it enacted said chapter. It will be noted from the foregoing that said Chapter 102 amended said Section 3161, as amended by Chapter 385, Laws of 1933 and Chapter 68, Extra Session Laws of 1935-36, by providing that the time during which a person has been an inmate of a hospital, old age home or nursing home for the care of the invalid or aged, whether public or private, is to be excluded in determining the time of residence thereunder.

Later, at the same session of the 1937 legislature, Chapter 138, Laws of 1937 was enacted, which was an act entitled "An Act to Amend Mason's

Minnesota Statutes of 1927, Section 3161, as amended, by Chapter 385, Laws of 1933 and Chapter 68, Extra Session Laws of 1935-36, relating to the legal settlement of paupers" and which act, so far as pertinent, reads as follows:

> "Every minor not emancipated and settled in his own right shall have the same settlement as the parent with whom he has resided. **Every child born in a state institution shall have a settlement in the county in which the mother had a settlement at the time she was committed to such institution.**

The underlined portions of the above quoted provisions of said Chapter 138 indicate the new matter added by the enactment of said Chapter 138.

It will be noted that the legislature in so amending said Section 3161, Mason's Minnesota Statutes of 1927, as amended by Chapter 385, Laws of 1933, and Chapter 68, Extra Session Laws of 1935-36, made no reference to said Chapter 102, Laws of 1937, which act had previously been enacted by the 1937 legislature. It will also be noted that the new matter contained in Chapter 102, Laws of 1937 does not appear in said Chapter 138, Laws of 1937, when it enacted Chapter 138, Laws of 1937, the legislature either intentionally or inadvertently omitted to make any reference to Chapter 102, Laws of 1937, and also omitted the new provisions found in said Chapter 102.

An examination of said Chapter 138 discloses that there is no repealing clause therein, nor any other evidence indicating that the legislature intended, at the time of the enactment of said Chapter 138, to modify or change the provisions of said Section 3161, as amended by Chapter 385, Laws of 1933, and Chapter 68, Extra Session Laws of 1935-36, as further amended by Chapter 102, Laws of 1937, insofar as said section, as so amended by the above referred to legislative enactments, relates to the exclusion of the time during which a person has been an inmate of a hospital, old age home or nursing home for the care of the invalid or aged, whether public or private, in determining the time of residence under Section 3161.

The problem presented by the enactment of said Chapters 102 and 138, Laws of 1937, seems to be clearly a case of the application of the well settled rule that a later act which is merely a re-enactment of a former law, in this case Section 3161, as amended by Chapter 385, Laws of 1933, and Chapter 68, Extra Session Laws of 1935-36, does not repeal an intermediate act which qualifies or limits the first one, the intermediate act being deemed to modify the new act in the same manner as it did the first, unless the provisions of the two acts are so irreconcilable that they cannot stand together. This rule was first stated by our Supreme Court in the case of Gaston v. Merriam, 33 Minn. 271. It was also applied in Powell v. King, 78 Minn. 83, and Nelson v. County of Itasca, 131 Minn. 478.

Applying the rule of law established in the above referred to cases to the situation presented, we are of the opinion that the provisions of said Chapters 102 and 138, Laws of 1937, are not so irreconcilable that they cannot stand together. It does not seem to us that the provisions of Chapter

102, the intermediate act, relating to the time which should be excluded in determining a person's residence thereunder, are in conflict with the provisions of Chapter 138, which amends said Chapter 3161, as amended by Chapter 385, Laws of 1933, and Chapter 68 Extra Session Laws of 1935-36.

In so holding we are not unmindful of the case of State ex rel. Effertz v. Schimelpfenig, 192 Minn. 55, and the rule stated therein that where two inconsistent statutes are enacted at the same session of the legislature, the first must give way to the last as the latest expression of the lawmaking power. However, it will be noted that in the above referred to case the court pointed out that Chapters 172 and 244, Laws of 1933, were hopelessly inconsistent and repugnant to each other. As above indicated, we do not believe that the provisions of Chapter 102 and Chapter 138, Laws of 1937 are inconsistent or repugnant to each other and we do not believe that said Chapter 138, repeals by implication, Chapter 102.

You further state:

> "In the event you believe Chapter 102 has not been repealed by implication I would like your opinion as to the effect of both the heading and Section 1 of Chapter 102, wherein evidently by mistake it sets forth that Chapter 102 amends 'Mason's Minnesota Statutes, 1936 supplement, Section 3136' instead of Section 3161 which it was evidently intended to amend."

It is a well established rule that mistakes or errors will not defeat a statute if the intention of the legislature can be ascertained with reasonable certainty. Mistakes may be disregarded and words changed or transposed, and omissions supplied by intendment. The rule, as stated in Dunnell's Digest, Vol. 6, Section 8985, is as follows:

> "Mistakes, errors, or omissions will not defeat a statute if the intention of the legislature can be ascertained with reasonable certainty in accordance with settled rules of construction. Mistakes may be disregarded, words changed, omitted, or transposed and omissions supplied by intendment. A statute is not to be defeated because it is imperfectly drawn. It must be assumed that the legislature intended to enact a valid and effective law. And the duty devolves upon the courts to ascertain the legislative purpose from a consideration of the act as a whole, and to interpret it, if possible, so that it will accomplish the intended purpose. To bring this about, obvious mistakes and omissions may be corrected or supplied; and contradictory expression, and language of doubtful import should be given a meaning consistent with the legislative intention as disclosed by the act taken as a whole. * * *"

In City of Winona v. Whipple, 24 Minn. 61, the legislature attempted to amend Section 2 of Chapter 4 of Chapter 20, Special Laws of 1867. However, in attempting such amendment, the amendatory act provided that Section 2 of Chapter 1 of Chapter 20, Special Laws of 1867 be amended. The provisions of the amendatory act were in no way germane to Section 2 of Chapter 1 of said Chapter 20. On the other hand, the provisions of said amendatory act were germane to and entirely appropriate to the pro-

visions of Section 2 of Chapter 4 of said Chapter 20. The Court in that case held that in order to carry out the manifest intention of the legislature the amendatory act should be construed as amending Chapter "4" instead of Chapter "1."

Section 3136, Mason's Minnesota Statutes of 1927, which said Chapter 102 purports to amend, relates to the organization of a Teachers' College or Department of Pedagogy by the Board of Regents of the University. It is obvious that the provisions of said Section 3136 are in no way connected with the provisions of our statutes relating to settlement for poor relief purposes. Both the title and the body of said Chapter 102 relate to legal settlement for poor relief purposes and it seems obvious that it was the intention of the legislature to amend Section 3161 relating to settlement for poor relief purposes and that "Section 3136" as found in Chapter 102 is a mistake which should be corrected to read "Section 3161."

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

January 5, 1938. 339a-2

399

STATE—University of Minnesota purchasing procedure, including the manner of securing competitive bids.

Mr. W. T. Middlebrook, Comptroller, University of Minnesota.

You inquire whether purchasing procedure and in particular the detail and manner of securing competitive bids for materials and supplies purchased for the University of Minnesota is under the control of the Board of Regents.

The extent of the power of the Board of Regents was considered by the Supreme Court in the case of State ex rel. University of Minnesota v. Chase, 175 Minn. 259. This case involved the question whether the Board of Regents could embark on a policy of group insurance for members of the faculty and other employes of the university. The court held that the Board of Regents possesses this power. The court based its opinion primarily upon the fact that Chapter 3 of the Laws of the Territory of Minnesota for 1851, which created a body corporate under the name of the Regents of the University of Minnesota, granted to this corporation the power "to enact laws for the government of the University" and upon the further fact that the powers so vested in the Board of Regents by statute were "perpetuated unto the said university" by Article 8, Section 4 of the state constitution, thereby vesting in the Board of Regents powers of control over the university which could not be taken away from said board by any act of the legislature.

We quote from the court's opinion:

"Section 7 provides that 'the Regents of the University and their successors in office, shall constitute a body corporate, with the name and style of the "Regents of the University of Minnesota," with the right as such, of suing and being sued, of contracting and being contracted with, of making and using a common seal.' Section 9 gave the regents power and made it their duty 'to enact laws for the government of the University' and provided for their appointment of professors, tutors and officers of the institution. Section 20 reserved to the legislative assembly the right at any time to alter, amend, or repeal the act.

"So the regents were made a 'body corporate' with power to govern. That is the power to control."

We quote again from page 266 of the court's opinion:

"So we find the people of the state, speaking through their constitution, have invested the regents with a power of management of which no legislature may deprive them. That is not saying that they are the rulers of an independent province or beyond the lawmaking power of the legislature. But it does mean that the whole executive power of the university having been put in the regents by the people, no part of it can be exercised or put elsewhere by the legislature. In consequence, so far as L. 1925, p. 756, c. 426, attempts to give the commission any power of supervision or control over university finances, it is in violation of art. 8, sec. 4, of the state constitution and therefore inoperative."

The Supreme Court has held that in so far as the Reorganization Act attempts to give the commission of administration and finance any power of supervision or control over university finances it violates the state constitution and is void. Control over purchasing procedure and the manner of securing competitive bids by the Board of Regents is a form of control over university finances. We are therefore of the opinion that control over all such purchasing procedure has by Section 4 of Article 8 of the state constitution been vested in the Board of Regents.

MATTHIAS N. ORFIELD,
Deputy Attorney General.

August 11, 1938. 618a-5

400

TAXATION AND TAXES—Agricultural Credit Corporation—Stock tax.

Mr. Henry L. Soderquist, Village Attorney.

You inquire whether certain agricultural credit corporation organized under the laws of this state pursuant to the provisions of Chapter 58, General Statutes 1913, Section 6144, for the purpose of advancing or lending money, or furnishing, or procuring credit, for persons, firms or corporations engaged in the production or marketing of agricultural products are

subject to the provisions of Sections 2026-1 to 4 inclusive, Mason's Minnesota Statutes of 1927, relating to the assessment and taxation of bank and mortgage loan company stock, where the notes and chattel mortgages are assigned to or discounted by the Federal Intermediate Credit Bank, a federal agency.

The statement that the two corporations which you name were organized pursuant to the provisions of Section 6144, G. S. of 1913, is not entirely accurate for the reason that Section 6144, which is now Section 7440, Mason's Minnesota Statutes of 1927, provides for the organization of certain business corporations specifically enumerated therein, and has a clause authorizing incorporation for "other lawful business not otherwise provided for in this chapter." In the footnote to said Section 7440, reference is made to General Statutes of 1913, Section 6145. The latter number is an error and should be correctly stated as Section 6144. It will be noted that the following Section 7441 relates to banks, and it is not believed that the two corporations under consideration were organized under the banking laws, nor are there any specifically enumerated purposes under Section 7440 relating to their type of business. However, Section 7436, Mason's Minnesota Statutes of 1927, or Section 6140, General Statutes of 1913, would apparently be the correct section under which these corporations may be exercising their powers and would preclude them from claiming organization under Section 7440 for any other lawful business "not otherwise provided for in this chapter." This type of business is otherwise provided for in the chapter. The fact that they may have recited in the preamble to their articles of incorporation that they incorporated under an enumerated section of a certain chapter would not be controlling, particularly where the powers which they state are those taken from another section of the same chapter. It would seem therefore that they are private mortgage corporations organized for pecuniary profit to engage in the mortgage business as authorized by the provisions of Section 7436 (6140).

These corporations claim that they cannot be classified as mortgage loan companies for purposes of taxation; that the funds from which the chattel loans are made are furnished by the Federal Intermediate Credit Bank; that the mortgages and notes taken from producers or marketers of agricultural products are assigned and discounted by such mortgage or credit corporations with the Federal Intermediate Credit Bank and that they act merely as agents of the Federal Intermediate Credit Bank for the purpose of procuring credit facilities for such producers and for marketers of agricultural products.

The advances made by the Federal Intermediate Credit Bank are not made directly to the producers or marketers of agricultural products or solely on their individual credit, but are made on the faith and credit of the credit corporations and the credit of the borrower. The original notes and chattel mortgages are made, executed and delivered to the local credit corporation and recorded in its name. No assignments or transfers are recorded in favor of the Federal Intermediate Credit Bank. The liability of the credit corporations and the original borrower is joint and several. The income or interest in excess of the amounts demanded by the Federal

Intermediate Credit Bank, the discounting bank, belong to the credit association. The charges are borne by the borrowers. The borrowers or makers are liable primarily and directly to the credit corporation and to bona fide puchasers in good faith. The credit corporations as indorsers of the paper are secondarily liable to the holder in good faith, in this case the Federal Intermediate Credit Bank, or its assigns. The entire transaction and method of doing business refutes the claim of agency. The local corporations are at liberty to loan their own funds or rediscount their customers' paper with other sources. They are not confined in their dealings to the Federal Intermediate Credit Bank. They have a real and substantial interest in the security. They participate in the earnings derived from the securities pledged or hypothecated with the Federal Intermediate Credit Bank.

It is our opinion that your local Board of Review should be advised that it not only has the right but the duty to tax the stock and assets of these local credit corporations in the manner provided by law.

FRANK H. OSTERLIND,
Assistant Attorney General.

July 15, 1937. 92b-1

401

TAXATION—Cancellation of tax certificates.

Mr. William P. Berghuis, County Attorney.

You enclose a letter received by you from the County Auditor of your county, in which reference is made to said Chapter 71. This chapter provides for the cancellation on the records of tax certificates upon which notices of expiration of redemption were not given within the statutory period of six years.

The County Auditor after referring to said Chapter 71 states and inquires:

> "The reason I am making this inquiry is that I am sure that in the early eighties and prior to that time no notice was called for by the law so of course under those circumstances I presume there would be no authority for marking the certificates cancelled. I do not know and am therefore requesting for information as to what, if any, of these older tax judgment sales would not require a notice of expiration of redemption and therefore would be exempt from the provisions of Sec. 2 above mentioned."

Section 2 of said Chapter 71 reads as follows:

> "The county auditor shall annually, as soon as practicable after the second Monday of May, cancel of record all real estate tax judgment sale certificates, state assignment certificates and forfeited tax sale certificates upon which notice of expiration of time of redemption has not been given within a period of six years next following the date of

the issuance of such certificate, by making an entry in the proper copy real estate tax judgment book opposite the description of land covered by such certificates, 'Cancelled by Limitation.' "

The requirement of a notice of expiration of redemption was first introduced by Laws 1877, Chapter 6, Section 37, which went into effect March 6, 1877. See Pigott v. O'Halloran, 37 Minn. 415, 35 N. W. 4. It was held that the original act did not apply to the state or to an assignee of the state after forfeiture. See State v. McDonald, 26 Minn. 145, 1 N. W. 832; State v. Smith, 36 Minn. 455, 52 N. W. 174; Powell v. King, 78 Minn. 83, 80 N. W. 850. In 1889 the legislature amended the act by extending the requirement to assignees of the state after forfeiture and the amendatory act was held constitutional. Laws of 1889, Chapter 198, was held constitutional. It had already been held that the original act applied to assignees of the state prior to forfeiture as well as to purchasers at the annual delinquent sale. Nelson v. Central Land Co., 35 Minn. 408, 29 N. W. 121; State v. Smith, 35 Minn. 456, 32 N. W. 174.

Under Laws of 1893, Chapter 58, the time for redemption of land bid in by the state at a tax sale did not expire as to the state until sixty days after giving notice of expiration of time for redemption. Laws of 1902, Chapter 2, repeal this requirement but did not affect any rights accrued under prior laws. Laws of 1905, Chapter 270, Section 1, again made it necessary to give notice of expiration of redemption as to tax sales made by the state. This statute was amended by Laws of 1915, Chapter 77. See Dunnell's Digest, Section 9420 and cases cited therein.

The requirement of a notice of expiration of redemption was eliminated by Laws of 1927, Chapter 119, for taxes for 1926 and subsequent years, but was reinstated by Laws of 1933, Chapter 366. See also Laws of 1933, Chapter 278. Laws 1933, Chapter 366 was upheld in State v. Erickson, 191 Minn. 636, 253 N. W. 529.

The present statutory provisions limiting the time in which notices of expiration of redemption may be served are set forth in Mason's Minnesota Statutes of 1927, Sections 2169 and 2170. See Klasen v. Thompson, 189 Minn. 254. This office has held that upon the enactment of said Chapter 366, the provisions of said Sections 2169 and 2170 became applicable to taxes for 1926 and subsequent years.

The above is a general outline of the history of the requirement for the service of notices of expiration of redemption. It is general because we have reached the conclusion that it would not be practicable to attempt to state specifically the cases in which tax certificates should be cancelled pursuant to said Chapter 71, because of the failure to give notice of expiration of redemption. In those cases where the statute did not require the service of a notice, it is clear that the legislature did not intend by Chapter 71 to require the cancellation of the certificate. From what we have said herein, your county auditor should be able to determine in most cases which certificate should be cancelled and which should not. If he is confronted with a

specific case that is not covered by what we have said, we will be glad to advise with you with reference thereto.

WILLIAM D. GUNN,
Special Assistant Attorney General.

May 6, 1938. 409a-1

402

TAXATION—Cities and Villages—Municipally owned Electric Light and Power Plant—Taxation of.

Minnesota Tax Commission, State Capitol.

You state:

> "Several times during the past years there have been cases of cooperative owned electric lines being sold to municipalities thereby removing such lines from the tax roll. These rural lines extend outside of the corporate village limits in some cases extending as far as thirty miles from the city line. These low voltage lines are built for the express purpose of serving farmers with electricity. These farmers live in different tax districts outside of the city.
>
> "Take the case at Fairmont. The city owns the rural lines formerly known as the Shoreacres electric line with a total length in 1933 of 38.5 miles serving 157 customers. This line serves customers who are located in tax districts separate from the City of Fairmont and serves no public purpose at all. The customers pay for their electricity directly to the City electric department. Profits of the plant go to the benefit of the people of Fairmont. The farm customers do not receive any benefit from the plant except the service rendered.
>
> "The question then amounts to this: the rural line located outside of corporate limits used for no public service at all, should not be considered tax exempt. Your opinion is requested regarding the taxation of this line."

Article 9, Section 1, of the Minnesota Constitution provides that public property used exclusively for a public purpose, shall be exempt from taxation. See also Mason's Minnesota Statutes of 1927, Section 1975.

The legislature has authorized municipalities to extend electric light lines beyond their corporate limits and sell electricity to consumers outside such limits. See Laws 1933, Chapter 141 as amended by Laws 1935, Chapter 316. In the absence of a statute, it has been held that a municipality is authorized to sell surplus electricity to consumers outside its borders. See 1934 report of the Attorney General, Opinion 91, and the cases referred to therein. Also Carroll v. City of Cedar Falls (Iowa), 261 N. W. 652, 654.

If the sale of electricity by a municipality to private consumers outside its corporate limits is confined to the sale of surplus and is incidental to the

maintenance of an electric light plant by such municipality for the purpose of furnishing itself and its inhabitants with electricity, it is our opinion that the lines outside such corporate limits, under the rules applied in the case of County of Anoka v. City of St. Paul, 194 Minn. 554, are exempt from taxation as public property used for a public purpose. It is a question of fact whether in a given case such sale of such electricity to inhabitants living without the limits of the municipality is the sale of surplus, and incidental to the operation of the municipally owned plant.

If, in any case, it is determined that such sale of electricity to consumers outside the corporate limits of the municipality furnishing the electricity is not incidental or the sale of surplus, the question of whether such property is exempt from taxation is one which we do not find has ever been directly passed upon by the Supreme Court of this State. It is a question upon which the courts in other states are not in accord.

Such electric lines are public property. The first condition of the constitution, that is, public ownership, is therefore met. It follows that the question to be determined is whether such lines are used for a public purpose. It has been held that any public utility serves a public purpose, whether it is publicly or privately owned. Because a public utility serves a public purpose it has the right of eminent domain and is subject to regulations not imposed upon private business. In the case of Carroll v. City of Cedar Falls, supra, the Iowa Supreme Court had under consideration the question of whether it was a public purpose for the City of Cedar Falls to sell electricity to another municipality. In holding that such sale of electricity was for a public purpose, the court said in part, page 656:

> "It is the well-settled rule of law that private property cannot be confiscated by a municipality or any other corporation under the right of eminent domain, except for a public purpose. The right securing private property from confiscation for private purposes is protected by provisions in both Federal and State Constitutions.
>
> "The right to confiscate private property on behalf of utility companies for the construction of transmission lines is authorized by statute. The statutory provisions authorizing the confiscation of private property under the right of eminent domain is a clear implication that the use of such property is for a public purpose. Power and light companies are continually taking advantage of the benefits derived from the confiscation of private property under the power of eminent domain. These rights are enjoyed by them **only** because the property taken is used for a public **purpose.** One of the uses made of the property confiscated, under this right, is the construction, maintenance, and operation of high-tension transmission lines and wires. If such use be considered a 'public purpose' on behalf of private corporations, there can be no logical reason why the use of similar property for a similar purpose by a municipal corporation should not also be considered a 'public' purpose. It would indeed present an anomalous situation to hold that certain services performed by a private corporation should be considered a public purpose, and that the same service, if performed by a public corporation, would be considered a private purpose."

In the case of Geneva Township v. City of South Haven (Michigan), 246 N. W. 196, the Michigan Court held that municipally owned electric lines and poles located outside of the municipality and used for conveying electrical energy from inside the city to users outside the city, for a consideration, were not taxable by a township in which such lines and poles were located. The controlling provisions of the Michigan statutes are similar to the Minnesota Constitution and statute. The opinion in the case just referred to is brief and refers to the City of Traverse v. Blair Township, 157 N. W. 81, in which the Michigan Court held that property owned by a municipality, located outside the municipality, and used by it in connection with the ownership and operation of an electric light plant, was used for a public purpose. Under different constitutional and statutory provisions, see State ex rel. Becker v. Smith (Kansas), 61 P. 297; and State ex rel. City of Tulsa v. Myers, 174 Okla. 286.

For the reason stated, it is our opinion that municipally owned electric lines used for the purpose of furnishing electricity to persons living outside the municipal limits, are exempt from taxation.

WILLIAM D. GUNN,
Special Assistant Attorney General.

Feb. 2, 1938. 414a-13

403

TAXATION—Condemnation proceedings—Effect of on extension of time of payment of taxes at reduced rates.

Mr. Lyman A. Brink, County Attorney.

You state that taxes are delinquent on certain land since 1924; that about May 1, 1936, the state seized said land under condemnation proceedings in connection with the Bronson-Two River Project; that notice of expiration of redemption was served in 1935 and forfeiture would have occurred August 10, 1936, unless the state had brought condemnation proceedings. You further state that the former owner now offers to pay the taxes on this land and inquire whether he must pay the amount of such taxes under Chapter 387 of the Laws of 1935 on the date when the lands were seized by the state under condemnation proceedings or must pay in full.

We advise you that the taxpayer must pay the amount of such taxes as provided by law at the time when he tenders payment. The condemnation proceeding does not operate to extend the time during which taxes may be paid at reduced rates under Chapter 278, Laws of 1935.

You inquire to what date interest should be figured on the delinquent taxes.

Interest should be figured to the date when the taxpayer tenders payment.

MATTHIAS N. ORFIELD,
Deputy Attorney General.

May 28, 1937. 412a-5

404

TAXATION—Confession of Judgment—Composite judgment—Release of.

Mr. J. Arthur Bensen, County Attorney.

It appears from your letter that a property owner in your county confessed judgment under the provisions of Chapter 72, Extra Session Laws of 1935, for the amount of taxes on several lots; that the taxes for all of the lots in question were included in one judgment; and that this property owner now wishes to pay up the taxes under this judgment on one of the lots in question.

You state that you have advised the County Auditor and the Clerk of Court of your county that there is "no provision under the law for one who has confessed judgment to do this; that where the judgment is entered in this manner it must be entirely paid."

You request the opinion of this office relative to this question.

We are unable to find any authority for the partial release of a composite judgment entered pursuant to the statutory provisions above referred to. It is our opinion, therefore, that you have correctly advised the County Auditor and Clerk of Court of your county that there may not be a partial release of such composite judgment.

WILLIAM D. GUNN,
Special Assistant Attorney General.

June 10, 1938. 412a-23

405

TAXATION—Confession of Judgment—Redemption—Payment required.

Mr. B. Frank Camp, Home Owners' Loan Corporation.

You submit a number of questions relative to the tax laws of this state which we will restate and answer in the order in which they appear:

1. "After the 1936 taxes have gone to judgment on the first Monday in January, 1938, can they be included in a Confession of Judgment taken on 1935 and prior years?"

The 1936 taxes are not included in the composite judgment, but they must be paid in full at the time of filing the offer to confess judgment. See Chapter 486, Laws 1937.

2. "Is it possible to confess judgment on the 1935 taxes when there are no prior delinquent taxes?"

In our opinion judgment for the 1935 taxes may not be confessed when there are no other prior delinquent taxes. See Chapter 486, Laws 1937.

3. "Where taxes for two or more years have gone to sale can one year be redeemed separately?"

We answer this question in the negative. See Mason's Minnesota Statutes of 1927, Section 2152.

4. "If taxes for one or more years have gone to sale, and the subsequent year to judgment, only, and not to sale, can the subsequent year be redeemed separately prior to the time it goes to sale?"

This question is also answered in the negative. See Mason's Minnesota Statutes of 1927, Section 2152.

5. "After November 1st is it possible to pay only one half of the current year's taxes, and if so, must interest at the rate of 8% be paid for the entire year at the time of paying the one half year?"

We answer your fifth question by saying that if the current tax unpaid after November 1 exceeds $25, the taxpayer may at any time before the next tax judgment sale pay an installment of 25% or more thereof, together with all accrued penalties and costs on such installment. Prior to March 1 of the year following the year in which the taxes become due no interest accrues, but the taxpayer must, on or after November 1 of the year in which the taxes are due pay a penalty of 8%. See Laws 1933, Chapter 121.

6. "If an annual installment on a Confession of Judgment for delinquent taxes is defaulted what period must elapse before tax deed can be issued?"

A tax deed may not be issued until the property covered by the confession of judgment becomes the property of the state. The property cannot belong to the state until a notice of expiration of redemption is served, and the time required by statute expires after service of such notice. See Laws 1935, Chapter 278.

We are enclosing herewith a copy of a previous opinion of this office which considers this question in detail.

WILLIAM D. GUNN,
Special Assistant Attorney General.

November 10, 1937. 412a-10

406

TAXATION—Confession of judgment—Where judgment is declared invalid by a court for failure to comply with provisions of law.

Mr. Clarence T. Perkins, County Attorney.

You state:

"The 1930 tax on a piece of platted land in this county was not paid. Judgment for this tax was recovered March 14, 1938. On May 9, following, said piece of land was sold at delinquent tax sale and bid in

for the state. No subsequent taxes have been paid except the 1932 tax and the half of the 1934 tax, which subsequent unpaid delinquent taxes have not been reduced to judgment.

"The resolution provided for in Section 2109, Mason's Minnnesota

Statutes of 1927, was never filed with the clerk of court in Fillmore County. Upon motion, the district court today made an order vacating said judgment upon the grounds that it was necessarily void for want of jurisdiction because said resolution was not filed as required.

"Consequently, the situation now is the same as if no judgment had been obtained and no sale had. The owner of the property wants to pay pursuant to Chapter 486 of the 1937 Session Laws.

You inquire:

1. May he do so?

2. Are there any bargain laws which apply to a situation such as this?

3. In the absence of payment of these taxes at what earliest time can the County Auditor proceed to reduce these taxes to a judgment? Laws of 1937, Chapter 456, Section 1, provides in part:

"Delinquent taxes upon any parcel of real estate for 1934 and prior years, which prior to the adoption of this act have been bid in for and held by the state and not assigned by it, together with taxes for the year 1935, and prior years upon which judgment has been entered, prior to the adoption of this act may be composed into one item or amount by confession of judgment for the entire amount of all such taxes and costs, excluding penalties and interest, as hereinafter provided, * * *."

In the case submitted by you, as the matter now stands there is no judgment, and the act of the state in bidding in such lands at the sale in 1932 was a nullity.

1. The conditions of Chapter 496 cannot be met by the taxpayer. It is our opinion, therefore, that such taxpayer is not authorized to confess judgment pursuant to the provisions of said Chapter 496.

2. We are not aware of any bargain laws that apply to this situation.

3. In our opinion the taxes for 1930 and other delinquent taxes for subsequent years should be included in the next delinquent list filed pursuant to Mason's Minnesota Statutes 1927, Section 2106, and judgment should be entered at the same time that judgment is entered for delinquent taxes against real estate in your county for 1937.

WILLIAM D. GUNN,
Special Assistant Attorney General.

April 29, 1938. 412a-23

407

TAXATION—Counties—Purchase of forfeited real estate by county.

Mr. Lester A. Johnson, County Attorney.

You state that your county is selling lands forfeited to the state for the nonpayment of taxes under the provisions of Laws 1935, Chapter 386 as amended; that there are two tracts of land which were offered for sale under this chapter and later for rent on which no bid was received; that on one of these tracts there is a dwelling house which is occupied by persons on relief who are paying no rent, and that the county board would like to either buy or rent this tract in the name of the County of Swift "as they feel that it will pay the county to own this property and charge rent therefor."

You inquire:

1. "Can the county buy this property pursuant to Chapter 386, paying the appraised value and repair the building on county funds and rent it out?"

A county is authorized to own real property for certain purposes. The ownership of property for the purpose of renting it is not one of those purposes. In our opinion your county board is not authorized to buy the property referred to in your letter for the purpose of renting it to private persons.

2. "Assuming that the County wouldn't have a right to buy this property would the county have a right to demand rent from the tenants occupying the premises and assuming that they would have such a right would the County have the right to repair the property?"

In our opinion the property may be leased by the county auditor under Laws 1935, Chapter 386, Section 7. We know of no other authority pursuant to which the property may be rented. Although the question is not entirely free from doubt, we are inclined to the view that power to lease property under said Section 7 carries with it authority to make necessary repairs to put the property in a tenantable condition.

3. "The other tract of land is non-agricultural land being a tract of land that the County desires to buy for the gravel it contains to be used on road building and maintenance. Has the County a legal right to buy this tract pursuant to Chapter 386?"

Within the limitations contained in Mason's Minnesota Statutes of 1927, Section 2613 it is our opinion that the county board may buy the property pursuant to said Chapter 386 "for the gravel it contains to be used on road building and maintenance."

4. "Pursuant to chapter 386 lands forfeited to the state for taxes were advertised for sale and those lands not sold were advertised for rent at a later date. Several tracts of land not sold were leased on date set for renting and they were rented and later other persons came in and bought the tracts already rented for 1938 claiming that that cuts

out the leasee; Query Does person buying land pursuant to chapter 386 after land has been rented pursuant to Chapter 386 take subject to said lease or renter? The County board is very anxious to have an answer to these questions as soon as possible so I would appreciate your courtesy in receiving a prompt reply."

It is our opinion that a person buying land pursuant to said Chapter 386 after the land has been forfeited pursuant to Section 7 of said Chapter 386 takes the land subject to a reasonable lease for a reasonable length of time, as for a crop season, in the case of agricultural land.

WILLIAM D. GUNN,
Special Assistant Attorney General.

March 24, 1938. 425c-10

408

TAXATION—Counties—Publication of.

Mr. Ed. J. Goff, County Attorney.

You refer to Sections 2108 and 2109, Mason's Minnesota Statutes of 1927, pursuant to which the county board designates the paper for publication of the delinquent list and notice as therein specified; to Section 667, 1936 Supplement to Mason's Minnesota Statutes, which provides for the designation of a paper for the publication of the financial statement; and to Section 662, Mason's Minnesota Statutes of 1927, which makes provision for the designation of a paper for the publication of the official proceedings of the county board.

You also refer to Section 2 of Chapter 386, Laws of 1935, which provides in part:

> "Immediately after classification and appraisal the county board shall provide and file with the county auditor a list of parcels of land to be offered for sale. Said list shall contain a description of the parcels of land and the appraised value thereof. The auditor shall publish a notice of the forfeiture and intended public sale of such parcels of land and a copy of the resolution of the county board fixing the terms of the sale, if other than for cash only, by two publications in the official newspaper of the county * * *."

You inquire:

> "The question is, which of the above designations, if any, is the official paper referred to in Chapter 386, Section 2, or does said Section 662 contemplate that the county board, in addition to designating a newspaper for publication of its official proceedings also designate a newspaper as the official newspaper of the county for the purpose of publication of all miscellaneous notices that may be required by law or ordered by the county board during the ensuing year?"

In our opinion the notices which by the provisions of Section 2, Chapter 386, Laws of 1935, are required to be published "in the official newspaper of the county" should be published in the newspaper designated by the county board pursuant to Section 662, Mason's Minnesota Statutes of 1927. You will note that said Section 662 refers to the newspaper so designated as "the official newspaper of the county."

WILLIAM D. GUNN,
Special Assistant Attorney General.

January 5, 1938. 277a-10

409

TAXATION—Delinquent—Confession of judgment.

Mr. M. F. Kinkead, County Attorney.

You state:

> "We have a situation in this county where a woman entered into a contract under Chapter 72 of the Extra Special Session Laws 1935-1936, and the said agreement was nullified by her failure to pay the 1935 tax on or before the first Monday in January, 1937.
>
> "Will you kindly advise whether such a person who has once entered into such an agreement known as a confession of judgment and has defaulted under the terms of such agreement, may again enter into a new contract on or before the first day of November, 1937, covering the same property."

Chapter 72, Special Session Laws of 1935-1936, was amended by Chapter 486, Laws of 1937. We find nothing in said Chapter 72 or in said Chapter 486 which specifically or by implication prohibits an owner who has confessed judgment under Chapter 72 and defaulted from again taking advantage of said laws.

It is our opinion, therefore, that a person who has once entered into a confession of judgment pursuant to Chapter 72, Special Session Laws of 1935-1936, and defaulted under the terms of such confessed judgment may again confess judgment under the provisions of said Chapter 72, as amended by Chapter 486, Laws of 1937, provided that the period of redemption has not expired and that the State did not dispose of its interest in such land after the default occurred.

WILLIAM D. GUNN,
Special Assistant Attorney General.

July 27, 1937. 425b-3

410

TAXATION—Delinquent—Confession of judgment—Default after.

Mr. Harry E. Burns, County Attorney.

You state:

"Extra Session Laws 1935, Chapter 72, provides for the payment of certain delinquent taxes by confession of judgment. Payments under such confession of judgment may be made in full or installments.

"Section 5 of said Chapter 72 provides for procedure in case of default in payment of deferred installments.

"There arises the following question.

"For instance, the owner of a tract of land pays anywhere from one to nine installments and defaults on the remaining payments, or payment, does such owner forfeit all of the amount that he has paid in? Or, should the county auditor apply the original penalty and interest on the unpaid balance of such delinquent taxes."

Section 5 of Chapter 72, Extra Session Laws of 1935-36 provides as follows:

"Laws 1935, Chapter 278, shall remain in full force and effect save and except wherein an applicant takes advantage of the provisions of this act. In the event of default occurring in the payments to be made under any confessed judgment entered pursuant hereto, the penalties and interest waived under the terms of section 2 hereof shall be reinstated and the lands described in such confessed judgment shall thereupon be subject to forfeiture according to Laws 1935, Chapter 278."

Section 3 of said Chapter 72 provides:

"The county auditor's statement and county treasurer's receipt issued for payment of a deferred installment, as herein provided for, shall not read for any specific year's taxes, but shall read for partial or full release of judgment, as the case may be, and shall show the year that such judgment was entered. In distributing the taxes collected in this manner, the county auditor shall apply the same in the inverse order to that in which such taxes were levied. A duplicate county treasurer's receipt for payment of a deferred installment, as hereinafter provided, shall be delivered to the clerk of the district court, and the clerk of the district court shall credit the amount so paid upon the judgment entered."

After default the original judgment is reinstated with penalties and interest and the situation is much the same as it would be if judgment had never been confessed.

In enacting said Chapter 72 the legislature did not specifically provide a procedure pursuant to which a taxpayer who confessed judgment under said Chapter and thereafter defaults, may have the payments he has made

on the composite judgment credited against the amount due on the original judgment. However, Section 3 of said Chapter 72 provides that payments shall be applied in the inverse order in which the taxes were levied. We do not believe the legislature intended that in the event of default the taxpayer should forfeit the amounts he may have paid on such composite judgment.

It is our opinion that a taxpayer who confesses judgment pursuant to said Chapter 72 and thereafter defaults is entitled to have the sum that he has paid under the composite judgment credited against the amount due at the time judgment was confessed.

WILLIAM D. GUNN,
Special Assistant Attorney General.

August 26, 1937. 412a-10

411

TAXATION—Exemption—Municipal Light Plant—Sale of Surplus does not affect.

Minnesota Tax Commission, State Capitol.

At the request of the City Attorney of Rochester, Minnesota, you have submitted to this office a question relating to the taxation of the Rochester Municipal Electric Light Plant.

It appears from the information submitted that the City of Rochester owns two municipal electric plants, one located in the City of Rochester, and one twenty miles north in Wabasha County, and that both plants have been used by the city for many years. The plant located in Rochester is a steam plant. The plant located in Wabasha County is a hydro-electric plant, and is simply a "stand-by plant for the city." The city recently made improvements on the plant located in Rochester and in making such improvements allowance was made "for a future growth" so that at the present time the city has a surplus of electric energy.

The city is now "negotiating with the Goodhue County Rural Co-operatives Association for the sale to them from our hydro-electric plant, located in Wabasha County, of our surplus, limiting the output to surplus only." If the deal goes through the city will sell such surplus through a meter located at the Wabasha County plant, and will have nothing to do with the distribution to the consumers of such electricity. The electricity sold will be between five and ten per cent of the total output of the Rochester municipal plants.

The city attorney of Rochester submits the following question:

"What I now desire to know is whether or not the sale of our surplus energy, as set forth in my letter of August 12th, furnished from our Hydro-Electric Plant, located in Wabasha County, to Goodhue County

Co-Operative Association would jeopardize our exempt standing in reference to the real estate and personal property tax on our Wabasha County Plant. In other words, whether our plant in Wabasha County could then be assessed for real estate or personal property tax."

The letter of August 12, referred to in the inquiry of the city attorney, states the facts to be as above outlined.

To answer the inquiry of the city attorney of Rochester it is necessary to consider three questions, which we will state as follows:

1. When a city operates a municipal electric plant, is the property used in connection with such plant used for a public purpose, so as to be exempt from taxation under Article 9, Section 1 of the State Constitution which exempts from taxation public property used for any public purpose?

2. If the property is otherwise exempt, does the fact that it is located outside of the city and in another county interfere with such exemption?

3. If the property is otherwise exempt from taxation, will the sale of surplus electricity to the Goodhue County Co-operative Association interfere with such exemption?

Questions very similar to those above stated were considered by the Minnesota Supreme Court in the case of County of Anoka v. City of St. Paul, 194 Minn. 554. The facts in this case are very similar to those presented by the city attorney of Rochester. The only distinction is that in the St. Paul case the question was the right to tax property used in connection with a municipal water works rather than with the municipal electric plant. We see no reason for a distinction because of the difference just referred to. In fact, the court in the St. Paul case clearly indicated that the rules established by that case would apply to the question of the right to tax a municipally owned and operated electric light plant.

In answering the question of whether property owned by the City of St. Paul, located in Anoka County and used by the city in operation of its municipally owned waterworks plant, was subject to taxation, the court said:

> "In our opinion the court properly held that the remaining 1,172.62 acres of Anoka county property were exempt from taxation. It is contended first that this land owned by the city and located in Anoka county is not 'used exclusively for any public purpose' but is used by the city in its proprietary capacity and not for a public use. We cannot follow this reasoning. * * * We have no difficulty in holding that the city is and was engaged in a municipal or governmental undertaking in so doing. **In our opinion the city is engaged in its governmental capacity when it manages or operates any public utility such as a waterworks, an electric power plant, a sewage disposal plant, etc.,** where the entire citizenry benefits thereby and the health and welfare of the community make such action expedient or necessary. * * *
>
> "The authorities appear to be divided on the question of whether or not a municipal waterworks, electric power plant, or similar enterprise and the realty on which the same is located is exempt from taxa-

tion. We believe the better reasoned decisions under constitutional provisions similar in purport to ours have held such property exempt. * * * (Citing cases) We follow these, and others which could be cited, in holding that this property is used for a public purpose and so is exempt from taxation."

In holding that the fact that the property was located in Anoka County did not deprive it of its exemption from taxation the court said:

"It is contended further that the property here involved, even though it might be exempt if located within the limits of the city of St. Paul, cannot be exempt when lying outside the city limits. With this we do not agree. * * *"

"We are following the great weight of authority in holding that where public property is used exclusively for a public purpose it is exempt even though situated outside the limits of the governmental agency which owns it."

The City of St. Paul was selling water to the cities of West St. Paul and South St. Paul. On this point the court said:

"The court was correct in its holding that the sale of water by the city to the cities of West St. Paul, South St. Paul, and other consumers outside the city was quite incidental to the operation of the waterworks and of no controlling importance to a determination of the issues of the case. Strictly speaking, the city was not engaged in a governmental or municipal activity in producing and selling water to other cities. To this extent it was carrying on a private business. But the record shows that the board of water commissioners derived only a little more than one tenth of their entire revenue from the sale of water to consumers outside the city. It is very likely that the percentage of revenue thus derived as compared to the entire yearly revenue varies somewhat from year to year. There is no feasible or reasonably practical way in which the land can be taxed only to this extent. The important thing is that nearly nine-tenths of the water produced was used by the city itself and by its inhabitants. That the whole plant should be taxed because a small portion of the water was sold to outsiders does not appear reasonable.

"It is argued that since the city was in part at least engaging in a private business the land upon which this waterworks was located was not used 'exclusively' for a public purpose and hence the entire waterworks should be taxed. We do not agree. The word 'exclusively' as here used means 'substantially all' or 'for the greater part.' "

The City of St. Paul owned two water plants. The one in Anoka County was held in readiness for use as a reserve plant. The court held that this did not interfere with the exemption of the property from taxation.

It seems to us that the case just discussed is decisive of the question presented by the city attorney of Rochester. It is our opinion, therefore, upon the basis of the information furnished, that the sale of surplus energy

by the City of Rochester from its plant located in Wabasha County to the Goodhue County Rural Co-operative Association would not interfere with the exemption from taxation of the real estate and personal property used by the City of Rochester in connection with said plant.

WILLIAM D. GUNN,
Special Assistant Attorney General.

Sept. 20, 1937. 414a-13

412

TAXATION—Exemption—Privately owned property used for a public purpose.

Mr. J. J. Hadler, County Attorney.

You state that a townsite company owns two lots upon which the taxes have not been paid for the year 1930 and subsequent years; that these lots were forfeited to the state for the nonpayment of taxes on October 27, 1937; that a number of years ago the city of International Falls was given the right to use these lots by the owner "with the oral understanding that the owner would not have to pay taxes"; that there is no writing covering this arrangement, but that pursuant to it the city built a storage shed upon the two lots and has used it ever since; and that the city has paid no rent for the property.

You further state that the City of International Falls has now filed an application with the county board to cancel these taxes on the ground that the propery is exempt from taxation and the taxes should be cancelled for that reason.

You inquire:

> "First, does this arrangement or situation exempt the two lots from taxation? You understand that the taxes involved are not for the building which, of course, is owned by the city, but only for the lots themselves. The other question would be, whether or not taxes can be abated after the property has reverted to the state for delinquent taxes or is the right to re-purchase under Chapter 88 the exclusive remedy of the owner of the property?"

All property within the state and subject to its jurisdiction is taxable unless expressly exempted. The legislature has no authority to exempt persons and property from taxation except as authorized by the constitution. See Article 9, Section 1 of the Minnesota Constitution. If the legislature may not exempt property from taxation except as permitted by the constitution, it is clear that a municipality may not do so. This office has uniformly held that private property used for a public purpose is not exempt. See Hennepin County v. Bell, 43 Minn. 344.

In our opinion the lots referred to in your letter were not exempt from taxation, because of the agreement made between the owner of the property

and the City of International Falls. It is also our opinion that taxes may not be abated after the property against which they were assessed has been forfeited to the state for the failure to pay such taxes. Such taxes are cancelled upon the forfeiture of the property and are no longer in existence. See Laws 1935, Chapter 386, Section 7 as amended by Extra Session Laws of 1933, Chapter 105, Section 2.

WILLIAM D. GUNN,
Special Assistant Attorney General.

February 11, 1938. 414a-9

413

TAXATION—Expiration of time for redemption.

Mr. Kenneth H. Dell, County Attorney.

You enclose a copy of a letter which you received from the county auditor of your county. In his letter the county auditor submits the following information and asks the following question:

> "I would like to have you get an opinion from the Attorney General's office with regards to lands forfeited to the State for the non-payment of taxes for the year 1931. Chapter 337 of the Laws of 1933 provides that the tax sale for 1931 taxes be deferred until the 2nd Monday in May, 1935. Notice of Expiration of Redemption for the State must be served by the County Auditor in 1938 on lands forfeited to the State for the non-payment of taxes for the year 1932. My question is this, would the time for redemption expire in 1938 on lands delinquent for 1931 and subsequent years?"

The stated period of redemption of parcels of land sold for taxes for the years 1931 and 1932, whether sold to purchasers or bid in for the state, will expire as follows:

For parcels of land sold

In May, 1935, for taxes for the year 1931—May, 1940;

In May, 1934, for taxes for the year 1932—May, 1939.

The exact time of the expiration of the stated period of redemption for a particular parcel of land sold for taxes for either 1931 or 1932 is the end of the last day of a five year period which commences to run on the date when such parcel was sold for taxes or bid in for the state for taxes.

It is our opinion, therefore, that the time for redemption of a parcel of land upon which taxes are delinquent for 1931 and subsequent years, will not expire in 1935. See Laws 1935, Chapter 278, Sections 2, 3, 5 and 7.

WILLIAM D. GUNN,
Special Assistant Attorney General.

September 28, 1937. 412a-23

414

TAXATION—State assignment before expiration of redemption.

Mr. John T. Calarneault, County Attorney.

You inquire:

> "I would like your opinion as to whether or not an assignment may be made by the County Auditor of a tax judgment after notice of expiration of redemption has been given under Chapter 278 of the Laws of 1935. And further if such an assignment can be made, can the County Auditor issue a new notice of expiration of redemption at the request of the purchaser?"

In our opinion, after notice of expiration of redemption has been given pursuant to Chapter 278, Laws of 1935, a state assignment may be made at any time prior to the expiration of the stated period of redemption but not after the expiration of the stated period of redemption. See Laws 1935, Chapter 278, Sections 2 and 9.

Said Section 9 provides in part as follows:

> "In case any such parcel shall be so assigned after notice of expiration of redemption has been given by the county auditor, such notice shall be ineffectual as to such parcel, and the time for redemption of such parcel shall continue until terminated after notice given as in other cases of parcels assigned to actual purchasers. * * *"

It is our opinion that where an assignment may be made, the county auditor may issue a new notice of expiration of redemption at the request of the purchaser.

WILLIAM D. GUNN,
Special Assistant Attorney General.

December 6, 1937. 423k

415

TAXATION—Expiration of redemption—Notice of.

Mr. Andrew R. Bratter, Assistant County Attorney.

You state that the County Auditor of Ramsey County is preparing to serve notice of expiration of redemption for taxes for 1932 that have been bid in by the state and not assigned. You refer to Laws of 1933, Chapter 121, and inquire whether in stating the amount required to redeem in said notices, interest should be figured from the 1st day of March, and whether interest is to be charged only upon the original taxes and costs and not upon the penalty.

You further inquire as to the form of the statement in said notice of the amount required to redeem.

The last paragraph of Laws of 1933, Chapter 121, Section 3, reads as follows:

> "Provided, that such interest shall be calculated from the first day of March following the year in which the taxes become due and no interest shall be charged on penalties accrued and only on the amount of taxes and costs authorized by law."

The paragraph quoted above, when considered in connection with the other provisions of said Chapter 121, clearly means that in determining the amount required to redeem a parcel of land upon which there are delinquent taxes for 1932 and subsequent years, interest should be figured from the 1st day of March following the year in which the taxes became due and that interest should be charged only upon the amount of the original taxes and costs, excluding the penalty. In previous opinions, to which, after giving the question further consideration, we now adhere, this office has expressed the view that full effect should be given to the language above quoted.

Mason's Minnesota Statutes of 1927, Section 2152, provides in part as follows:

> "Any person redeeming any parcel of land shall pay into the treasury of the county, for the use of the funds or person thereto entitled:
>
> 1. If such parcel was bid in for the state and its right has not been assigned, the amount for which the same was bid in, with interest at twelve per cent per annum from the date of sale, and the amount of all delinquent taxes, penalties, costs and interest thereon at said rate from and after the time when such taxes become delinquent."

The amount required to redeem, and the amount that should be stated in the notice of expiration of redemption to be served by the county auditor for delinquent taxes for 1932 and subsequent years is the amount stated in said Section 2152 as modified by Chapter 121, Laws of 1933.

Because of the provisions of Laws of 1933, Chapter 337, there is a separate judgment for taxes for 1931 and 1932, and the 1931 taxes were not sold or bid in for the state until the tax judgment sale held in May, 1935. Because of this, in those cases where the 1931 taxes are delinquent and have not been sold or assigned, the question of computing delinquent taxes, interest and penalties, and the statement of the amount required to redeem in the notices of expiration of redemption to be served for taxes for 1932 is further complicated. Where the 1931 tax was bid in for the state and the state's interest has not been assigned, it seems clear under the decision of the Minnesota Supreme Court in Jenswold v. Canal Co., 93 Minn. 382, 102 N. W. 603, that the 1931 taxes are delinquent and must be paid by a person redeeming pursuant to a notice of expiration of redemption served by the state for taxes for 1932.

We suggest the following form of notice of expiration of redemption for taxes for 1932 which were bid in for the state for the first time at the annual tax judgment sale in 1934 and which have not been redeemed or assigned. Where the taxes for 1931 or any other year have been paid or

assigned, the statement in the following notice referring to such taxes should be omitted or left blank.

NOTICE OF EXPIRATION OF REDEMPTION
Office of the County Auditor

County of....., State of Minnesota,

To:.....

YOU ARE HEREBY NOTIFIED that the following described piece or parcel of land, situated in the county of ....., and State of Minnesota, and known and described as follows, to-wit:

.....,

is now assessed in your name; that on the ..... day of May, A.D., 1934, at the sale of land pursuant to the real estate tax judgment duly given and made in and by the District Court in and for said County of ..... on the ..... day of March, A.D., 1934, in proceedings to enforce the payment of taxes delinquent upon real estate for the year 1932 for said County of ....., the above described piece or parcel of land was duly bid in for the state for the sum of $....., and the amount required to redeem said piece or parcel of land from said sale exclusive of the costs to accrue upon this notice, is the sum of $..... (insert sum for which land was bid in for the state), and interest upon the sum of $..... (insert amount of original taxes and costs) from said ..... day of May, 1934, A.D., to the day such redemption is made; and the further sum of $....., being the sum for which said piece or parcel of land was duly bid in for the state at the sale held on the ..... day of May, 1935, in proceedings to enforce the payment of taxes delinquent upon said real estate for the year 1931, and interest upon said sum at 10 per cent per annum from said ..... day of May, A.D., 1935, to the day such redemption is made; and the further sum of $..... (insert amount of 1933 taxes with penalty and costs which have attached to the judgment for the 1932 taxes) with interest upon the sum of $..... (insert amount of original 1933 taxes and costs) at the rate of 8 per cent per annum from the 1st day of March, 1935, to the day when redemption is made; and the further sum of $..... (insert the amount of 1934 taxes with penalties and costs which have attached to the judgment for the 1932 taxes) with interest upon the sum of $..... (insert amount of original 1934 taxes and costs) at the rate of 8 per cent per annum from the 1st day of March, 1936, to the day when redemption is made; and the further sum of $..... (insert amount of 1935 taxes with penalties and costs which have attached to the judgment for 1932 taxes) with interest upon the sum of $..... (insert amount of the original 1935 taxes and costs) at the rate of 8 per cent per annum from the 1st day of March, 1937, to the day when redemption is made; and the further sum of $..... (insert amount of 1936 taxes with penalties and costs which have attached to the judgment for the 1932 taxes) with interest upon the sum of $..... (insert amount of the original 1936 taxes and costs) at the rate of 8 per cent per annum from the 1st day of March, 1938, to the day when redemption is made,

March, 1938, to the day when redemption is made, ...

.....

.....

.....

.....

and the time for redemption of said piece or parcel of land from said sale will expire 12 months after the service of this notice and proof thereof has been filed in my office.

In calculating interest for any fractional part of a year on taxes levied in 1932 and subsequent years it shall be calculated on the basis of two-thirds of one per cent for any month or major fraction thereof.

WITNESS my hand and official seal this ..... day of ..... A.D., 19.....
(Official Seal)

.....
County Auditor of .....
County, Minnesota.

It will be noted that the form suggested above differs in the following respects from the form set forth in the opinion of May 20, 1938, to the Tax Commission referred to in your letter.

1. In the statement of the amount required to redeem from the 1932 taxes, the form is modified so that it clearly appears that interest is to be figured only upon the amount of the original taxes and costs for 1932.

2. Specific reference is made to the statement required when the 1931 taxes have been bid in for the state at the 1935 sale and the state's interest has not been assigned.

3. In the statement of the amount required to redeem for taxes for 1933 and subsequent years, the form has been modified so that it clearly appears that interest is to be computed only from the 1st day of March of the year following the year in which the taxes became due, and that no interest is to be charged on penalties accrued.

That part of the form which is set forth in parenthesis is not a part of the form proper but has been inserted merely for the purpose of assisting the county auditors to determine the amount required by the statute.

MATTHIAS N. ORFIELD,
Deputy Attorney General.

July 15, 1938. 423c

416

TAXATION—Expiration of redemption—Affidavit of publication—Affidavit of posting—Return of sheriff.

Mr. William Merrill, County Attorney.

You enclose therewith copy of an opinion written by you to the county auditor of your county relating to the service and posting of notice of expir-

ation of redemption in Pope County under Chapter 278, Laws of 1935. You state that the county board of your county has requested you to submit said opinion to this office for confirmation or correction.

It appears from the statement of facts in your opinion to the county auditor that a certain lot in Pope County was bid in for the State of Minnesota at the annual tax sale on May 11, 1931, for delinquent taxes for the year 1929; that no assignment has ever been made and there has been no redemption; that in the month of July, 1935, the county auditor caused a notice of expiration of redemption covering such parcel to be posted in his office, which list remained posted for nearly one year; that a notice of expiration of redemption was published in the official paper of Pope County for three weeks during the month of July, 1936; that the sheriff served a copy of said printed and published notice on the occupant of the above premises and made his return of such service, which was filed in the office of the county auditor on August 24, 1935; that the lot was not redeemed and on August 28, 1936, the county auditor made the certificate required by Section 8 (f) of Chapter 278, Laws of 1935, and caused the same to be recorded in the office of the register of deeds and in his office; that thereafter the county auditor cancelled all taxes and tax liens, delinquent and current, appearing on the records; and that on December 17, 1936, the owner of said lot appeared and offered to confess judgment under Chapter 72, Special Session Laws of 1935-1936, claiming that the proceedings for the forfeiture of the lot were defective and void.

The county auditor submitted to you the posted list with his certificate of posting, the notice published in the official paper and the sheriff's return of service, and requested your opinion as to whether or not the lot in question had become forfeited to the State of Minnesota. The county auditor also asked whether if the lot was not legally forfeited he could correct the certificate of posting or make a new one, secure an affidavit from the printer of the publication and file it in his office, and have the sheriff correct his return or file a new one, so that forfeiture might take place one year from the date such instruments were properly filed without again going through the proceedings required by Chapter 278, Laws of 1935.

You set out in your letter the published notice of expiration of redemption, the posted notice, the auditor's certificate of posting and the return of the sheriff of service on the occupant.

The rule appears to be that a valid tax title can not be acquired in this state unless the title of the fee owner has first been eliminated by the service of such a notice as the statute provides. See Spear v. Noonan, 131 Minn. 332; Luck Land Company v. Dixon, 132 Minn. 144; and Glaze v. Stryker, 135 Minn. 186.

It seems from the information submitted that the service of notice of expiration of redemption under Chapter 278, Laws of 1935, of the parcel of land in question may be defective for four reasons:

1. The record does not show an affidavit of publication for the published notice and no such affidavit can be found.

2. The auditor's certificate does not show that the posted notice was kept posted for at least one week after the last publication of the published notice.

3. The sheriff's return shows that service was made upon the person in possession but it does not affirmatively show the place of such service.

4. The posted notice of the county auditor does not give the date of the judgment sale and there is some question whether it properly shows the year for which taxes were delinquent.

We will discuss these objections to the validity of the notice of expiration of redemption in the order in which they are above stated.

1. Section 7 (b), Chapter 278, Laws of 1935, provides as follows:

> "The time for redemption of any parcel of land as to which notice of expiration has been given as provided in this section shall expire one year **after the giving of such notice and the filing of proof thereof in the office of the county auditor,** unless such parcel shall theretofore be assigned to an actual purchaser as herein provided."

Subdivision (c) of Section 8, Chapter 278, Laws of 1935, prescribes the form for the published notice and provides that "proof of publication of such notice by affidavit as provided by law shall be filed in the office of the county auditor."

There has not been a compliance with the statutory provisions above quoted. Statutes such as Chapter 278 are mandatory. They must be followed with strictness and they are to be construed liberally in the interest of the owner. See Dunnell's Digest, Section 9424. Where defective affidavits have been filed it has been held that the period of redemption did not start to run. See Dunnell's Digest, Section 9437, and Burbridge v. Warren, 139 Minn. 346.

The year of redemption does not start to run until proper notice has been given and proof thereof has been filed in the office of the county auditor. Until there is an affidavit of publication on file in the office of the county auditor "proof thereof" is not on file in that office.

We agree with your conclusion that the time for expiration of redemption does not start to run until the printer's affidavit of publication of the printed notice is filed in the office of the county auditor.

2. Subdivision (b) of Section 8, Chapter 278, Laws of 1935, sets out the form of the notice of expiration of redemption that should be posted in the office of the county auditor. The last paragraph thereof reads as follows:

> "Such notice shall be posted by the auditor in his office, subject to public inspection, and shall remain so posted until at least one week after the date of the last publication of notice as hereinafter provided. Proof of such posting shall be made by the certificate of the auditor, filed in his office."

In your opinion to the county auditor you stated that because the auditor's certificate of posting does not show that it was kept posted at least one week after the date of the last publication there has not been the proof of posting required by law and that the period of expiration of redemption can not start to run until this omission is corrected. For the reason stated in our discussion under one, we agree with the conclusion that you reached.

3. The return of the sheriff fails to show the place of service. We agree with your opinion that such return shall affirmatively show the place of service.

4. The statute sets out the form of the posted notice and provides that the notice posted by the county auditor shall be substantially in that form. In the statutory form a space is provided for the date when the taxes were bid in for the state, and another space is provided for the year for which the taxes were delinquent. In the notice posted by your county auditor the date when the taxes were bid in for the state does not appear and the year for which such taxes were delinquent appears only in the caption and not in the body of the notice.

The case of Eide v. Clark, 57 Minn. 397, cited in your opinion, is the only Minnesota case we find that appears to be in point, and, as you point out, the pertinent language thereof is obiter dicta. However, as we have indicated, Minnesota authority sustains the statement that a valid tax title can not be acquired unless a fee owner's title has been divested by the service of a notice that complies with the statute. Glaze v. Stryker, supra.

The general rule in other jurisdictions is that while strict adherence to the precise statutory form of a notice of expiration of redemption is not necessary, all the information required in such form must be given. See 61 Corpus Juris, Sections 1732 and 1733, page 1263. In Section 1733 we find the following statement:

> "The notice must clearly identify the sale from which the owner is required to redeem; and in particular it must state the day and year of the sale, * * *."

For the reason stated we agree with your conclusion that the posted notice was not in substantial compliance with the statute and, therefore, void. Because a proper notice was not posted we believe it will be necessary for the auditor to post a new notice and go through the proceedings required by Chapter 278, Laws of 1935. All subsequent proceedings seem to depend upon the validity of the posted notice.

It is possible that if a notice in compliance with the statute had been posted, an affidavit of publication for the published notice and a proper certificate of posting could be filed, and the return of the sheriff corrected so as to start the running of the period of redemption against the parcel of land in question. However, because the posted notice was defective we do not feel that it is necessary at this time to express a definite opinion on this question.

You also inquire:

"In the event that the opinion should be confirmed as to the validity of the posted notice, the county board would also like to have you confirm or correct an oral opinion given by me that the county auditor may now proceed to give notice of expiration of redemption according to the provisions of Chapter 278, Laws of 1935, and the sheriff to serve the notices as it should have been done on July 1, 1936 or shortly thereafter. In other words, that the county officials may now proceed to give notice of expiration of redemption of the 1926-27-28 and 29 taxes which have not been assigned in accordance with the provisions of said Chapter, and that the redemption period will then expire within one year from the filing of the proper proof in the office of the county auditor."

We agree with your oral opinion to the county board.

See the first paragraph of Section 8 of Chapter 278, Laws of 1935.

WILLIAM D. GUNN,
Special Assistant Attorney General.

August 7, 1937. 419f-3

417

TAXATION—Gasoline tax—Motor fuels—Use of for highway machinery.

Mr. G. H. Griffith, Oil Inspection Division.

You submit a proposed order to bulk dealers in motor oils and ask whether the same is valid. In this order you direct such dealers to collect a four-cent tax on all sales of fuel to be used in Diesel-motored trucks and tractors operated on the highways of the state, including Diesel-motored trucks and tractors hauling material on the highway for road work.

You inquire whether you have correctly stated the law applicable to the taxation of motor fuels used in Diesel-motored vehicles.

The first question presented by your inquiry is whether the four-cent tax is applicable to Diesel-motor fuels used in motor vehicles operated on the highways in the usual way. Gasoline is defined by Section 2720-70, Mason's Minnesota Statutes, 1936 Supplement, to include:

"all gasoline, distillate, benzine, naphtha, benzol, liberty fuel, and other volatile and inflammable liquids used or useful in producing or generating power for propelling motor or other vehicles used on the public highways of this state, but does not include the product commonly known as kerosene oil. For the purpose of calculating the tax imposed by this Act, the term 'gasoline' as herein defined shall be construed to include any lubricating oil or other petroleum products inter-mixed with any of the said liquids although said lubricating oil or other petroleum products may not be used or useful in producing or generating

power for propelling motor or other vehicles used on the public highways of this state."

You will note that gasoline as used in this statute includes not merely gasoline in the ordinary sense of the term but distillate (a less volatile oil than gasoline) and "other volatile and inflammable liquids used or useful in producing or generating power for propelling motor or other vehicles used on the public highways of this state."

In our opinion Diesel-motor fuels clearly come within the scope of this definition.

Section 2720-71, Mason's Minnesota Statutes of 1927, as last amended by Chapter 383, Laws of 1937, provides:

> "There is hereby imposed an excise tax of four cents per gallon on all gasoline used in producing or generating power for propelling motor vehicles used on the public highways of this state."

Having held that Diesel-motor fuel oil is included in the term "gasoline" as defined above, it follows that the four-cent tax on gasoline is applicable to Diesel-motor fuels when used to propel motor vehicles on public highways.

The next question presented by your letter is whether the four-cent tax is applicable to Diesel-motor fuels used in Diesel-motored trucks and tractors hauling material on public highways for road work. We believe this question also should be answered in the affirmative. When the legislature in Chapter 376, Laws of 1937, changed the refunding provision to read as follows:

> "Any person who shall buy and use gasoline for any purpose other than use in motor vehicles, or for use in machinery operated for the purpose of constructing, reconstructing or maintaining the public highways of this state, and who shall have paid any excise tax required by this act to be paid directly or indirectly through the amount of such tax being included in the price of such gasoline or otherwise, shall be reimbursed * * *."

it indicated an intention that a motor fuel "for use in machinery operated for the purpose of constructing, reconstructing or maintaining the public highways," should not be exempt from the tax. If we do not so construe the law this chapter becomes meaningless and accomplished nothing. We have noted the definition of motor vehicle found in Section 2720-70 (b), which reads as follows:

> " 'Motor vehicles used on the public highways of this state' includes every vehicle operated upon the highways of this state the power for the operation of which is produced or generated by gasoline, but does not include tractors used solely for agricultural purposes or for drawing threshing machines **or for road work other than hauling material."**

In our opinion said Chapter 376, Laws of 1937, authorizes the taxation of motor fuels "for use in machinery operated for the purpose of constructing, reconstructing or maintaining the public highways of this state" not-

withstanding the exception of "tractors used solely * * * for road work" found in the definition of motor vehicle quoted above and to that extent by implication amends said definition.

You list in your order as tax-exempt fuels used in tractors used for road work other than hauling material and road patrols which are built for grading roads or plowing snow. We do not see how such fuels can be exempt under the terms of the refunding provision of Chapter 376, Laws of 1937.

MATTHIAS N. ORFIELD,
Deputy Attorney General.

August 31, 1937. 324e

418

TAXATION—Gasoline tax—Distribution of to towns.

Mr. Russell L. Frazee, County Attorney.

You state:

> "Several of the town boards in Renville County have made demand upon the county board that it make a division of the gasoline tax money and allot 50% thereof to the town boards under Chapter 366 of the Laws of 1937. Many of the townships oppose the idea of apportioning the money under Chapter 366, and are in favor of having the county use all the gasoline tax money and continue on as in the past.
>
> "The question necessarily arises as to whether or not these townships who are opposed to the apportionment will have to accept their share, if the county board should allot the money on the basis set forth under Chapter 366. In other words, my inquiry is whether or not if the gasoline money is apportioned and allotted to the townships by the county board, will each and every township have to accept the same and proceed to accept the same in maintenance of its roads and boundaries under Chapter 366?
>
> "Your immediate answer on this inquiry will be greatly appreciated as we would like to get the matter settled as soon as possible."

The first paragraph of Section 1 of said Chapter 366 provides that of the gas tax money apportioned to each county and not used to pay interest or principal on county road or bridge bonds or warrants, fifty per cent thereof shall be devoted to the construction and maintenance of county aid roads by the county board or expended on state aid roads under certain circumstances.

The last paragraph of said Section 1 provides as follows:

> "The town board of any town may appropriate to the county, moneys out of its road and bridge fund, or from its share of the gas

tax moneys distributed to such town as hereinafter provided, and any moneys so appropriated shall be expended by the county in the construction and maintenance of county aid roads within such town."

Section 2 of said Chapter 366 provides in part that the remainder of the moneys apportioned to each county may be distributed to the towns in said county in the manner provided in said section.

It is our opinion that it is the function of the county board in the first instance to determine whether a distribution of gas tax moneys shall be made to the towns. If such a distribution is made, we believe it is the duty of each town to accept its share. However, after distribution "the town board of any town may appropriate to the county, moneys * * * from its share of the gas tax moneys distributed to such town * * * and any moneys so appropriated shall be expended by the county in the construction and maintenance of county aid roads within such town." See the second paragraph of Section 1, Chapter 366, Laws of 1937.

WILLIAM D. GUNN,
Special Assistant Attorney General.

December 27, 1937. 324d

419

TAXATION—Gasoline tax—Licensing distributors, employment or occupation—Revocation of licenses—Construing term "responsible person," etc.—Sections 2720-86, 2720-87, 2720-88, 2720-90 and 2720-91, Mason's Minnesota Statutes of 1927, as amended.

Mr. G. H. Griffith, Chief Oil Inspector.

You inquire what is the meaning of the term "responsible person," as used in Section 2720-88, Mason's Minnesota Statutes, 1936 Supplement, which provides in part that "license to engage in the business of handling petroleum products as hereinabove referred to shall be issued by the Chief Oil Inspector to any responsible person." You inquire whether this term means financial responsibility solely and whether the Chief Oil Inspector is mandatorily bound to issue a license to a person whom he knows to be engaged and involved in highly questionable gasoline tax evasion schemes, even though he may be financially responsible.

You further inquire whether the Chief Oil Inspector would be justified in cancelling a license for cause, other than failure to pay taxes promptly when due, such as knowingly participating in the issuance of invoices to claimants not justly entitled to gasoline excise tax refunds for the purpose of aiding and supporting fraudulent claims for reimbursement of gasoline excise taxes from the state.

In its general and popular sense, the term "license," as used with reference to occupation and privileges, is the right or permission granted by

some competent authority to carry on a business or do an act which, without the license, would be illegal.

Section 2720-86 provides that:

> "No person shall engage in or purport to be engaged in or hold himself out as being engaged in the business of buying or selling petroleum products as a Distributor unless he shall be licensed to carry on such business by the Chief Oil Inspector."

Section 2720-88 provides in part:

> "License to engage in the business of handling petroleum products as hereinabove referred to shall be issued by the Chief Oil Inspector to any responsible person, partnership, association or corporation which shall apply therefor, and shall pay to the Chief Oil Inspector at the time of making application for license and annually thereafter a license fee of one dollar and further comply with the conditions herein provided, to-wit: * * *."

Licensing of employments is an exercise of the police power. In the present instance the licensing of distributors of petroleum products has been delegated by the legislature to the Chief Oil Inspector. The fact that the State incidentally derives a nominal revenue from the exercise of its police power in regulating the business does not change the fundamental nature of the statute so as to interfere with the reasonable exercise of that power in regulating such employment. In the present instance the distribution of petroleum products is so intimately connected with one of the most important revenue producing acts of the State that integrity of transactions, both in the collection of gasoline excise taxes and of reimbursements of claims for repayment as authorized by law, are of paramount importance to the State. Certainly the State should not be precluded from denying a license to a known violator of its excise tax laws, or one who has been guilty of participating in fraudulent refunds of those taxes. The same cogent reasoning applies just as forcibly to the dealings of distributors with the public. They are entitled to the protection afforded by the application of the police power in the proper denial or licenses to unfit applicants who by devious means seek to defraud the public by the sale of inferior products or dishonest measure.

We are of the opinion that the term "responsible person," as used in the act, establishes a reasonable qualification susceptible of definition as to the fitness of the applicant to engage in the occupation of "distributor," which latter term is defined in the act, Section 2720-70(d). We believe the term should be reasonably, if not broadly, construed, having in mind the objectives herein stated, and that having those objectives in mind the term would include the suitability, experience and integrity of the applicant to engage in the business of distribution, or to exercise the particular privilege for which the license is desired. We can see nó reason or good ground for not refusing a license to an applicant who may be irresponsible in his dealings with the State or with the public. We do not believe the term should be limited to ability to respond in money damages for violations of the act or to financial responsibility alone. Wright v. May, 127 Minn. 150.

Your attention is directed to the provisions of Section 2720-90 of the same act which provides that "the Chief Oil Inspector may issue regulations not inconsistent with law to assist in the enforcement of this act," which would include the right to make reasonable regulations pertaining to the issuance of licenses. It is probably true that there is some discretion in the licensing officer, the Chief Oil Inspector. This does not amount to a delegation of legislative power but is rather an administrative or executive function and a delegation of such functions would not violate the provisions of Article 1, Section 2 of the State Constitution. State v. Schoenig, 72 Minn. 528; 1 Dunnell's Digest, Section 1660, and cases cited; St. Paul v. Troyer, 3 Minn. 291; State v. Redington, 119 Minn. 402.

Judge Mitchell in State v. Schoenig, in which case a measure of discretion was vested in the licensing authority, said that the "granting or refusing a license always involves the exercise of a reasonable discretion in determining whether the applicant is or is not a fit person to whom to issue a license."

Section 2720-88, relating to the issuance of licenses to distributors, provides the term for which they shall be issued as follows:

> "All licenses and bonds executed and delivered hereunder shall be for the duration of one year, expiring May 31st."

It further provides, Subdivision (c), that:

> "Whenever the licensee shall sell, dispose of or discontinue his business during the term of his license, he shall at the time such action is taken, notify the Chief Oil Inspector in writing and shall surrender his license."

These are the only express provisions in the statute relating to the termination of the license. The first fixes a definite term which may not be exceeded and the other provides for an earlier termination of the license upon sale of the business by the licensee.

The act further provides in very general terms, Section 2720-91:

> "Any person who fails or refuses to comply with any of the provisions of this Act shall be guilty of gross misdemeanor."

It is generally held that a license may be revoked for any reason that would have justified a refusal to issue it in the first instance, for fraud in its procurement or unfitness of the licensee to engage in the occupation or privilege. A license is not a contract nor a property or vested right. It has been held that a statute or ordinance authorizing or providing for revocation does not violate constitutional provisions or deprive the licensee of property, immunity or a privilege. Such revocation is generally within the discretionary power of the revoking authority but cannot be exercised arbitrarily without cause unless authority to do so is expressly given by statute. In the present instance no express authority to revoke is granted by statute. The only provisions in the statute are those above stated relating to the termination of the term as fixed by law, limiting licenses to a period of one year, and termination by reason of discontinuance of the licensee of the

business. The power of revoking a license generally is vested in the authority empowered to issue it, where it has not been expressly given to another or different authority, officer or agency. The discretion of the licensing authority in revoking a license where exercised with manifest injustice is subject to judicial review. 37 Corpus Juris, page 246, Sections 108 to 111.

As pointed out in this opinion, the Chief Oil Inspector has power to issue regulations not inconsistent with law to assist in the enforcement of the act, and we believe that he may provide by regulation that licenses issued pursuant to the act shall provide that they may be revoked for cause. Those who accept and act under such licenses would thereby assent to the condition thus imposed and be estopped to question the right of the issuing power to revoke, except as pointed out, where the power of revocation is exercised with manifest injustice, or by the whim or caprice of the officer.

FRANK H. OSTERLIND,
Assistant Attorney General.

October 12, 1937. 325a-5

420

TAXATION—Gasoline tax—Refunds—Machinery operated by municipalities for the purpose of constructing, reconstructing and maintaining public highways.

Mr. Henry H. Flor, City Attorney.

You state that the City of New Ulm owns machines in which gasoline is used for power, some of which are operated for the purpose of road grading, snow removal, etc. You state that you have in mind such machinery as is defined in Subdivision (b), Section 1, Chapter 297, Laws of 1925 (Section 2720-70 (b) of Mason's Minnesota Statutes of 1927), which relates to the definition of motor vehicles used on the public highways, and of Section 2720-71, as amended, imposing an excise tax of four cents per gallon on all gasoline used in producing or generating power for propelling motor vehicles used on the public highways of this state.

Prior to the amendment of Section 2720-79, Mason's Minnesota Statutes, 1936 Supplement, as provided by the terms and provisions of Chapter 376, Laws of 1937, we believe your construction would have been correct. However, we believe that the latest act of the legislature must be given effect, if possible, and where there is a conflict between several sections pertaining to the same subject the latest expression of the legislature should control.

We also call your attention to Section 2720-78 in which it is stated that all gasoline inspected for unloading in this state and all gasoline produced in or brought into this state shall be deemed to be intended for use in motor vehicles in this state, and every person who pays the tax imposed by this act shall be deemed to have paid the same for and on behalf of the person using such gasoline in motor vehicles in this state.

The sections above referred to, Sections 2720-71 and 2720-78, and the operation of the act as a whole, indicate that the amount of the tax is measured by the number of gallons of gasoline sold. It may be of interest in this connection to note that the Supreme Court of the United States, in discussing a similar taxing act in the case of Panhandle Oil Company v. Knox, 277 U. S. page 222, said in substance:

> "To use the number of gallons sold * * * as a measure of the privilege tax is in substance and legal effect to tax the sale."

The State of Mississippi in that case contended that the tax was in fact an occupation tax imposed upon the privilege of engaging in the business of distributing petroleum products. The same can be said of our act. In any event the act could be construed as a tax upon that privilege. To assume the position that the tax is solely a tax upon the privilege of using the public highways by motor vehicles would be difficult to do, in view of the construction placed upon a similar act by the United States Supreme Court. Justice Butler, in Panhandle Oil Company v. Knox, said:

> "It is immaterial that the seller and not the purchaser is required to report and make payment to the State. **Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests.** * * * It depends immediately upon the number of gallons."

We enclose herewith a copy of an opinion which we heretofore rendered to the County Attorney of Lac qui Parle County on September 6, 1937, in response to a similar question and in which we called attention to the fact that during the Extra Session of 1937 following the regular session, an attempt was made in the legislature to amend the provisions of Chapter 376, Laws of 1937, so that it would allow municipal corporations of the state to claim refunds in such instances where gasoline is used in motor vehicles or machinery operated by municipalities for road grading, snow removal, etc. The bill failed to pass. It would be difficult for this office to ignore this legislative history of the subject thus disclosed.

We also know that one of the real reasons for the passage of the amendment of the reimbursement act, said Chapter 376, Laws of 1937, was to reduce the large number and amount of unjustified and questionable claims against the gasoline tax funds, some by unscrupulous road contractors who made claims for reimbursement on substantially all gasoline used by them, merely because they happened to be engaged in operating part of their equipment in the construction, reconstruction or maintenance of the public highways. The abuse of the refund privileges heretofore granted by law and administrative difficulties pertaining to determining mixed use claims for reimbursement caused the legislature to deny the reimbursement privileges. Municipal corporations and public highway construction contractors are immediate and direct beneficiaries of the excise taxes derived from the sale of gasoline. No good reason is apparent why the amendment should not be operative as to them. A reduction in the number and amount of unjustified claims for reimbursement will result in further benefits to them, both directly

and indirectly. We are of the opinion that the validity of the act should be sustained.

FRANK H. OSTERLIND,
Assistant Attorney General.

December 28, 1937. 324k

421

TAXATION—Gasoline tax—Reimbursement in certain cases—Machinery operated for the purpose of constructing, reconstructing or maintaining public highways.

Mr. G. H. Griffith, Oil Inspection Division.

You inquire whether persons who have paid the excise tax on gasoline consumed in operating machinery for the purpose of processing or conveying sand, gravel, rock or other road building material used for the purpose of constructing, reconstructing or maintaining the public highways of the State are entitled to reimbursement or refund of such taxes pursuant to the provisions of Chapter 376, Laws of 1937, which provides in part:

> "Any person who shall buy and use gasoline for any purpose other than use in motor vehicles, or for use in machinery operated for the purpose of constructing, reconstructing or maintaining the public highways of this state, and who shall have paid any excise tax required by this act to be paid directly or indirectly through the amount of such tax being included in the price of such gasoline or otherwise, shall be reimbursed and repaid the amount of such tax paid by him * * *."

We are of the opinion that no reimbursement or repayment may be made of the amount of such excise tax to a person who has used the gasoline for such purpose.

FRANK H. OSTERLIND,
Assistant Attorney General.

September 24, 1937. 324k

422

TAXATION—Gross earnings—Car rental debit balances.

Hon. Edward J. Pearlove, Comptroller.

You state:

> "The Minneapolis and St. Louis Railway Company at Minneapolis, Minnesota has made deductions from taxable revenues in their gross earnings tax returns to the State of Minnesota for the last half of the years 1935 and 1936 amounting to $23,960.48 and $43,261.65 respectively. These deductions were made through the hire of equipment account

based on the theory that when a debit balance results through the application of the so-called Burlington formula, the railroad should be allowed to reduce its taxable revenues by the amount of this debit balance.

"The Burlington formula referred to above consists of first determining the separate receipts and disbursements that the Minneapolis and St. Louis Railway Company may have in its car rental relations with other railroads. Then a system balance is struck with each individual railroad, to which balance, be it credit or debit, the percentage that the Minnesota loaded freight car miles bear to the system loaded freight car miles of the using road, is applied. The results of this computation are then totaled, and if a credit balance exists the same is taxable, and if a debit balance, no tax is assessed."

You ask:

"Are debit balances of this nature proper deductions from taxable revenues?"

It is my opinion that your question should be, and it is, answered in the negative.

The amount received by a railroad company for its cars employed in transportation in excess of the amount paid out by it for the use of cars of other companies was held taxable, as a gross earnings in State v. Minnesota & International Railway Company, 106 Minn. 176.

The court there stating that:

"Where accounts are kept between different companies and charges are adjusted for such service, up to the point where the accounts balance, the operation is a mere exchange of the use of the cars, but the amount received by any company for the use of its cars in excess of the amount paid out by it for the use of the cars of other companies is one of its sources of revenue earned by its rolling stock, and should be included in the gross earnings."

In State v. Great Northern Railway Co., 163 Minn. 88, the effort was to tax a huge car rental credit balance in the hands of the defendant railway. The court there held that in so far as said credit balance was augmented by receipts from railroads not physically operating in Minnesota, that the same was not taxable. However, in its opinion this court itself confesses its inability to comprehend why only credit balances were taxed rather than the entire receipts. On this situation the court there states:

"But the state contends the conclusion above stated is out of harmony with the holding in State v. M. & I. Ry. Co. supra, that such credit balances are gross earnings. It may be difficult to find a logical basis for taking only the credit balance on rental of cars and not the entire receipts. The credit balance as figured in that decision is really the net and not the gross earnings from that item. But, be that as it may, the question now presented was neither raised nor decided in that case. The question now is, can the rental for cars used entirely outside the state by railroads not extending into the state be considered as part of defendant's gross earnings?"

From the foregoing it readily appears that the taxing of a credit balance, rather than the entire receipts, is an exception in the taxing of gross earnings, and that it should not be extended by permitting any railroad to credit itself, against properly taxable gross earnings, with any debit balance that it may have in its car rental account.

HARRY W. OEHLER,
Assistant Attorney General.

June 19, 1937. 216i-1

423

TAXATION—Homesteads—Two houses on one lot—Located in two towns.

Mr. Clarence T. Perkins, County Attorney.
Therein you state:

1. "Where a man owns a lot with one big house on it with a shack on the rear of the lot and he rents out the big house, can he claim a homestead exemption on the entire lot and buildings thereon under Class 3c of Section 1993, Mason's 1927 Supplements merely because he lives in the small shack on the rear of the lot?"

If we correctly understand your question, we believe it is answered by the answer to question No. 12 in opinion No. 796 of the 1934 Report of Attorney General. Said question and the answer thereto are as follows:

"A person owns a city lot on which is located two houses. He lives in one and rents the other. How should this lot be classified for purposes of taxation?"

"That part of the lot on which is located the house in which he lives should be placed in class 3b. The remainder of the lot should be placed in class 4."

2. "Where a house stands on the line between two townships with the bedroom in one township, should the cattle, livestock and machinery be assessed in the township where the owner sleeps? This is rather important in one case down here as wherever the assessment is made it throws it into a different school district with one district having a much greater rate (mill rate) than the other. The principal place of business of this farm is in the township other than where the part of the house with the bedroom is located."

In our opinion the cattle, livestock and machinery should be assessed in the township where the owner resides. See Mason's Minnesota Statutes of 1927, Section 2003. It does not appear from the statement of facts submitted that the provisions of Section 2003 are applicable because the farm in question is not one upon which the owner resides.

Upon the facts before us we cannot attempt to determine which township is the residence of the owner. In a situation such as that outlined in your letter where the dwelling houses of the owner is situated partly in one municipal subdivision and partly in another, we find the applicable rule stated in Kennan on Residence and Domicile, Section 47, as follows:

> "It sometimes happens that a dwelling house is so situated that a part of the building is in one municipal subdivision and a part in another. In rare instances the line passing through the house constitutes the boundary between two states. * * *
>
> "The rule is fairly well established that if a line runs through one's house he must be taxed in the town or taxing district in which the most necessary and essential portion of the building is situated. Where a dwelling house is so divided by the boundary line between two towns as to leave in one town that portion of the house in which the occupant substantially performs those offices which characterize his home, such as sleeping, eating, sitting and receiving visitors, he is a citizen of that town. **A consideration of the acts and intention combined determines the residence**; and, where the line between two counties passes through a house, evidence as to which county the owner voted in, or obtained a hotel license from, is admissible as showing by his acts, declarations and intention that he had elected to have his residence in that county."

The owner's intention is one factor to be considered. If he has claimed a residence in one of the two townships, that fact, if other things are equal, might be the determining factor. By applying the rule stated in Kennan, there should be little difficulty in determining the township in which the owner of the farm resides.

WILLIAM D. GUNN,

Special Assistant Attorney General.

August 2, 1938. 232d

424

TAXATION—Homestead—What is for taxation purposes.

Mr. J. Norman Peterson, County Attorney.

You state that the sheriff of your county owns a residence in the Village of Long Prairie; that at the present time he does not occupy this residence, as he is living in the living quarters provided for the sheriff in the Todd County jail building; that he has one room reserved in his residence where he has stored some furniture and other articles; that the rest of the house is rented; and that his residence in the living quarters of the Todd County jail building is only temporary while he is in office as sheriff of the county.

You inquire:

"Will you please advise me whether or not he loses his homestead exemption under the tax laws of this state while temporarily occupying the living quarters in the Todd County jail building?"

When you speak of "his homestead exemption" we assume that you have reference to the exemption provided by Laws 1933, Chapter 359.

This office has held that the term "homestead" as used in said Chapter 359, means the place occupied by a person as his home. The question of whether a place is occupied by any person as a home is primarily one of fact, and should be determined in the first instance by the officials charged with the duty of assessing such property.

We have previously expressed the opinion that a person owning a piece of property on which is located a house, who maintains one room in such house for storage purposes, but who actually lives elsewhere, does not have the right to have such property valued and assessed as a homestead under Chapter 359, Laws 1933. If an owner of property is actually living elsewhere, he is not occupying such property as a home. The fact that he intends to occupy such property at some indefinite time in the future, is not of importance, if he has an established home elsewhere.

We answer your specific inquiry by saying that if the assessing authorities find that the sheriff of your county is not actually occupying the residence referred to in your letter, and that such sheriff has an established home elsewhere, it is our opinion that such sheriff does not have the right to have such property valued and assessed as a homestead under said Chapter 359.

WILLIAM D. GUNN,
Special Assistant Attorney General.

June 29, 1937. 232d

425

TAXATION—Homestead—What is under facts stated.

Mr. P. M. Lindbloom, County Attorney.

You ask:

"Please give me your opinion as to whether or not a person is entitled to have all of the following described property classified as a homestead for the purpose of assessing the value thereof for taxation; a person owns three lots, all contiguous, located in Stillwater, Minnesota. The total acreage of these three lots is less than one-half an acre, and therefore can be classified as a homestead for the purpose of exemption from debts. This person lives in a house on one of these lots and has a house on another of these lots which he rents out. Are the whole three lots to be assessed as a homestead?"

Section 1993 of Mason's Minnesota Statutes of 1927, as amended, as far as material here, provides:

> "All platted real estate, except as provided by class one (1) hereof and which is used for the purposes of a homestead, shall constitute class 3c and shall be valued and assessed at twenty-five (25) per cent of the true and full value thereof. Provided, if the true and full value is in excess of the sum of $4,000.00, the amount in excess of said sum shall be valued and assessed as provided for by class four (4) hereof."

Under this act platted real estate used for the purposes of a homestead up to a valuation of $4,000.00 shall be valued and assessed at twenty-five per cent of the true and full value thereof. You will note that if the real estate is used for the purposes of a homestead it is to be so assessed. A value limitation but no area limitation is imposed as a requisite to preferred classification. The property must be used "for the purposes of a homestead." In the case to which you refer the house in which the owner lives and the land used with the house for the purposes of a homestead clearly are entitled to homestead classification. The house which is rented is not used by the owner for the purposes of a homestead and cannot be given homestead classification. The third lot may be given homestead classification if it is contiguous with the lot upon which is located the house used by the owner and if such third lot is used for homestead purposes. If, for instance, it is used for garden or lawn it is used for homestead purposes.

MATTHIAS N. ORFIELD,
Deputy Attorney General.

May 20, 1937. 408d

426

TAXATION—Interest—Amount of.

Mr. Clayton A. Gay, County Attorney.

You inquire:

> "Would you kindly render me an opinion as to the amount of interest to be collected in the redemption of lands sold under Chapter 387, Laws of 1935, for 1930 taxes sold in May, 1932, bid in by the State and thereafter the taxes for 1931, 32, 33, and 34 were not paid and attached to the State's judgment for the 1930 taxes and sold to an actual purchaser on June 30, 1936, for four-fifths of the taxes for 1930 to 1934 inclusive?
>
> "Does the amount required to redeem in this case call for interest at 10% for the 1930 and 1931 tax and 8% for the balance, or does the sale under this chapter and at the reduced price change the situation so that only 8% can be collected for all the years?"

In our opinion a person redeeming the parcel of land referred to in your letter is required to pay interest at 10% on four-fifths of the 1930 and 1931 taxes from June 30, 1936, and interest at 8% on four-fifths of the 1932, 1933 and 1934 taxes from June 30, 1936. See Section 2105, Mason's Minnesota Statutes of 1927, and Section 2105-1, Mason's Minnesota Statutes, 1936 Supplement.

WILLIAM D. GUNN,
Special Assistant Attorney General.

April 4, 1938. 425b-2

427

TAXATION—Maximum tax levy for school purposes.

Mr. R. S. Wiggin, City Attorney.

You inquire whether the said Board of Education is authorized to levy a tax in excess of 22 mills for current school expenses.

Chapter 18, Section 6 of the charter of the City of Minneapolis, authorizes the Board of Education to levy upon the taxable property in the city such taxes as will raise a sufficient sum of money for all school purposes. Said Section 6, however, contains the following limitation:

> "Provided, that the aggregate annual levy of such taxes in any one year, exclusive of state and county school taxes, shall not exceed 22 mills on each dollar of the assessed valuation of the taxable property of the city as determined by the last assessment for city, state and county purposes."

We call attention first to Chapter 359, Laws of 1933, as originally passed and as amended, which provides that real estate used for the purposes of a homestead up to a valuation of $4,000 shall be valued and assessed for purposes of taxation at 20% and 25% of its true and full value respectively depending upon whether the real estate is unplatted or platted instead of being assessed at 33⅓% and 40% of its full and true value respectively as had been the case prior to the enactment of said Chapter 359, Laws of 1933. The effect of this law was to reduce the assessed valuation of the property of the city of Minneapolis by a large amount and, but for the following saving clause in the statute, to reduce by a large amount the proceeds of the tax levy of twenty-two mills which the Board of Education of the city of Minneapolis is authorized to make under the city charter. This saving clause reads as follows:

> "For the purpose of determining salaries of all officials based on assessed valuations and of determining tax limitations and net bonded debt limitations now established by statute or by charter, class 3b and class 3c property shall be figured at 33⅓% and 40% of the true and full value thereof respectively."

You will note that the paragraph quoted above definitely provides that for three designated purposes class 3b and class 3c property shall be figured, not at 20% and 25% respectively of full and true value of the property assessed, but at 33⅓% and 40% respectively. These three purposes, as set forth in the statute, are:

1. For the purpose of determining salaries of all officials based on assessed valuations.

2. For the purpose of determining tax limitations.

3. For the purpose of determining net bonded debt limitations.

Obviously, the 22-mill limitation in the city charter is a tax limitation. As such it comes within the scope of the saving clauses and, as applied to said 22-mill tax limitation, the provision means that notwithstanding that the assessed valuation of the real estate of the city has been reduced by a large amount by the operation of said Chapter 359, nevertheless the aggregate amount of taxes that can be raised by the tax levy of the Board of Education is exactly the same as it would have been if there had been no reduction in the assessed valuation of property used for the purposes of a homestead.

We point out that under this opinion the preferred treatment of homesteads for purposes of taxation is in nowise affected.

In reply to the possible objection that the tax limitation concerning which you make inquiry is found in a home rule charter and may therefore not be reached by the saving clause in said Chapter 359, we ask you to note that even the provisions of a home rule charter are subject to statutes of general application and furthermore that this provision of said Chapter 359 is specifically made applicable to "tax limitations * * * now established by statute or by charter."

The foregoing opinion is in accord with several earlier opinions of this office. It has, moreover, received the approval of the Supreme Court of Minnesota in the case of Sutton v. Board of Education of the City of Duluth, 197 Minn. 125, in which the Supreme Court said:

> "By L. 1921, c. 332, the maximum annual tax levy defendant can make is 20 mills on each dollar of taxable valuation of the property within the district; under 1 Mason's Minnesota Statutes, 1927, Section 3012, a county school tax of an additional mill is extended; and by L. 1933, c. 359, 3 Mason's Minnesota Statutes, 1934 Supplement, Sections 1933, 1993-1, to help out the schools, the reduction in homestead valuation is disregarded."

We understand that in the past the Board of Education has never levied a tax for school purposes in excess of 22 mills and that by following the procedure outlined above the board can raise an additional amount of about $500,000. Assuming, however, that the aggregate amount that can thus be raised is deemed by the board not sufficient to provide an adequate system of public schools for the city your inquiry raises the further question

whether the board may go beyond the 22-mill limitation as qualified by said Chapter 359, and levy such an amount as it shall deem adequate for the needs of the public schools of the city. It is well established that in certain emergency situations tax limitations are not binding. In the case of Upton v. Strommer, 101 Minn. 97, it appears that shortly after its organization Clearwater County had no court house, that it rented offices for its county officials in various private buildings in the city of Bagley and that there was no safe place for the keeping of county records. Under these circumstances the county board entered into a contract for the repair and remodeling of a building donated to the county for a courthouse in order to make that building fit for occupancy by the county officials. This involved the expenditure of an amount of money which, when added to other amounts necessary to defray current expenses, exceeded the statutory limitation on the taxing power of the county. Nevertheless the Court held the contract valid, saying:

> "The situation is no different from a case where, by storm or other calamity the buildings of a county are unroofed, or otherwise damaged and rendered unfit for occupancy, in which case it would be the clear duty of the county board to provide economically all necessary repairs, the cost of which would constitute a necessary expense, to which the statute limiting the power of taxation would not apply."

The Supreme Court, however, has indicated in other cases that it will apply a very strict construction to this doctrine of emergency. Thus in Johnston v. County of Becker, 27 Minn. 64, the Court refused to sanction the building of a jail, in Rogers v. Le Sueur Co., 57 Minn. 434, the building of a courthouse, where such construction would result in exceeding the county tax rate limitation.

More nearly in point, however, is the case of State v. Keyes, 188 Minn. 79, in which it appears that the County of Koochiching levied a tax for revenue purposes of $90,000 although it was subject to a statutory tax limitation of $40,000. The larger levy was necessary to enable the county to pay the salaries of its county officials, expenses for fuel, janitor services, printing, supplies, boarding of prisoners, transporting of the insane and persons convicted of crime to places of detention, and other expenses. Notwithstanding the precarious financial condition of the county, the Court held the larger levy invalid. The Court said:

> "It is impossible to construe c. 313 in any manner other than as a plain and clear limitation of the authority of a county, situated as Koochiching County, to levy for county revenue purposes any sum in excess of $40,000. There are no exceptions in the law. If it conflicts with statutes in existence when enacted, such prior statutes must yield or be subject thereto. The situation in this county in regard to its usual and ordinary current operating expenses cannot be regarded as an emergency which would authorize the county board to exceed the express limit of taxation such as is found in Upton v. Strommer, 101 Minn. 97, 111 N. W. 956, where a fire had made it imperative that the county board provide funds to repair the damage thereby done the courthouse."

We wish, however, to call attention to the following provision of Section 3 of Article 8 of the state constitution:

> "The legislature shall make such provisions, by taxation or otherwise, as, with the income arising from the school fund, will secure a thorough and efficient system of public schools in each township in the state."

This mandate of the constitution cannot be disregarded in imposing tax limitations. Whether in the present case the tax limitation imposed is so severe as to make it impossible for the board to provide a thorough and efficient system of public schools is essentially a question of fact upon which this office cannot pass and which must be determined in the first instance by the board. In view of the fact that such determination would be subject to review by the courts we have, however, thought it proper to point out how strict the Supreme Court has been in upholding tax limitations in situations similar to that referred to in your inquiry.

MATTHIAS N. ORFIELD,
Deputy Attorney General.

October 9, 1937. 519m

428

TAXATION—Money and credits—Annuities—Determination of value of.

Minnesota Tax Commission, State Capitol.

You refer to certain group pension contracts purchased by an employer for his employes toward which both the employer and employes contribute. It is stated that prior to the age of retirement the only cash value available to the employe is his share of the monthly contributions; that after retirement there is no cash value available; and that on the employe's death there is no return unless such employe has elected to take a smaller income from the policy in order that there may be a continued income to his dependents. In no case is there a cash value on which the employe may draw. The following questions are asked:

> "The point in question is, how are such pensioners to determine the taxable amount of these annuities, under the Moneys and Credits tax, both before they retire and after retirement? We have one specific case now up for decision where the employe has received his pension income for just a few months, and has raised this question for our decision. There will undoubtedly be others who raise this point, and we want to be in the position of advising them correctly, so will appreciate a definite ruling from your department, just as soon as possible."

Mason's Minnesota Statutes of 1927, Section 2337, provides that the word "credits" shall include "every annuity or sum of money receivable at stated periods, due or to become due."

It appears from the statement submitted that while the policy in question remains in force the interest of the insured in his share of the monthly contributions is not a right to which he is entitled without the surrender of other valuable rights, and that until these rights are surrendered he has no claim or demand due or to become due. On the basis of the information furnished, it is our opinion that prior to retirement the interest of the employe in such a group policy is not subject to taxation under the law relating to money and credits.

In our opinion after an employe retires and the policy has matured the present value of the unpaid annuity is taxable under the money and credits tax law as an "annuity or sum of money receivable at stated periods, due or to become due." There should be no difficulty in ascertaining the present value of future payments on the basis of the life expectancy of the annuitant. This method of determining the present value of such an annuity has been recognized by the courts and in the case of inheritance taxes adopted by statute. See Mason's Minnesota Statutes of 1927, Section 2294.

WILLIAM D. GUNN,
Special Assistant Attorney General.

March 28, 1938. 614h

429

TAXATION—Money and credits—Exemptions—United States Savings bonds.

Mr. C. A. Rolloff, County Attorney.

You inquire whether United States Savings bonds are exempt from the Minnesota moneys and credits tax.

We assume that the bonds you refer to are issued pursuant to U.S.C.A. Title 39, Section 760, which reads in part as follows:

> "Any depositor in a postal savings depository may surrender his deposit, or any part thereof, in sums of $20, $40, $60, $80, $100, and multiples of $100 and $500, and receive in lieu of such surrendered deposits, under such regulations as may be established by the board of trustees, the amount of the surrendered deposits in United States coupon or registered bonds of the denominations of $20, $40, $60, $80, $100, and $500, which bonds shall bear interest at the rate of 2½ per centum per annum, payable semi-annually, and be redeemable at the pleasure of the United States after one year from the date of their issue and payable twenty years from such date, and both principal and interest shall be payable in United States gold coin of the present standard of value. * * * The bonds herein authorized shall be exempt from all taxes or duties of the United States as well as from taxation in any form by or under State, municipal, or local authority."

(See also U.S.C.A. Title 31, Section 742.)

Because of the statutory provisions above referred to, it is our opinion that bonds of the United States, issued pursuant to U.S.C.A. Title 39, Section 760, are exempt from the Minnesota money and credits tax.

WILLIAM D. GUNN,
Special Assistant Attorney General.

May 26, 1938. 614g

430

TAXATION—Mortgage registration tax—Church property—fee payable to county treasurer.

Hon. C. A. Halverson, State Treasurer.

Your request for information of January 20th, relative to the correct disposition of a check in the sum of $3.30 sent to you for payment of the registration tax upon a mortgage deed from the First Presbyterian Church of Crookston to the Board of National Missions Of The Presbyterian Church in The United States of America, which item was forwarded to you by the register of deeds of Polk County, Crookston, Minnesota, in which he states that he understood the tax is to be paid to the state treasurer and refers to an opinion No. 364 of the Attorney General Report of 1914, which in turn refers to opinion No. 165 of the Attorney General Report of June 4, 1907, which opinions in substance, ruled that a mortgagee to a mortgage secured by church real estate must pay the registration tax and that the tax is payable to the state treasurer, has been modified by Chapter 30, Laws 1929, Section 2327, 1936 Supplement to Mason's Minnesota Statutes of 1927, which provides as follows:

> "When any real estate situate in this state and described in any such mortgage is exempt from taxation under Section 1, Article 9 of the Constitution, ('* * * Section 1, * * * all seminaries of learning, all churches, church property and houses of worship * * * shall be exempt from taxation * * *') the tax herein provided shall be paid to the treasurer of the county in which such real estate is situate in the same manner as if such real estate was not exempt from taxation * * *."

Pursuant to the foregoing provision of the statute it is our opinion that the registration tax on the church mortgage referred to should be paid to the treasurer of the county in which the real estate mortgaged is situated.

We therefore suggest that you return this item to the register of deeds of Polk County, and we are furnishing you an additional copy of this opinion to accompany its transmittal.

FRANK H. OSTERLIND,
Assistant Attorney General.

January 20, 1937. 418c-3

431

TAXATION—Mortgage registration tax—computation of tax.

Mr. Clarence T. Perkins, County Attorney.

You state:

> "A contract for deed has been presented for recording and payment of Mortgage Registration tax thereon under Sec. 2323 of Mason's Minnesota Statutes, 1927, which provides for no principal amount as consideration for the purchase price except that the vendee shall assume and thereby agrees to pay a mortgage on said land covered therein in the sum of $2400.00 and in addition agrees to pay to the vendor the sum of $16.00 per month 'each month thereafter until the death of the vendor.'
>
> "On what basis shall we compute the Mortgage Registration Tax thereunder?"

The first question raised by your inquiry is whether the $2400.00 mortgage is to be considered in computing the amount of the mortgage registration tax.

This office has heretofore held that if an existing mortgage is mentioned in a contract for deed, which mortgage the vendee assumes or as to which the contract is made subject, the amount of such existing mortgage is to be deducted from the total indebtedness in ascertaining the amount for which the contract is secured and upon which the mortgage registration tax is to be computed. See opinions 545 of the 1916 report of the Attorney General, and 813 of the 1920 report of the Attorney General.

The second question presented by your inquiry is the mannr of computing the amount upon which the mortgage registration tax is to be paid under the provision in the contract pursuant to which the vendee agrees to pay the vendor the sum of $16.00 per month "each month thereafter until the death of the vendor."

The usual method of determining the value of the consideration in a case such as this is to arrive at the number of years of expectancy of the grantor from approved mortality tables and then to multiply the yearly value of the payments by the expectancy in years at the time the contract is made. That portion of the contract price payable in more than five years and sixty days from the date of the contract must carry the 25c rate, and the portion payable in less than that time, the 15c rate.

WILLIAM D. GUNN,
Special Assistant Attorney General.

August 17, 1938. 418a-11

432

TAXATION—Mortgage registration tax—New Mortgage.

Mr. H. G. Whitney, County Attorney.

You state that on October 5, 1935, a loan company made a mortgage for $5200.00 to a Murray County mortgagor; that said mortgage was due November 1, 1945 and the registration tax was paid in full; that on November 1, 1936, the mortgage was reduced to $4160.00; that on March 1, 1937, the mortgagor increased the loan to $6000.00; that a new mortgage was taken due April 1, 1947, with the same terms and interest as the original mortgage; that the mortgagor paid a registration tax only on the increase of $800.00; and that the mortgage has been stamped "registration tax paid in full" and the mortgage recorded.

You inquire:

> "Is this handled correctly, or should mortgagor start 'from scratch,' and pay full $15 on the $6000 mortgage, disregarding fact that all runs during same term as the $5200 on which registration was paid?"

The only circumstances under which a registration tax is not required to be paid on a mortgage are set forth in Section 2322, Mason's Minnesota Statutes of 1927, as follows:

> "A mortgage given to correct a misdescription of the mortgaged property, or to include additional security for the same indebtedness, shall not be subject to the tax imposed by this act; nor shall a mortgage securing the same and other indebtedness, additional to that upon which such tax has been paid, be taxable hereunder, except for such added sum."

Clearly, this new mortgage was not given to correct a misdescription of the mortgaged property or to include additional security for the same indebtedness, and hence the only ground upon which it could be tax exempt would be that it is given to secure the same and other indebtedness additional to that upon which the tax has been paid. We doubt that the new mortgage is a "mortgage securing the same and other indebtedness, additional to that upon which such tax has been paid."

You do not definitely so state but we assume that the note is a new note. The old debt is paid. A new debt is incurred, payable upon a different due date. This seems to be a strict construction of the statute, but under the decisions of our Supreme Court statutes granting exemptions from taxes are required to be strictly construed. It should be remembered also that, as a practical matter, in connection with mortgage registration taxes it is much better to be too strict than too liberal in passing on exemptions for the reason that under the statute failure to pay a small amount of mortgage registration tax may result in litigation affecting valuable property rights.

It is our opinion, therefore, that the full tax on the new $6000.00 mortgage should be paid.

WILLIAM D. GUNN,
Special Assistant Attorney General.

July 23, 1937. 418a-12

433

TAXATION—Mortgage Registration Tax. Where consideration is services to be rendered.

Mr. Ed. J. Goff, County Attorney.

You submit to us an excerpt from a contract for deed stating the consideration set forth on such contract and inquire how the mortgage registration tax on such contract should be computed. We assume that the following is that portion of the statement of consideration which is troublesome.

> "Said parties of the second part also agree as a part of the consideration of this contract to take care of the party of the first part until he shall depart this life, and to provide him with living quarters on the dwellings in said property and to give him full use of the said dwelling and of the premises as long as he shall live. Said parties of the second part also agree to plant, cultivate and raise a crop on the cultivated area of the said premises each season by and with such assistance as party of the first part may be able to give, and to pay party of the first part fifty (50%) per cent of the returns of all crops sold off of the premises each season. It is distinctly understood by and between the parties hereto that party of the first part enters into this contract with the definite understanding that he is to have a home on said premises as long as he should live and that he is to pay nothing therefore except his equity in his premises. When party of the first part shall have passed away parties of the second part agree to give him a decent burial and to pay the expense of his funeral and last sickness as part of the consideration for this contract."

The usual method of determining the money value of the consideration in a case such as this is to arrive at the number of years of expectancy of the grantor from approved mortality tables to estimate from the best evidence available the yearly value of the several yearly benefits to be received by him, and then to multiply the yearly value of such benefits by the expectancy in years at the time when the contract was made.

The value of the care and lodging to be furnished grantor seems to call for no special comment. It must be determined from the best evidence available. Similarly the probable value of fifty per cent of the crops to be raised each year during the years of expectancy must be determined from the best evidence available. The probable value of the grantor's yearly

labor contribution to the production of said crops should be deducted from the yearly value of such crops. The estimated expense of a decent burial and the amount of the funeral expenses and expenses of last illness must likewise be estimated and added to the total.

Obviously that portion of the contract performable in more than five years and sixty days must carry the twenty-five-cent rate and that portion performable in less than that time the fifteen-cent rate.

MATTHIAS N. ORFIELD,
Deputy Attorney General.

September 27, 1937. 418b-5

434

TAXATION—Payment of on undivided interest.

Mr. Clarence R. Smith, County Attorney.

You state:

> "We have a situation where one person owns an undivided 3/5 interest in certain real estate in this county. He has kept his taxes paid to date. Another party owns the remaining 2/5 interest in this property and has permitted the taxes to become delinquent and forfeited. The records in the Auditor's office show a forfeiture of a 2/5 interest.
>
> "There seems to be considerable confusion as to whether or not the forfeiture of the 2/5 interest affects the title to the 3/5 interest. I have always held and given opinions to the effect that the person who pays his taxes on his undivided 3/5 interest has a good title to that undivided interest regardless whether the owner of the other 2/5 interest ever pay the taxes or not.
>
> "The Auditor is of the opinion that your office has rendered an opinion relating to undivided interests in property affected by tax payments. If so, I will appreciate receiving a copy of same."

We do not find that this office has rendered an opinion which answers your specific question. However, Mason's Minnesota Statutes of 1927, Section 2080, provides that any person holding an undivided interest in any property may pay taxes on such undivided interest and that "thereupon such undivided interests shall be exempt from proceedings to enforce the collection of the same tax against other undivided interests, upon which such tax has not been paid and the collection of such tax upon the undivided interests upon which the taxes have not been paid shall be proceeded with in the same manner as to such undivided interests as though it were a separate description."

It is our opinion, because of the statute just referred to, that your opinion "to the effect that the person who pays his taxes on his undivided

3/5 interest has a good title to that undivided interest regardless of whether the owner of the other 2/5 interest ever pays the taxes or not" is correct.

WILLIAM D. GUNN,
Special Assistant Attorney General.

August 26, 1938. 412a-9

435

TAXATION—Personal property—Lien.

Mr. Kenneth H. Dell, County Attorney.

You state that in 1935 a tax assessment was made against certain personal property "belonging to the Reko Cafe of Osakis, Minnesota;" that such tax became payable in 1936, and also in 1936 a personal property tax assessment was again made against such property, and the tax became payable in 1937; that in December, 1936 the personal property of such cafe against which such tax was assessed was sold to another party.

You inquire:

> "Whether or not the taxes so assessed as aforementioned became a lien against such property so as to subject the same to the payment of such tax, regardless of the fact that the same was sold at the time aforementioned to a bona fide purchaser."

The question of when, if ever, the amount of personal property taxes becomes a lien on the specific personal property of the owner assessed has been the subject of much controversy, but we are not aware of a decision of our Supreme Court which specifically decides such question.

Mason's Minnesota Statutes of 1927, Section 2199 provides that taxes assessed upon personal property shall be a lien upon the personal property of the person assessed from and after the time the tax books are received by the county treasurer.

Mason's Minnesota Statutes of 1927, Section 2199-1 provides as follows:

> "The taxes assessed upon personal property, with lawful penalties, interest and costs, shall be a first and perpetual lien, superior and paramount to all other liens or encumbrances thereon, except liens or mortgages filed for record previous to the time said tax was levied, prior or subsequent in point of time, upon all of the personal property of the person assessed from and including May 1 in the year in which they are levied, until they are paid; provided such lien shall not continue on items of personal property sold at wholesale or retail in the ordinary course of business."

Without reference to the statutes above referred to, the Minnesota Supreme Court in at least three cases has intimated that a specific lien for a personal property tax never attaches to personal property, at least as against bona fide purchasers.

In State v. Red River Valley Elevator Company, 69 Minn. 131, 135 the court said:

> "Personal taxes are assessed against a person, and not against the property, and are not even a lien upon it."

In State ex rel. v. Eberhard, 90 Minn. 120, 123 the court said:

> "In the one case (personal property) the tax is against the person, although estimated in amount according to the value of the personal property possessed, and is never a lien upon the property assessed."

In State v. O'Connell, 170 Minn. 76, 80 the court said:

> "To be sure the tax upon personal property is not a lien upon the property but only a personal liability of the owner."

In the case of State v. Security National Bank, 139 Minn. 162, the court did have occasion to consider the provisions of Section 2199 above referred to. In this case the court at Page 173 said:

> "A tax is not a lien upon property **except as made so by statute.** State v. Bellin, 79 Minn. 131; Gould v. City of St. Paul, 120 Minn. 172. The statute provides:
>
> 'The taxes upon personal property shall be a lien upon the personal property of the person assessed from and after the time the tax books are received by the county treasurer.' G. S. 1913, Sec. 2180. As the tax books embracing the tax in controversy were not delivered to the county treasurer until long after defendant had disposed of all its property, the tax never attached as a lien upon such property, even assuming that this statute gives a lien upon the property of the bank for the tax of its shareholders."

Also of interest is the case of Bristol v. Washington County, 177 U. S. 133, a case originating in Minnesota. In this case the United States Supreme Court cited the Minnesota statute and on Page 148 said:

> "The estate of Mrs. Bristol is liable to respond to this claim (for personal property taxes) because these taxes were lawfully levied in respect of her property situated in Minnesota when the levies were made; and **the statute gave a lien for them against all her personal property within the jurisdiction."**

The legislature has declared the public policy of the state, and the legislative intent seems to be clear that there shall be a lien for personal property taxes upon the personal property of the person assessed. In view of this legislative declaration and the absence of direct authority to the contrary, it is our opinion that in a case coming under the statute the lien exists. Your inquiry is answered in the affirmative.

WILLIAM D. GUNN,
Special Assistant Attorney General.

June 15, 1937. 421a-9

436

TAXATION—Personal property—Situs—Farm in Village and Town.

Mr. J. Norman Peterson, County Attorney.

You state that one of the taxpayers in your county owns a farm which is located partly in a village and partly in a township; that the house which contains all the household goods and other personal property enumerated in Mason's Minnesota Statutes of 1927, Section 2003-1, is located on that part of the farm which is in the village; and that the barn, livestock and other personal property is located on that part of the farm which is in the township.

You inquire:

> "Should the household furniture and personal property in the house be listed and assessed in the Village? Should the livestock and other personal property be assessed in the Township? Or should all the property be listed and assessed in the Village?"

Mason's Minnesota Statutes of 1927, Section 2003 provides:

> "Except as otherwise in this chapter provided, personal property shall be listed and assessed in the county, town or district where the owner, agent or trustee resides."

An exception relating to personal property on a farm is found in Mason's Minnesota Statutes of 1927, Section 2006, which provides that when an owner of livestock or other personal property connected with a farm does not reside on such farm, the same shall be assessed in the town or district in which the farm is situated; and that if the farm is situated in several towns or districts, it shall be listed and assessed in the town or district in which the principal place of business of such farm is located. This exception does not apply in the case presented by your letter, as, from the facts stated, it appears that the owner resides on the farm.

We are not aware of any other exception that will apply to such case. We believe therefore, that the question of where such personal property should be listed or assessed is governed by the provisions of Section 2003, and that such personal property should be listed and assessed in the village, where the owner resides.

WILLIAM D. GUNN,
Special Assistant Attorney General.

June 26, 1937. 421a-17

437

TAXATION—Personal property—Situs—Law books and office equipment of judge.

Mr. Russell L. Frazee, County Attorney.

You state that one of your district judges resides on the outskirts of the city of Renville in your county in the township of Emmet; that he

maintains his court chambers within the city of Renville where he has several hundred dollars in law books and office equipment; that the assessor of Emmet Township assessed the judge on the law books and office equipment that he had in his court chambers in the city of Renville; and that the assessor of the city of Renville also assessed the same property.

You inquire whether the law books and office equipment of the judge should be assessed and taxed in the township of Emmet or the city of Renville.

Section 2003, Mason's Minnesota Statutes of 1927, reads as follows:

> "Except as otherwise in this chapter provided, personal property shall be listed and assessed in the county, town, or district where the owner, agent, or trustee resides."

Various sections of the statute provide that under certain circumstances personal property should be given a situs for taxation at some place other than the place of residence of the owner. However, we find no such statutory provision which applies to the facts outlined in your letter.

It is our opinion, therefore, that because of the provisions of Section 2003 the law books and office equipment of the judge should be assessed and taxed in Emmet Township.

WILLIAM D. GUNN,
Special Assistant Attorney General.

July 28, 1938. 421a-17

438

TAXATION—Personal property—Tax judgment—Limitation of.

Mr. Ed J. Goff, County Attorney.

You submit the following inquiry:

> "Is a judgment for personal property taxes subject to the ten year limitation as provided generally by Section 9400, Mason's Minnesota Statutes, 1927, or does such judgment become a perpetual lien under the provisions contained in Section 2199-1, Mason's Minnesota Statutes, 1927?
>
> "In other words, does a judgment obtained by reason of personal property taxes outlaw in ten years, the same as other judgments?"

The question you ask is one that we do not find has been definitely passed upon by our Supreme Court or by this office. On February 5, 1929, an opinion was written by William K. Montague, then an Assistant Attorney General, in which the conclusion was reached that the statute of limitations runs against a personal property tax judgment in ten years. The request for this opinion was withdrawn so it was never released.

We have given your request our careful consideration and while we feel as Mr. Montague did that the question is somewhat doubtful, it is our opinion that a personal property tax judgment outlaws in ten years, the same as other judgments.

We do not deem it necessary in this letter to state in detail the reasons for the conclusion reached as they are fully explained in the opinion written by Mr. Montague, a copy of which is herewith enclosed. We have not overlooked the language used by the Supreme Court in the case of State v. Brooks, 183 Minn. 251.

WILLIAM D. GUNN,
Special Assistant Attorney General.

December 31, 1937. 421a-8

439

TAXATION—Personal property—Tax judgment—Satisfaction of by State.

Hon. Stafford King, State Auditor.

You refer to us a letter in which you are asked to state whether you as State Auditor have authority to execute a release of a personal property tax judgment which is outstanding against a certain person and which is a cloud on the title to certain homestead property.

We advise you that in our opinion a claim of this character cannot be satisfied by you as State Auditor, but that in a proper case the Executive Council may authorize such a claim to be released by the Attorney General.

MATTHIAS N. ORFIELD,
Deputy Attorney General.

December 15, 1937. 421a-8

440

TAXATION—Public hospital—Paupers—Treatment of—Fees for.

Mr. Chester G. Rosengren, City Attorney.

Your letter to Attorney General William S. Ervin, under date of February 4, 1937, has been referred to the undersigned for attention.

Therein you state that ther are two tax exempt hospitals in th city of Fergus Falls; that from time to time indigent persons are hospitalized in these two institutions; that these two hospitals have presented claims to the city for expenses incident to the hospitalization of such persons; that the city has been paying these claims on a reduced basis pursuant to an arrangement made with these two hospitals; that recently some of

the aldermen have made an investigation as to the possibility of having these hospital services rendered to such indigent persons without charge "on the theory that they are tax exempt institutions;" and that you have advised these aldermen that the city cannot evade liability for such hospital bills so incurred in behalf of paupers having a legal settlement in the city on the theory that hospitals are tax exempt.

You inquire:

> "In the event that you have never given an opinion upon this subject will you please advise me as to your opinion on the same?"

We do not find that this office has ever had occasion to pass upon this question. We assume that the two hospitals to which you refer are public hospitals within the purview of Section 1 of Article 9 of the State Constitution, and that such hospitals are operated for the benefit of the public in contradistinction to being operated for the benefit of private individuals, corporations or groups of individuals. In other words, we assume that said hospitals are such as those referred to in the case of State v. H. Longstreet Taylor Foundation, 269 N. W. 469. Although this case does not directly pass upon the question of whether such tax exempt hospitals may charge municipalities for services rendered in hospitalizing indigent persons having a settlement in such municipalities, it does lay down the rule that such hospitals are tax exempt even though a fee is charged for such services. It will be noted that in the Longstreet case the hospital there involved had made arrangements with counties, similar to those made by the two hospitals to which you refer in your letter, for the care and treatment of indigent persons; that a charge of $19.50 per week was made for hospitalization for each such person; that the general charge to paying patients was from $25.00 to $35.00 per week; and that in many instances the hospital in that case accepted almost anything the patient could pay and sometimes patients were unable to pay anything. The court in this case in adopting the language used in State v. Browning, 192 Minn. 25, 29, said:

> "We are inclined to the view that it was intended that a public hospital also should be operated for the benefit of the public in contradistinction to being operated for the benefit of a private individual, corporation, or group of individuals. So construed, operated for the benefit of the public means operated without an intent to make a private profit. **It is not thereby meant that the institution must dispense charity or that it may not charge a fee for services rendered.** 'Operated for the benefit of the public' does mean that the receipts shall not be substantially more than the disbursements so that a profit results."

Applying the above rule to the question which you have submitted, we believe that you are quite right in your conclusion that the city may not evade liability for hospital bills incurred in behalf of indigent persons

having a legal settlement in your city "on the theory that the hospitals are tax exempt."

DAVID J. ERICKSON,
Deputy Attorney General.

February 19, 1937. 1001d

441

TAXATION—Redemption—After confession of judgment.

Mr. Clarence R. Smith, County Attorney.

You state:

> "General Statutes 2152 provides that any person redeeming any parcel of land shall pay into the treasury of the county, if the right of the state has been assigned the amount paid by the assignee with interest, **and all unpaid delinquent taxes,** etc.
>
> "General Statutes 2176-11 provides for confession of judgment on delinquent taxes bid in for and held by the state and **not assigned.**
>
> "And owner desires to redeem a tax assignment certificate on taxes that are bid in by the state and assigned to a third person. Since this sale and assignment other taxes have become delinquent and a confession of judgment entered. The question is—must the owner in making redemption of the tax assignment certificate in order to meet the requirements of the statute providing for payment of all subsequent taxes now also pay the full amount of the taxes under which confession of judgment has been entered?"

Section 2 of Chapter 72, Extra Session Laws of 1935-36, provides that after confession of judgment "further proceedings shall be suspended on any judgment for taxes embraced in said confessed judgment as long as no default exists."

We have heretofore held that where a holder of a certificate for 1930 taxes presented the same to a county auditor and requested such auditor to prepare and issue a notice of expiration of redemption, and the taxes for subsequent years had been bid in by the state and pursuant to said Chapter 72 judgment had been confessed for such subsequent taxes, that neither the composite judgment nor the subsequent taxes included in such judgment should be mentioned in the notice of expiration of redemption issued upon said tax certificate covering the 1930 taxes.

It is our opinion that the owner in making redemption of the tax assignment certificate referred to in your letter need not pay the full amount of taxes for which confession of judgment has been entered in order to make such redemption.

WILLIAM D. GUNN,
Special Assistant Attorney General.

September 15, 1937. 412a-19

442

TAXATION—Redemption of state trust fund lands.

Hon. E. V. Willard, Commissioner of Conservation.

You state that the "task of regaining title to trust fund lands sold under certificate of sale that have become delinquent in the payment of interest and/or taxes, is somewhat complicated by the passage of recent statutes."

You inquire:

> "Is the title of the state secured by the provision of Laws 1937, Chapter 326, sufficiently strong to advise the several county treasurers not to accept interest payments on such lands or to permit redemption under Mason's Minnesota Statutes for 1927, Section 6291?"

Chapter 326, Laws of 1937, provides, in part, that any parcel of land forfeited to the State as provided by Chapter 278, Laws of 1935, "shall become unsold trust fund land." Section 3 of said Chapter 278 provides:

> "Every parcel of land heretofore sold to an actual purchaser or bid in for the state at any tax judgment sale and now subject to redemption, and every parcel of land hereafter sold to an actual purchaser or bid in for the state at any such sale, shall continue subject to redemption until the expiration of the time allowed for redemption after the giving of notice of expiration as provided by law. **Upon the expiration of such time absolute title to such parcel, if not theretofore redeemed, shall vest in the state, the purchaser, or its or his assigns, as the case may be.**"

It is our opinion that if the lands referred to in your letter have become forfeited to the State pursuant to Chapter 278, Laws of 1935, interest payments should not be accepted and redemption should not be permitted under Section 6291, Mason's Minnesota Statutes of 1927.

WILLIAM D. GUNN,
Special Assistant Attorney General.

June 2, 1937. 425g

443

TAXATION—Taxes voluntarily paid.

Mr. Paul D. Stratton, County Attorney.

You state:

> "A bank, assisting a depositor in making a loan, paid a $1400.00 ditch tax against the land upon which the loan was made. They also paid some $400.00 delinquent taxes and $300.00 current taxes, making

a total of some $2100.00. The loan was afterward rejected and they now desire the county auditor and county treasurer to refund the money. There was no defect or mistake of any kind in the tax proceedings or records.

"1. Has the auditor and treasurer any right to refund the money?

"2. Would the State Tax Commission have such authority upon recommendation of the board of county commissioners?"

It is a general rule, based upon consideration of public policy, that the taxes paid voluntarily can never be recovered. See Dunnell's Digest, Section 9516 and cases cited.

The Tax Commission under the provisions of Mason's Minnesota Statutes of 1927, Section 1983 has broad powers in connection with the abatement and refundment of taxes under certain circumstances. However, upon the basis of the facts submitted in your letter, we do not believe that the Tax Commission would be authorized to order a refundment of the tax money referred to therein.

We answer both your questions in the negative.

WILLIAM D. GUNN,
Special Assistant Attorney General.

December 13, 1937. 424a-9

444

TAXATION—Registered land—New certificate of registration.

Mr. Kenneth H. Dell, County Attorney.

You state:

"In addition to the contents set forth in my letter of September 3rd, would the fact that the purchaser obtain a quitclaim deed from the former owner in conjunction with the state deed be such as to authorize the Register of Deeds to issue a new certificate of title as to such registered lands, upon the mere presentation of the state deed and the quitclaim deed."

We have discussed the problem presented in your letter with H. G. Patton, Examiner of Titles in Hennepin County. It is his view and our opinion that where the purchaser at a sale held pursuant to said Chapter 386, secures a quitclaim deed from the former owner, a new certificate may be issued by the Registrar of Titles upon the presentation of the deed from the state, the quitclaim deed from the former owner and the duplicate certificate of the former owner, without the necessity of bringing the action referred to in Mason's Minnesota Statutes of 1927, Section 8313.

WILLIAM D. GUNN,
Special Assistant Attorney General.

September 21, 1938. 409

445

TAXATION—Repurchase by farmer owner—Assignment.

Minnesota Tax Commission, State Capitol.

You enclose a copy of a letter received by you from the County Auditor of Ramsey County relative to Chapter 88, Extra Session Laws of 1937. You request an opinion of the Attorney General on the questions presented.

In the letter of the County Auditor it is stated that a quit claim deed dated February 1, 1938, from "A" to "B" has been presented for recording with the register of deeds of Ramsey County, covering a parcel of land forfeited to the State on June 20, 1937, for taxes for 1930; and that "A", the record owner of said parcel, repurchased it pursuant to said Chapter 88, Extra Session Laws of 1937, but has only paid one-fifth of the purchase price.

It is also stated that:

"Chapter 88, Section 5, provides that the County Auditor certify to the Minnesota Tax Commission:

Description of Land

The date of sale

The name of the purchaser and the date when the final installment of the purchase price is paid.

The Certificate of County Auditor being Minnesota Tax Commission Form No. 70 provides as follows:

That payment has been made in full of the purchase price

Description of Land

The year of Tax Judgment Sale

Date of Forfeiture

That an appropriate conveyance in fee should now be issued to

.....who is now entitled thereto."

The following questions are asked:

1. "Is it mandatory for the County Auditor to keep a record on the repurchase contract or receipt of the chain of title to ascertain after installment payments are completed who is now entitled to a Quit Claim Deed from the State?"

2. "Should not the original purchaser be entitled to and receive said Quit Claim Deed in his name?"

3. "Should the Certificate of the Auditor (Minnesota Tax Commission Form No. 70) show only the name of the purchaser leaving the decision of who is entitled to the Quit Claim Deed to the Minnesota Tax Commission?"

4. "Should the form of the Certificate of Auditor to the Minnesota Tax Commission be changed to show only the name of the purchaser?"

5. "Should a transfer, by deed, presented to the auditor be stamped 'Taxes paid and Transfer Entered'?"

You request our opinion on the questions presented by the County Auditor of Ramsey County.

The first problem is whether the owner at the time of forfeiture, after repurchasing a tract of land pursuant to said Chapter 88 and making his initial payment on the repurchase price, may assign his interest and the assignee may complete the payment and receive a deed in his own name from the State. We have previously expressed the opinion that such interest may be assigned and that the assignee after completing the payments and performing the other conditions of the contract may receive a quit claim deed from the State. See opinion to Mr. L. A. Wilson, County Attorney of Mahnomen County, dated December 16, 1937. We have given this problem further consideration in the light of some of the suggestions made by members of your Commission. For reasons now to be stated we adhere to the opinion above referred to.

When a former owner repurchases a parcel of land pursuant to said Chapter 88, makes a one-fifth payment on the purchase price, and receives his receipt, a contract is entered into between the purchaser and the state. It is in effect a contract for deed between the state and the purchaser. The general rule is that a right under such a contract is assignable unless (1) the substitution of the rights of the assignee for the rights of the assignor would vary materially the duty of the obligor, or increase materially the burden or risk imposed upon him by his contract, or impair materially his chance of obtaining performance, or (2) the assignment is forbidden by statute or by the policy of the common law, or (3) the assignment is prohibited by the contract creating the right. See Volume 4, American Jurisprudence, page 235. American Law Institute Restatement, Contracts, Section 151.

If the right of an assignee is substituted for that of the original purchaser under Chapter 88, it does not seem to us that such substitution would vary materially the right of the State, increase materially the burden or risk imposed upon the State, or impair materially its chance of obtaining performance. The legislature did not say that the interest of a purchaser could not be assigned so the assignment is not prohibited by statute. The assignment is not prohibited by the contract creating the right.

Contracts for deed have been held assignable in this state even where the contract contained a stipulation against assignment. In Johnson vs. Eklund, 72 Minn. 195, 75 N.W. 14, a contract for the sale of land was specifically enforced in behalf of the assignee where the assignment was in violation of a stipulation against the assignability of the contract. In this case the court said:

"It will be noted that there is no provision that an assignment without Eklund's written approval should forfeit the contract, or give the vendor the right to declare it forfeited; and certainly the courts will not read any such right into the contract by implication. There is nothing personal in the nature of the contract. All that the vendor was interested in was the payment of the purchase money at maturity. If he received this, it was wholly immaterial to him who paid the money or who got the land."

See also McPheeters vs. Ronning, 95 Minn. 164.

If the legislature had intended to prohibit the assignment of the interest of a purchaser under Chapter 88, we believe it would have used language to accomplish that purpose. It does not seem to us that such an intent to restrict the right of alienation, should be inferred from language of doubtful import.

This disposes of question 2. In other words, it is our opinion that the original owner is not entitled to a quit claim deed from the state if he has assigned or conveyed his interest in the parcel of land purchased to another.

Section 5 of said Chapter 88 provides in part:

"When the purchase price of a parcel of land shall be paid in full, the following facts shall be certified by the county auditor to the Minnesota Tax Commission: the descriptions of the land, the date of sale, the name of the purchaser and the date when the final installment of the purchase price is paid. Upon payment in full of the purchase price, the purchaser shall receive a quitclaim deed from the state, to be executed by the Tax Commission."

The question arises as to the sense in which the legislature used the word "purchaser" when it provided that the county auditor should certify the name of the purchaser to the Tax Commission, and that the purchaser should receive a quit claim deed from the state.

Section 8195, Mason's Minnesota Statutes of 1927, defines the word "purchaser" as follows:

"The word 'purchaser', as used in this chapter, shall embrace every person to whom any estate or interest in real estate is conveyed for a valuable consideration, and also every assignee of a mortgage, lease, or other conditional estate."

Although Chapter 88 is not directly made a part of Chapter 63, the chapter relating to conveyances of real estate, we believe the definition above quoted has some bearing in connection with the problem being considered. We believe that this definition is broad enough to include an assignee of the original purchaser under said Chapter 88.

In Ambler vs. Glos, 86 N.W. 113, 237 Ill. 637, it was held that in a statute making the receipt of redemption money by a "purchaser" operate as a release of all claims to the property purchased at the sale, the term

"purchaser" was not limited to the original purchaser of a certificate of sale under a special assessment, but included an assignee of such original purchaser.

In Roll vs. Nation, 109 Pac. 302, 82 Kan. 675, the Kansas court held that where a purchaser of school lands had assigned a certificate and the assignment had been brought to the knowledge of the county clerk who entered it upon the records of his office, an assignee of the certificate should thereafter be considered the purchaser within a statute providing that notice of forfeiture should be issued to the purchaser. See also Nesbit vs. Bearman, 109 Pac. 1085, 83 Kan. 122, in which it was held that an assignee of a tax sale certificate bid in by the county for delinquent taxes was a purchaser at a tax sale.

In Butler vs. Bank, 68 N.W. 998, 94 Wis. 351, it was held under a statute providing that the term "purchaser" should be construed to embrace every person to whom any estate or interest in real estate might be conveyed and also every assignee of a lease, mortgage or other conditional estate, the assignee of a mortgage was included within the term "purchaser". In Caruthers vs. Greer, 122 S.W. 629, 92 Ark. 167, it was held that the word "purchaser" in a statute authorizing the purchaser under an invalid tax sale to recover the taxes assessed against the land for which it was sold, and taxes subsequently paid, up to the time of adjudication of invalidity, did not limit such right of recovery to the person actually purchasing at the sale, but extended to his subsequent assignees.

We are inclined to the view that the term "purchaser" used in the above quoted language of Section 5 of said Chapter 88, includes an assignee of the original purchaser who has completed the payments under the contract of purchase and is entitled to a quit claim deed from the state. It is our opinion that such an assignee is a purchaser whose name should be certified by the county auditor to the Tax Commission. It is our opinion that it is not necessary to change the form of certificate by the county auditor to the Tax Commission. This disposes of questions three and four.

While it is probably not mandatory for him to do so, we believe it is advisable for the county auditor to keep a record on the repurchase contract or receipt of the chain of title to assist him in ascertaining, after installment payments are completed, who is entitled to a quit claim deed from the state. When the auditor certifies the name of the purchaser to the Tax Commission he should use the best information available to ascertain who the purchaser actually is.

We answer your fifth question as follows:

Upon forfeiture to the state for nonpayment of the taxes, all taxes and assessments are cancelled. Section 7, Chapter 386, Laws 1935, as amended. The payment of the repurchase price pursuant to said Chapter 88, Extra Session Laws 1937, is not the payment of taxes. The only taxes reinstated by Chapter 88 are special assessments payable in 1937 and thereafter. If at the time such deed is presented no subsequent taxes are

due, it is our opinion that the deed may be stamped "Taxes Paid and Transfer Entered."

We are enclosing herewith a copy of an opinion to Mr. Emmett Jones, County Attorney of Lake County, dated December 15, 1937, which may be of interest to you and the County Auditor of Ramsey County in connection with the last question submitted.

WILLIAM D. GUNN,
Special Assistant Attorney General.

February 25, 1938. 412a-23

446

TAXATION—Tax forfeited lands—Leasing of for gravel pit.

Hon. H. C. Wenzel, Commissioner of Conservation.

You state that application has been made to the department of conservation to lease a gravel pit on tax forfeited land in the Roseau County Conservation Area created under Chapter 407, Laws of 1931. You point out that this land is not subject to repurchase under Chapter 88, Special Session Laws of 1937, inasmuch as ditch assessments were included in the sum for which said lands were forfeited. You then inquire whether the department of conservation has authority under Section 2, Chapter 407, Laws of 1931, to lease gravel pits on such land and fix the rental therefor.

In our opinion the department of conservation possesses this power.

MATTHIAS N. ORFIELD,
Deputy Attorney General.

November 26, 1937. 525

447

TAXATION—Tax forfeited lands—Repurchase of—Personal property tax judgment—Payment of.

Mr. M. F. Kinkead, County Attorney.

You state:

"Ramsey County has been asked for a partial release on a title to a certain piece of real estate in this County from the liens for personal property tax judgments obtained during 1936 and 1937. It appears that the title has forfeited to the State of Minnesota in June, 1937, for non-payment of taxes and the owner has repurchased under Chapter 88 Extra Session Laws of 1937 and is about to obtain a deed

from the State. It appears that the first judgment was docketed June 20, 1936, and the second was docketed July 9, 1937, after the title forfeited to the State.

"Will you kindly advise whether or not the forfeiture of this title to the State wiped out the liens for personal property taxes so that the delivery of the State's deed upon repurchase carries with it all of the title and interest of the State in these premises. If so, then I suppose that this owner is entitled to a partial release from the liens of record above mentioned."

Laws 1935, Chapter 386, Section 7, as amended by Extra Session Laws of 1935, Chapter 105, provides, in part:

"Immediately after forfeiture to the state of any parcel of land, as provided by Laws 1935, Chapter 278, the county auditor shall cancel all taxes and tax liens appearing upon the records, both delinquent and current, and all special assessments, delinquent or otherwise."

We are of the opinion that the taxes and tax liens referred to in said Section 7, as amended, are those real estate taxes and tax liens which are specific charges against the forfeited parcel, and do not include liens which arise because of a personal property tax judgment entered either before or after forfeiture.

A judgment lien is not an estate or interest in land. See Dunnell's Digest, Section 5066 and cases cited. In our opinion when the owner of the property referred to in your letter repurchased it from the state pursuant to Chapter 88, Extra Session Laws of 1937 and received a quit claim deed from the state, said property became subject to the lien of the personal property tax judgments obtained during 1936 and 1937.

WILLIAM D. GUNN,
Special Assistant Attorney General.

January 18, 1938. 421a-8

448

TAXATION—Tax forfeited lands—Repurchase.

Mr. Henry N. Jenson, County Attorney.

You state:

"I assume that you have already passed on the question as to whether under Chapter 88, Laws Special Session 1937, taxes for the year 1936 are to be collected by the County Auditor before accepting payment and certifying repurchase arrangements within that Section.

"The Act provides for the reinstatement of special assessments. I am wondering if taxes for the year 1936 should be collected as well."

We are enclosing herewith a copy of an opinion written September 1, 1937, by Deputy Attorney General Orfield to the Minnesota Tax Commission, which answers your question in so far as it relates to land forfeited to the state for taxes for the year 1930.

A different situation is presented under Chapter 88, Extra Session Laws of 1937, where land has been forfeited to the state for taxes for the years 1926, 1927, 1928 and 1929. Said Chapter 88 provides that the former owner may repurchase land forfeited to the state for taxes for one or more of the years above referred to by paying a sum equal to three-fifths of the aggregate of all taxes and assessments accrued against said land at the time of forfeiture less penalty and interest but including cost.

It is specifically provided that special assessments payable in 1937 must be paid in full without penalty and interest. There is no similar provision relating to general taxes for the year 1936 payable in 1937.

In any case where the taxes for 1936 were accrued against the land at the time of forfeiture it is clear that a sum equal to three-fifths of such taxes must be included in the purchase price of a parcel of land repurchased pursuant to said Chapter 88. Land could not be forfeited to the state for the years 1926, 1927, 1928 and 1929 until July 1, 1936. See Section 2, Chapter 278, Laws of 1935. In some cases land has not yet been forfeited to the state for taxes for the years above referred to because the provisions of Chapter 278, Laws of 1935, have not been complied with. Land remains subject to taxation while it is in private ownership.

Before it can be determined whether the 1936 taxes must be included in the purchase price under Chapter 88 it becomes necessary to ascertain (1) the date when the land was forfeited to the state, and (2) whether the 1936 taxes were accrued against the land on said date. Land is forfeited to the state for taxes for 1926, 1927, 1928 and 1929 after proceedings are taken pursuant to Chapter 278, Laws of 1935, and a year has expired after the service of notice of expiration of redemption and the filing of proof of such service.

The question of when taxes are accrued against land is a troublesome one. Arguments may be advanced to sustain either one of three positions, namely; (1) that the tax accrues on May 1, (2) that the tax accrues when it becomes due and payable, (3) that the tax accrues when it is spread against the land on the books of the county auditor.

In the case of State ex rel. Susquehanna Ore Company v. Bjornson, 194 Minn. 649, 653, the Supreme Court held that on December 29, 1925, real estate taxes for the year 1925 were accrued against a parcel of land. This disposes of the second position above referred to.

In principle the question presented seems similar to the question of whether or not property acquired by the state for any public purpose is subject to taxation for the current year. This question has been before this office many times. The opinions have held that if land is acquired by the state prior to the time that the tax is actually spread by the county auditor there is no valid tax.

Section 2191, Mason's Minnesota Statutes of 1927, makes the real estate tax a lien upon the land from May 1st of the year in which the tax is levied. In the case of land owned by private individuals that date is controlling. See Dunnell's Digest, Section 9195; County of Martin v. Drake, 40 Minn. 137; State v. Northwestern Telephone Exchange Company, 80 Minn. 17; and Report of the Attorney General for 1927, Opinion No. 200.

In the case of land acquired by the State the rule is different. In Foster v. City of Duluth, 120 Minn. 484, the Supreme Court held that unless all proceedings necessary to perfect the tax levy were completed before the state acquired title there was no valid tax.

In the case of In re Delinquent Real Estate Tax Proceedings, 182 Minn. 437, the Supreme Court held that there was no authority to tax lands of the Rural Credit Department, some of which lands were acquired between May 1st and August 5th.

The auditor has no authority to spread the tax against the lands after title passes to the state, and until the tax is spread by him upon his books there is no tax in existence. McCormick v. Fitch, 14 Minn. 252, Gil. 185. The time when the auditor spreads the tax levy may vary in different cases. In no case can it be earlier than October 10th. It may be as late as January 1st of the following year.

It is our opinion, therefore, that the 1936 tax need not be paid or included in the purchase price under Chapter 88, Extra Session Laws of 1937, where the land was forfeited to the state prior to the time that the 1936 tax was spread upon the books of the county auditor. It is our opinion that if the land was forfeited to the state after the 1936 tax was spread upon the books by the county auditor, the 1936 tax was accrued against the land at the date of forfeiture and should be included in the purchase price.

WILLIAM D. GUNN,
Special Assistant Attorney General.

September 13, 1937. 425c-17

449

TAXATION AND TAXES—Tax forfeited lands—Repurchase.

Mr. M. F. Kinkead, County Attorney.

You ask the following questions:

"I have a request for an opinion from the County Auditor of Ramsey County as to whether in the event a repurchase is made under Chapter 88, Special Session Laws 1937, general taxes for 1937 may be levied and assessed or will the property be exempt from this year's taxes because it forfeited to the state prior to May 1, 1937. We are

also asked whether 1937 taxes may be levied and assessed against property which is forfeited to the state subsequent to May 1, 1937."

You first refer to a situation where a parcel of land became forfeited to the state prior to May 1, 1937 and is being repurchased subsequent to May 1, 1937 under Chapter 88 of the Extra Session Laws of 1937, and inquire whether taxes for 1937 may be levied and assessed against such a tract of land.

We advise you that inasmuch as such a parcel of land was on May 1, 1937 the property of the state and therefore not subject to assessment at that time, no assessment of general taxes can be made for the year 1937. We point out, however, that Section 1 of said Chapter 88 provides that upon such repurchase any special assessments payable in 1937 and thereafter, theretofore cancelled under Chapter 386, Laws of 1935 or under other laws, shall be reinstated and the county auditor shall forthwith levy and assess against said parcel any special assessment which would have been levied and assessed payable in 1937 and thereafter except for such forfeiture. You should note also that when any special assessment shall be reinstated or levied and assessed (unless required to be paid at the time of repurchase) the same must be paid at the time and in the manner in which said special assessment would have been payable except for the forfeiture. It follows that any special assessment which would have been levied and assessed, payable in 1937 and thereafter, except for the forfeiture, is to be levied and assessed notwithstanding the forfeiture. Accordingly, under the facts stated by you, any special assessment against a given parcel payable in 1937 which would have been levied and assessed in 1937 except for the forfeiture, is to be levied and assessed in 1937 notwithstanding the forfeiture, but general taxes against such a parcel cannot be levied and assessed in 1937.

Your second inquiry is whether 1937 taxes may be levied and assessed against a parcel of land forfeited to the state subsequent to May 1, 1937 (and we assume) repurchased under said chapter during 1937.

With reference to your second question three factual situations are possible. (1) The parcel of land may become forfeited before it is assessed. (2) The parcel may become forfeited after it has been assessed but before the levy has been extended on the county auditor's books. (3) The parcel may become forfeited after the levy has been extended on the county auditor's books. In the first situation the general taxes cannot be assessed. In the second situation the levy cannot be extended on the books of the county auditor. Pursuant to Chapter 326, Laws of 1937, the county auditor is required, immediately after forfeiture, to cancel "all taxes and tax liens appearing upon the record, both delinquent and current." This, we believe, includes the tax lien for the 1937 tax. In the first situation there could be no assessment of taxes that had theretofore been cancelled. In the second situation there could be no extension on the auditor's books of taxes that had theretofore been cancelled. In the third situation, however, the 1937 tax would have accrued against the land at the time of forfeiture and three fifths of the general tax for 1937 would accordingly have to be

included in the repurchase price pursuant to the provision of Section 1 of Chapter 88 of the Extra Session Laws of 1937, which provides that the owner at the time of forfeiture of a parcel of land lost for taxes for certain years may repurchase the same "for three fifths of the aggregate of all taxes and assessments accrued against said parcel at the time of forfeiture, less penalties and interest, but including costs."

What we have said above with reference to special assessments is applicable to your second question as well as to your first.

MATTHIAS N. ORFIELD,
Deputy Attorney General.

October 25, 1937. 425c-13

450

TAXATION—Tax forfeited lands—Repurchase by former owner.

Hon. Herman C. Wenzel, Commissioner of Conservation.

You ask:

"We will appreciate your opinion on the following questions:

"Chapter 326 Section 7 Laws of 1937 provides 'Immediately after forfeiture to the state of any parcel of land, as provided by Laws 1935, Chapter 278, the county auditor shall cancel all taxes and tax liens appearing upon the records, both delinquent and current, and all special assessments, delinquent or otherwise. When the interest of a purchaser of state trust fund land sold under certificate of sale, or of his heirs or assigns or successors in interest, shall by reason of tax delinquency be transferred to the state as provided by law, such interest shall pass to the state free from any trust obligation to any taxing district and free from all special assessments and such land shall become unsold trust fund land.'

"Chapter 485 Laws of 1937 provides for the repurchase of lands forfeited for taxes for the years 1928 or 1929 in certain cases.

"Chapter 88 Special Session Laws of 1937 provides for the repurchase of lands forfeited for the years 1926 to 1930 both inclusive.

"Example: X holds a state land certificate on a tract of trust fund land. The interest on the certificate is paid to 1935. The land forfeited to the state for delinquent taxes on June 15, 1937, the year's period of redemption having expired on that date. The land is not in any area specifically exempted by Section 6, Chapter 88, Special Session Laws of 1937.

"This presents the following question:

"1. What rights, if any, has X under Chapter 485 Laws of 1937 or Chapter 88, Special Session Laws of 1937? Would not such a repurchase be contrary to the provisions of sale of trust fund lands as set out by Article 8 Section 2 of the State Constitution?"

X has no rights of repurchase under either Chapter 485 of the Laws of 1937 or under Chapter 88 of the Extra Session Laws of 1937. Pursuant to Section 7 of Chapter 326, Laws of 1937, quoted above, the interest of a purchaser of state trust fund land becomes vested in the state immediately after the state acquires title under Chapter 278, Laws of 1935. It is provided that such land shall become unsold state trust fund land and shall be free from any trust obligation to any taxing district and from all special assessments. Being then unsold trust fund land it must be offered for sale in the manner provided in the state constitution for the sale of such land. Section 2 of Article 8 of the state constitution provides that no portion of the school land shall be sold otherwise than at public sale. The sale provided for in said Chapters 485 and 88 is not public. Said Section 2 of Article 8 of the state constitution provides for the preservation of the proceeds of the sale of school lands as a perpetual fund and for the distribution of the income from such fund to the different townships throughout the state. Said Chapter 88 provides for the distribution of the proceeds of the sale among the interested taxing districts. The same limitations are imposed by said Section 2 of Article 8 on the sale of swamp lands and in addition a limitation of the minimum price. Neither said Chapter 485 nor said Chapter 88 sets a minimum sale price.

The legislature cannot have intended to include state trust fund lands in the sales of land authorized in said Chapters 485 and 88 or it would have paid attention to these regulations of the constitution with reference to the manner of sale of such lands.

MATTHIAS N. ORFIELD,
Deputy Attorney General.

August 11, 1937. 525

451

TAXATION—Tax forfeited lands—Repurchase—Rents and profits.

Mr. F. H. Stadavold, County Attorney.

You inquire:

"1. Under Chapter 386, Minnesota Laws of 1935, the County of Polk has leased certain lands. They have now been repurchased by the owner under Chapter 88 of Extra Session Laws of 1937. Does the repurchaser get the county's share under the lease or does this share go to the county to be placed in the forfeited tax sale fund as provided by Section 9 of Chapter 386? Would it make any difference if the lease called for a cash rent or crop share rent?"

Section 4 of Chapter 386, Laws of 1935, authorizes the lease of land forfeited to the state for taxes. Chapter 88 of the Extra Session Laws of 1937, provides that a former owner of the land forfeited to the state for taxes for the years 1926, 1927, 1928, 1929 and 1930 may repurchase such lands under certain conditions. Said Chapter 88 is silent on the effect of such a repurchase on an existing lease. However, Section 3 of said Chapter 88 provides as follows:

> "All such parcels of land shall be subject to lease under the provisions of Chapter 386, Laws of 1935, as amended, until repurchased." This is a recognition of the existing right to lease such land.

Chapter 386 does not specifically provide the length of time that a lease made thereunder may run but we believe that the authority to lease should be construed to be authority to lease for a reasonable time, as for a crop season in the case of the lease of agricultural lands.

A lease of forfeited land that is authorized is a contract between the state and the lessee. We question the authority or the intention of the legislature to provide that a repurchase of land pursuant to Chapter 88 should thereupon terminate the lease. In other words, we believe that a repurchase of lands under said Chapter 88 is subject to the existing rights of the lessee to such land. If we are correct in this conclusion it follows that the same rules will apply with reference to your question that would apply if a sale of land subject to lease was made by a private owner of such land, where the contract of sale was silent on the question of whether the seller or buyer was entitled to rent.

It is a general rule that rent belongs to the owner of the soil and that an assignment or transfer of the reversion carries with it the right to rent subsequently accruing unless it is expressly reserved. See 36 C. J. page 364, Sections 1205 and 1206 and cases cited; 16 R. C. L. page 915, Section 422. This is the rule in Minnesota. See Dunnell's Digest, Sections 5419 (a) and 5419 (b); Boeing v. Owsley, 122 Minn. 190; State v. Royal Mineral Association, 132 Minn. 232; Orr v. Bennett, 135 Minn. 443; and O'Brien v. Liberty Mining Co., 164 Minn. 186. In 16 R. C. L. page 915, Section 422 the rule is stated as follows:

> "It is not necessary in order to make rent incident to the reversion and transmissible with it that it should be payable in money, and where rent is payable out of the grain raised. If the landlord sells the land, the vendee becomes entitled to that proportion of the grain growing at the time of the conveyance which the landlord would have been entitled to had he not conveyed; * * *"

It is our opinion, therefore, that where there is an authorized lease of a parcel of land subject to repurchase pursuant to said Chapter 88, and the relation of landlord and tenant exists between the state and the lessee, and the land is thereafter repurchased pursuant to said Chapter 88 the repurchaser is entitled to rents that are not accrued at the time the land is repurchased. If the rents are accrued at the time of such repurchase, they belong to the state. Whether in a given case the rents are accrued

at the time of repurchase will depend upon the terms of the lease and the other facts existing in such case.

It appears from your letter that certain forfeited land in your county was leased on a share crop basis. Generally, contracts for farming on shares in this state do not create the relation of landlord and tenant between parties. Under the form of contract in common use the parties are tenants in common of the crops until there is a division thereof. However, such contracts sometimes create the relation of landlord and tenant between parties. The intention of the parties controls. In Dunnell's Digest, Section 5484, is the following statement:

> "It is usually held that where the cropper has possession exclusive of the owner this is conclusive that the relation of the parties is that of landlord and tenant. Provisions for a fixed term, provisions to give up possession at the end of the term, provisions against underletting, and provisions to keep the improvements on the premises in repair are all deemed important in indicating an intention to create the relation of landlord and tenant. Under the form of contract in common use in this state the parties are tenants in common of the crops until a division, but the title to all the crops remains in the owner of the land until a division as security for the performance of the contract by the cropper. The position of the landowner is that of a mortgagee."

By applying the rules established in the cases cited in the notes of said Section 5484, Dunnell's Digest, to the facts as they exist in connection with the leasing of forfeited land on the shares, you should be able to determine whether the relation between the state and the lessee is that of landlord and tenant or whether the state and the lessee are tenants in common of the crops.

Cultivated and annual crops under common law and under our statutes are personal property. See Schuchard v. St. Anthony Elevator Co., 176 Minn. 37. But unsevered crops are regarded as part of the realty in the sense that they will pass by deed thereof without special mention unless excepted. See Dunnell's Digest, Section 2508 and cases cited. In Rue v. Kutzbach, 164 Minn. 366, the Supreme Court said:

> "Where there is no reservation thereof, growing crops pass with a conveyance of the land."

If the crops are severed at the time the land is conveyed, they do not pass with the reversion.

The rule seems to be that where by the terms of a lease, rent is reserved in a share of the crops and the landlord and tenant are tenants in common of the growing crops, a purchaser of the land from the landlord during the lease in the absence of an agreement to the contrary, is not entitled to the portion of the crops belonging to the landlord, which had been severed from the realty before he acquired title to the land upon which the crop was grown. See Wendt v. Stewart, 74 Nebr. 855, 105 N. W. 550.

In the case of Dixon v. Niccolls, 39 Ill. 372, 89 Am. Dec. 312, 316, the court said:

> "If the relation of landlord and tenant existed, then the rent followed the reversion. If Knoop and Broderick were tenants in common of the crop, then it did not pass by the deed."

It is our opinion, therefore, that if as a result of the share crop agreements referred to in your question, the relation of landlord and tenant exists between the state and the lessee, a former owner of the land repurchasing the same pursuant to Chapter 88, Extra Session Laws of 1937, is entitled to the landlord's share of the crops as rent if such rent was not accrued at the date of repurchase. If such rent was accrued at the date of repurchase it is our opinion that it belongs to the state. If, however, the contract referred to does not create the relation of landlord and tenant between the state and the lessee but rather that of tenants in common of the crops, it is our opinion that if at the date the land was repurchased the crops had been severed from the land, the landlord's share of the crops belongs to the state. If the crops were not severed at the date of repurchase, the landlord's share of the crops belongs to the repurchaser.

> "2. Land forfeited on December 8, 1936, for taxes of 1926 to 1935 was repurchased on December 9, 1936, under Chapter 407, Laws of 1933. Is this land subject to the taxes of 1936, which became due on January 4, 1937?"
>
> In case the above land is taxable for 1936, would it still be taxable for 1936 in case of repurchase after January 4, 1937?
>
> Would it be liable for taxes of 1936 and 1937 if repurchased now, September 16, 1937, under Chapter 88, Special Session of 1937?"

Section 1 of Chapter 407, Laws 1933, provides that the former owner of land forfeited to the state for taxes for either of the years 1926 or 1927, may repurchase such land by paying a sum equivalent to the amount of one-half of the taxes accrued against the land at the date of forfeiture, less penalties, interest and costs. It is our opinion that if the 1936 taxes were spread against the land on the books of the county auditor on December 8, 1936, when such land was forfeited to the state, the 1936 taxes were accrued against the land and one-half of the amount of such taxes should have been included in the repurchase price of such land, whether repurchased on December 9, 1936, or after January 4, 1937. Otherwise the land is not subject to the 1936 tax. We are enclosing herewith a copy of an opinion written September 13, 1937, to Mr. Henry N. Jenson, County Attorney of Becker County, in which the reasons for the conclusions above reached are fully stated.

If repurchased now, pursuant to Chapter 88, Extra Session Laws of 1937, three-fifths of the amount of the 1936 taxes, if accrued against the land at the date of forfeiture, should be included in the repurchase price. Special assessments payable in 1937 must be paid in full exclusive of penalty and interest at the time of repurchase. The land is not subject to

taxation during the time it is owned by the state, and under the facts stated is not subject to tax for the year 1937.

"3. Chaper 407, Laws of 1933, and Chapter 88, Special Session of 1937, provide for quit claim deeds from the State. Would a quit claim of this kind render the land immune from taxes as above or would it cover only the State's interest in taxes due at the time of forfeiture?"

As soon as a parcel of land is forfeited to the state for taxes, the county auditor is required to cancel all taxes and tax liens appearing upon the records, both delinquent and current, and all special assessments, delinquent or otherwise. See Laws 1935, Chapter 386, Section 7.

At the time a former owner offers to repurchase a parcel of land either under Chapter 407, Laws 1933 or Chapter 88, Extra Session Laws of 1937, there are no taxes or special assessments against the land. After the land is repurchased, it is, of course, subject to taxes which subsequently accrue, and as above indicated, special assessments payable in 1937 must be paid in full. We do not understand how the quit claim deed from the state issued pursuant to said Chapters 407 and 88 can have the effect of rendering the land immune from taxes.

WILLIAM D. GUNN,
Special Assistant Attorney General.

September 28, 1937. 412a-8

452

TAXATION—Tax forfeited lands—Repurchase—Who may exercise right of.

Mr. L. A. Wilson, County Attorney.

You ask the following four questions, which we answer in the order of your inquiry.

"Many tracts of land in this county have forfeited to the state for nonpayment of taxes pursuant to Chapter 278 of the Laws of 1935. The forfeiture occurred November 26, 1936, and thereafter all taxes against such tracts were cancelled except the 1936 tax which had not yet been extended. Many tracts were tax delinquent for the years 1926 and 1927 and are subject to repurchase pursuant to Chapter 407 of the Laws of 1933.

"One B. was the record owner of a certain tract which forfeited to the state November 26, 1936, for nonpayment of the taxes for 1926 and 1927 and subsequent years. One W. has now presented an unrecorded deed of said tract from B. which was executed and delivered to him prior to November 26, 1936, and proposes to pay the 1936 taxes on said tract and demands that the County Auditor certify that all other taxes have been paid or cancelled and that the Register of

Deeds record such deed upon payment of his prescribed fee therefore. Should the County Auditor so certify and should the Register of Deeds record such deed?"

Answer. Yes.

"Is said W. eligible to repurchase as owner under such unrecorded deed pursuant to Chapter 407 of the Laws of 1933?"

Answer. Yes. He was the owner of the land notwithstanding the fact that his deed was not recorded.

"If he is and if he does repurchase on an instalment basis may he then record his unrecorded deed prior to payment of the unpaid instalments of his purchase contract?"

Answer. Yes. The taxes against the land have been wiped out by the passing of title to the state. The unpaid instalments on the purchase price are not taxes.

"Might W. take a deed from B. at this time and thereafter repurchase? It may be assumed that B. is eligible to repurchase now and the precise question upon which a ruling is desired is whether such right passes by deed to the grantee by a deed executed and delivered after forfeiture?"

Answer. Yes.

"Would the form of deed affect the question in any way?"
Answer. No.

MATTHIAS N. ORFIELD,
Deputy Attorney General.

May 21, 1937 425c-13

453

TAXATION—Tax forfeited lands—Repurchase—Transfer of property.

Mr. J. J. Hadler, County Attorney.

You inquire:

"In the event that property is re-purchased from the State under Chapter 88, Laws of the Special Session of 1937, and such re-purchase is made by the payment of 20% cash and the remainder in annual installments, can a transfer of such property be made without the payment of any or all of such remaining installments?

"In other words, will the remaining installments be considered as taxes which must be paid before a deed describing such property can be recorded with the Register of Deeds?"

In our opinion, where land is repurchased pursuant to the provisions of Chapter 88, Extra Session Laws of 1937, and a payment of 20 per cent is made, a transfer of such property may be made without the payment of any or all of the remaining installments. In our opinion such remaining installments are not taxes which must be paid before a deed describing such property can be recorded with the register of deeds.

We are enclosing herewith a copy of an opinion to L. A. Wilson, County Attorney, Mahnomen County, written December 16, 1937, that may be of interest to you.

WILLIAM D. GUNN,
Special Assistant Attorney General.

February 8, 1938. 412a-23

454

TAXATION—Sales—Mortgages—When a lien.

Mr. George H. Tyler, County Attorney.

You inquire:

1. "In cases where the land has been taken over by the state for taxes delinquent prior to the year 1929 and are about to be sold after appraisement by the Commissioners and there is a mortgage on the land, what is the status of such mortgage after the sale?"

In our opinion if such land is sold by the state under the provisions of Chapter 386, Laws 1935, to a person other than the former owner, such person will get title to the land free from the lien of a mortgage that existed prior to the forfeiture of the land to the state for taxes.

2. "In a similar situation where the land is repurchased by the original owner and title by reason of such purchase vests in him would the mortgage still be a valid lien upon the premises?"

The question of whether, where land is repurchased by the original owner under said Chapter 386, a mortgage that existed prior to the forfeiture of the land to the state for taxes will be a valid lien against the land so purchased, is a question upon which we find no direct authority. Its answer will probably depend upon the warranty contained in the mortgage. Under the usual form of mortgage we are inclined to agree with you that the lien will continue to exist.

WILLIAM D. GUNN,
Special Assistant Attorney General.

March 9, 1938. 425i

455

TAXATION—Sales—Registration of title.

Mr. Frank J. Williams, Assistant County Attorney.

You state that you have received a letter from Mr. R. G. Patton, Examiner in the Land Registration Department of your county, in which he refers to the fact that the state is planning to make conveyance in your county of lands forfeited to it for delinquent taxes. He further states that several parties who are planning to purchase such lands intend to commence proceedings to register their title. He requests you to secure an opinion from this office as to whether or not the first sentence of Section 8250, Mason's Minnesota Statutes 1927, will apply to a title based upon such a conveyance.

We assume that the sales referred to in Mr. Patton's letter is to be held under the provisions of Laws 1935, Chapter 386, as amended.

The first sentence of Mason's Minnesota Statutes 1927, Section 8250, reads as follows:

> "No land, the title to which is derived from any tax or local assessment sale shall be first registered until such title has been adjudged to be valid by a court of competent jurisdiction, and a certified copy of the decree duly recorded with the Register of Deeds; provided, however, that any person may make application when for at least fifteen years the land has been in the adverse possession of the applicant or those through whom he claims title."

Although the title received by a purchaser of land forfeited for taxes at a sale held under Chapter 386, as amended, is in many respects superior to the ordinary tax title, we see no escape from the conclusion that such title is derived from a tax sale. It is our opinion, therefore, that the provisions of the first sentence of said Section 8250, Mason's Minnesota Statutes 1927, apply to such title. It is our opinion that before such land may be registered the title to the applicant must be adjudged to be valid by a court of competent jurisdiction.

WILLIAM D. GUNN,
Special Assistant Attorney General.

March 23, 1938. 425i

456

TAXATION—Tax forfeited lands—Special assessments—Not subject to.

Mr. George A. Barnes, County Attorney.

You state that a parcel of land in a village in your county was forfeited to the state for taxes on August 18, 1937; and that on December

18, 1937, the village council of the village in which said parcel was located filed "a sidewalk lien and a blacktop lien against this property which assessments are valid and were properly levied by the village council of Wabasso."

You also stated:

> "I am of the opinion that this lien can not be maintained against property belonging to the state of Minnesota under forfeited taxes, but the County Auditor asked me for an opinion from you as to whether or not this lien is still against the property or was cancelled by section 2 of the laws of 1935, chapter 105."

You request our opinion relative to the question submitted by your county auditor.

From the facts stated in your letter, it appears that the attempt to file said liens was made after the parcel in question had become the property of the state. The general rule is that public lands are subject to special assessments for local improvements only when made so by legislative enactment. See State Board of Education, 133 Minn. 386, Foster v. City of Duluth, 120 Minn. 484, and In Re Delinquent Real Estate Taxes, Polk County, 182 Minn. 437.

Laws 1935, Chapter 386, Section 7, as amended by Extra Session Laws 1935, Chapter 105, provides that immediately after forfeiture to the state for taxes the county auditor shall cancel all taxes and tax liens appearing upon the records, both delinquent and current, and all special assessments, delinquent or otherwise.

Because the liens referred to in your letter were not in existence at the time of forfeiture, there could be no opportunity for their cancellation by the county auditor pursuant to said Section 7, as amended. However, we agree with your conclusion that the charges for such local improvements are not a lien against the property. We base our opinion upon the ground that in the absence of a controlling statute property owned by the state is not subject to special assessments for local improvements.

WILLIAM D. GUNN,
Special Assistant Attorney General.

April 5, 1938. 700a-8

457

TAXATION AND TAXES—Tax forfeited lands—Easements on tax commission.

Mr. Charles L. Clark, County Attorney.

You enclose a copy of a letter written by you to the Minnesota Tax Commission in which you requested the Tax Commission to execute an easement for county highway purposes on certain parcels of land that have been forfeited to the state for taxes. You also enclosed a copy of letter

from the secretary of the Minnesota Tax Commission in which it was stated that the Commission was without authority to execute such an easement. You state that you are of the view that the Tax Commission does have this authority. If we agree with you, you request us to so advise the Tax Commission. If we are of the opinion that the Tax Commission does not have this authority, you ask us to advise how such an easement may be obtained.

In our opinion the Minnesota Tax Commission is without authority to execute the easement referred to in your letter. We have been unable to find a statute vesting such authority in the Tax Commission.

The statutes providing for the sale and management of tax forfeited lands to the state for taxes are incomplete in that they do not furnish an answer to your question. The general supervision of public lands is vested in the Conservation Commissioner. See Mason's Minnesota Statutes of 1927, Section 65, Laws 1931, Chapter 186, Laws 1935, Chapter 386, Section 1, Laws 1937, Chapter 310. We doubt if this general power of supervision authorizes the Conservation Commissioner to execute an easement of tax forfeited lands for county highway purposes.

The writer has discussed your problem with Mr. C. T. Bundlie, Assistant Attorney General in the Highway Department, where similar questions have arisen in connection with the taking of lands for state highway purposes. The Highway Department has always acquired such tax forfeited lands through the exercise of the power of eminent domain. Mr. Bundlie suggested that this was the only safe procedure for you to follow. Property devoted to one public use may be taken or acquired for another public use where the taking is not detrimental to the public and is not inconsistent with a paramount interest already existing. It is for the court to determine which interest is paramount.

We are sorry that we are unable to suggest a more satisfactory solution to your problem.

WILLIAM D. GUNN,
Special Assistant Attorney General.

April 13, 1938. 700a-3

458

TAXATION AND TAXES—Tax forfeited lands—Tax liens—Cancellation of.

Mr. N. A. Nelson, Minnesota Tax Commission.

You make inquiry as follows:

> "1. When a piece of land is sold at the forfeited sale under Chapter 386, Laws of 1935, as amended, and when only a one-tenth installment is paid, can the purchaser take possession of the property at once?"

In our opinion the purchaser of land under Chapter 386, Laws of 1935, is entitled to immediate possession.

"2. If there are special city assessments against a city lot that have not been paid are these cancelled? A certain city clerk contends that any unpaid city assessments, still standing on his records, are enforcible even if the lots have become forfeited to the state and have been sold. While Chapter 386, Laws of 1935, directs the county auditor to cancel all liens standing against property sold under the provisions of said Chapter 386, as amended, would this also apply to unpaid installments for local assessments that have not yet been certified to the county auditor by the city clerk?"

Section 7 of Chapter 386 of the Laws of 1935, as amended by Section 2 of Chapter 105 of the Extra Session Laws of 1935, provides as follows:

"Immediately after forfeiture to the state of any parcel of land, as provided by Laws 1935, Chapter 278, the county auditor shall cancel all taxes and tax liens appearing upon the records, both delinquent and current, and all special assessments, delinquent or otherwise. Nothing in this section shall apply to the cancellation of taxes and tax liens on state trust fund land."

You will note that this section provides for the cancellation of all taxes and tax liens appearing upon the records, both current and delinquent, and all special assessments, delinquent or otherwise. In our opinion this includes any unpaid city assessments and any unpaid installments of local assessments. Your question accordingly is answered in the affirmative.

MATTHIAS N. ORFIELD,
Deputy Attorney General.

June 30, 1937. 525

459

TAXATION—Tax forfeited lands—Withdrawal of—From list for sale.

Mr. E. A. Foster, Division of Forestry.

You state:

"Certain counties are interested in withholding some such lands and managing them for forestry purposes. Laws of 1935, Chapter 386, specifies that the county auditor shall sell the lands at an appraised valuation to anyone offering to buy them.

"Your advice, therefore, is desired on the following points:

"1. May a county board legally withhold tax-forfeited lands from sale after their classification has been approved by the Conservation Commissioner?

"2. After the date of public auction, can the remaining unsold lands be withheld from sale? The sale notice states, 'Tracts remaining unsold after the auction may be purchased through this office (County Auditor) at appraised value and on terms stated below.'

"3. If such lands were withheld from sale by the county board and managed for forestry purposes, could anyone at some future period force the county to sell the lands on the grounds that they had been previously advertised and offered?

"4. If the county board cannot legally withhold tax-forfeited land from sale that had been advertised and offered, is there any other legal means to reasonably safeguard such land against sale (for example, reappraisal at a higher valuation)?"

Laws of 1935, Chapter 386, provides the procedure to be followed in offering tax forfeited lands for sale. Section 1 of said Chapter 386, after providing that such lands shall be classified as agricultural and nonagricultural, which classification shall be approved by the Conservation Commission before lands are offered for sale, states in part:

"All such parcels of land shall be sold by the state at public or private sale, as hereinafter provided, if it shall be determined, by the county board of the county wherein such parcels lie, that it is advisable to do so, having in mind their accessibility, their proximity to existing public improvements, and the effect of their sale and occupancy upon the public burden."

It is apparent from the language above quoted that the legislature intended to vest authority in the various county boards to determine in the first instance whether a parcel of land forfeited to the state for taxes should be sold. The legislature clearly recognized that in some cases it would not be for the best interest of the state to sell certain parcels.

The problem presented by your questions is whether after a county board has made a determination with reference to certain parcels, and determined that such parcels should be sold, the board has implied authority to withdraw such lands from sale either before or after the date of the public sale provided for in said Chapter 386.

The statute provides for an annual reappraisal if in the opinion of the county board such a reappraisal is necessary to carry out the intent of said Chapter 386. We believe it is quite clear that the county board in the exercise of its discretion may withdraw parcels from sale at the time of a reappraisal if it is of the opinion that the best interest of the state will be served by such a withdrawal. It does not seem to us that the legislature could have intended to give a county board such broad authority to determine whether land should be sold without giving it implied authority to correct errors that might be made. While the statute is somewhat incomplete in this respect, we are inclined to the view that if a county board in the exercise of an informed and honest discretion determines that parcels of land offered for sale should be withdrawn from sale, a resolution

withdrawing such parcels from same may be adopted either before or after the date of the public sale provided for in said Chapter 386.

WILLIAM D. GUNN,
Special Assistant Attorney General.

June 7, 1938. 425c-5

460

TAXATION—Tax lists—Delinquent—Publication of—What included.

Mr. A. B. Anderson, County Attorney.

You refer to us for answer the following question addressed to you by your county auditor:

> " 'Is it necessary for the County Auditor to include in his publication of the delinquent tax list the 1935 tax payable in 1936 in a situation where the owner of the land upon which the 1935 tax payable in 1936 has not been paid and where the owner has under Chapter 72 of the Extra Session Laws of Minnesota for 1935-36 confessed judgment on delinquent taxes for the years 1932, 1933 and 1934?' "

Section 2 of said Chapter 72 provides in part as follows:

> "Upon the entry of said judgment, * * * further proceedings shall be suspended on any judgment for taxes embraced in said confessed judgment as long as no default exists."

Section 5 of said Chapter 72 provides in part as follows:

> "In the event of default occurring in the payments to be made under any confessed judgment entered pursuant hereto, the penalties and interest waived under the terms of section 2 hereof shall be reinstated and the lands described in such confessed judgment shall thereupon be subject to forfeiture according to Laws 1935, Chapter 278."

Mason's Minnesota Statutes of 1927, Section 2106, provides in part as follows:

> "On or before February 1 in each year the county auditor shall file with the clerk of the district court of the county a list of the delinquent taxes upon real estate within his county, which list shall contain a description of each parcel of land on which such taxes shall be so delinquent, except such parcels as shall have theretofore been bid in by the state and not assigned by it or redeemed."

From the foregoing provisions of the law it appears that when a person confesses judgment pursuant to said Chapter 72 all further proceedings on any judgment for taxes embraced in said confessed judgment are suspended. If, however, the current taxes are not paid and become delinquent, a default occurs and the land described in such confessed judg-

ment becomes subject to forfeiture pursuant to law. The status of such lands then becomes the same as if no confession of judgment had been entered pursuant to said Chapter 72. You do not definitely so state, but from the facts presented we assume that a default has occurred in the payments on the judgment referred to in your letter of inquiry. Upon such default the penalties and interest waived under the terms of Section 2 of said Chapter 72 were reinstated and the land to which you refer became subject to forfeiture according to Chapter 278 of the Laws of 1935. It was then within the scope of the exception set forth in Section 2106 of Mason's Minnesota Statutes of 1927, quoted above, and as such need not be included in the list of lands filed with the clerk of the district court and need not be published.

We are accordingly of the opinion that your question should be answered in the negative.

MATTHIAS N. ORFIELD,
Deputy Attorney General.

June 10, 1937. 314b-22

461

TAXATION—Trust fund land—Confession of judgment.

Hon. Stafford King, State Auditor.

You state that Ed Kutina of Effie, Minnesota, purchased the SE¼ NW¼ of Section 36-63-26 from the State; that said tract has become delinquent for the nonpayment of interest and taxes since the year 1929; that on October 15, 1937, the State Conservation Department had this tract put on the list of lands to be offered for sale at International Falls; that prior to the sale Mr. Kutina appeared before the Clerk of the District Court and offered to confess judgment for the delinquent taxes against said land pursuant to the provisions of Chapter 486, Laws of 1937; and that the county auditor and county treasurer of Koochiching County refused to accept payment upon the offer to confess judgment for the reason that they construed our opinion of June 2, 1937, as "binding with reference to tracts of land in this class, as recited above."

You further state and inquire:

> "I cannot understand why this refusal was made, as it appears, under Chapter 486, Laws of 1937, that the original purchaser has the right to redeem property by appearing before the Clerk of the District Court and confessing judgment and then making payments therefor.
>
> "The Constitution of Minnesota provides that STATE TRUST FUND lands may be redeemed at any time by paying all delinquent interest and penalties thereon.

"There seems to be a difference of opinion with reference to this sale. Therefore, will you kindly go over the opinion rendered by you on June 2, 1937, and advise this department whether or not these persons, Mr. and Mrs. Ed. Kutina, would have the right to proceed to redeem their property?"

We are not aware of any provision in the Constitution of this state providing that state trust fund lands may be redeemed at any time by paying all delinquent interest and penalties thereon. In our opinion the question of whether the certificate holder referred to in your letter may confess judgment under the provisions of Extra Session Laws of 1935, Chapter 72, as amended by Laws of 1937, Chapter 486, depends upon whether or not the offer to confess judgment was made prior to the time that the interest of the certificate holder in the land covered by said certificate was forfeited as the result of proceedings taken pursuant to the provisions of Laws of 1935, Chapter 278. It does not definitely appear from the statement submitted by you whether any such proceedings with reference to the land covered by said certificate have been taken. If before the offer to confess judgment was made a valid notice of expiration of redemption was served pursuant to said Chapter 278 and a year expired after service of such notice and the filing of proof thereof, it is our opinion that the county auditor and county treasurer of Koochiching County were right in refusing to accept payment under such offer. If on the other hand the offer to confess judgment was made before forfeiture pursuant to said Chapter 278, we believe that such payments should have been accepted.

The legislature has provided that when the interest of a purchaser of trust fund land sold under a certificate of sale shall be transferred to the state by reason of tax delinquency "such land shall become unsold trust fund land." See Laws of 1937, Chapter 326, which amended Laws of 1935, Chapter 386, Section 7, as amended by Extra Session Laws of 1935, Chapter 105.

WILLIAM D. GUNN,
Special Assistant Attorney General.

December 28, 1937. 412a-10

462

TOWNS—Annual meeting — Motions — Reconsideration of — Highways — County aid roads—Designation of by county board.

Mr. M. C. Rockne, Township Attorney.

You state that at an annual town meeting called for the purpose of considering joint motion with the county board on a county road, the voters present at said meeting unanimously "took the position of designating a certain road as a county road and the gas tax from the township was to be applied to its construction"; that this road was surveyed and the county board purchased culverts for the same but no work was

done; and that at the annual town meeting this year action was taken by the electors to reconsider the former designation of said road whereby the former designation was "lost by a vote of two to one."

You direct attention to the provisions of Mason's Minnesota Statutes of 1927, Section 1035, and inquire:

> "Would you construe the language to mean that the motion for reconsideration would have to have a majority of all the qualified electors at the last regular election or a majority of all those present at this town meeting?"

Section 1035, to which you direct attention, so far as pertinent, reads as follows:

> "* * * no proposition to reconsider any vote shall be entertained at any town meeting **unless made within one hour from the time such vote was passed,** or the motion for such reconsideration is sustained by a number of voters equal to a majority of all the names entered upon the poll list **at such election up to the time such motion is made;** * * *"

We construe the above quoted language to mean that the motion for reconsideration in order to carry would have to have a majority of all the qualified electors entered upon the poll list at the election at which the proposition was originally adopted. The language of the statute seems to indicate that a motion to reconsider must be made at the annual meeting at which the original proposition was adopted. In other words, the statute does not seem to contemplate a motion for reconsideration at a meeting subsequent to that at which the original proposition was adopted.

Although you do not so state, we assume that the county aid road to which you refer was designated as such pursuant to Chapter 283, Laws 1929, as amended. This statute, in substance, provides for the apportionment and use of moneys by the several counties of the state of the tax imposed on the use of gasoline. Under this law the county boards have exclusive authority to designate what are known as **"county aid roads."** All of the money paid to the county out of the gasoline tax must be used either in the construction or maintenance of such county aid roads. It will be noted from the language of said statute that neither the electors of the town nor the town board have anything directly to say as to what road or roads shall be designated by the county board on which this money is to be expended.

In other words, the county board is the duly constituted body to designate what county aid road in the township this gas tax money is to be spent on. It is true that in most cases county boards endeavor to be fair and to designate county aid roads as the needs of the several towns may require. As indicated, however, under the above referred to act the legislature has placed the matter of designating such county aid roads exclusively under the jurisdiction of the county board.

It will be observed from the provisions of Section 8 of said Chapter 283 that the only time that the electors would have occasion to vote with reference to such county aid road is in the event that the town within which such road is to be constructed desires to appropriate an additional amount of money out of its road and bridge fund to be expended by the county board on the construction of such road in such town. In other words, the only time that the electors of the town would vote with reference to such county aid road construction would be if the town was desirous of expending an additional sum of money on such road, above the amount the county board appropriates or spends on the same.

DAVID J. ERICKSON,
Deputy Attorney General.

March 19, 1937. 434b-13(a)

463

TOWNS—Drains—Private—Outlet of.

Mr. Milton F. Juhnke, County Attorney.

You state that the owner of certain land desires to construct "a private tile system along a natural watershed with the outlet of said tile to empty into a ditch along an established town road."

You inquire:

> "Will you please advise me as to whether or not an outlet of a private tile can be emptied into the ditch along an established town road, or must such outlet be a number of feet from such ditch?"

We are not aware of any statutory provisions requiring the outlet of a private drainage system emptying into the ditch along a town road to be located a certain number of feet from the right-of-way of said road.

However, we direct your attention to Subdivision 1 of Section 2615, Mason's Minnesota Statutes of 1927, which provides as follows:

> "Any person who shall obstruct any of the public highways of this state in any manner or who shall dig any holes therein, or remove any earth, gravel or rock therefrom, or any part thereof, or who shall in any manner obstruct any ditch on the side of any such highways, and thereby damage the same, shall be guilty of a misdemeanor. It is hereby made the duty of the county attorney to prosecute all violations of the provisions of this section, occurring in his county."

Under the above referred to statutory provisions, a person owning land adjacent to a public highway may not locate the outlet of his private drainage system at a place where such outlet or the water emptying therefrom will obstruct a public highway or the ditch along the side of such highway.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

August 13, 1938. 602h

464

TOWNS—OFFICERS—Assessor—Bond—Place of filing.

Mr. Frank F. Michael, County Attorney.

You state that Section 1084 provides that the town assessor's bonds should be filed with the town clerk, and Section 1987 provides for the filing of said bond with the county auditor.

You inquire as to which of said sections is controlling.

Said Section 1987 was originally enacted as Section 30 of Chapter 1, Laws 1878. This section was incorporated into the Revised Laws of 1905 by the Revision Commission as Section 805 with slight changes in the language thereof. Section 1084 of Mason's Minnesota Statutes of 1927 was apparently incorporated in the Revised Laws of 1905 by the Revision Commission as a new section. However, the Revision Commission evidently had in mind the provisions of said Section 805, Revised Laws of 1905 at the time of the insertion of said Section 677 into said Revised Laws. (Sec. 1084, Mason's Minnesota Statutes of 1927.) In other words, we do not believe that there was any intention on the part of the legislature at the time of the enactment of said Section 677 of the Revised Laws of 1905 to supersede or modify the provisions of said Section 805, Revised Laws of 1905. (Sec. 1987, Mason's Minnesota Statutes of 1927.)

We are of the opinion, therefore, that said Section 1987 is controlling rather than the provisions of said Section 1084. It necessarily follows that the township assessor's bond should be filed with the county auditor and not with the town clerk. The township assessor is more or less answerable to the county auditor; he receives his assessment books and the necessary blanks and forms from the county auditor. The county auditor should have in his office some satisfactory evidence that he is delivering such books and blanks to the proper township officer. Moreover the filing of the official bond and the official oath of office by the assessor with the county auditor constitutes notice that the town assessor has accepted such office. The duties of the assessor do not relate solely to the affairs of the township. The state and county taxes are also based upon his assessment. The bond of the assessor runs to the State of Minnesota, not to the township. In the case of State ex rel. v. Wadhams, 64 Minn. 318, the Supreme Court held that said Section 1987 was controlling over a conflicting city charter provision with reference to the place of filing of a city assessor's bond.

DAVID J. ERICKSON,
Deputy Attorney General.

April 16, 1937. 439a

465

TOWNS—Recreational programs—Need not be authorized by electors of town.

Mr. John E. Green, Town Attorney.

You state that the town board of the town of Thomson plans to conduct a program of public recreation and playgrounds under Chapter 233,

Laws of 1937. You further state that the matter was not taken up at the annual town meeting and no levy was made at that time to provide funds for such a program.

You inquire if the town board may proceed to carry out said program of public recreation and playgrounds without being authorized to do so by a vote of the electors at a special town meeting.

We are of the opinion that the town board of the town may carry out such a program without being authorized so to do by the voters of the town. The only provision contained in said act requiring a vote of the electors is as follows:

> "In the case of school districts the right to enter into such agreements with any other public corporation, board or body, or the right to delegate power to a board for operating a program of recreation, shall be authorized only by a majority vote cast at an annual school election * * *."

In expressly providing, under said Chapter 233, for the submission of certain questions to the vote of the electors in the case of school districts, we believe that it must have been the intention of the legislature not to require the other political subdivisions named therein to submit a proposal to conduct such a program to the vote of the electors thereof.

You also inquire whether a tax levy for such purpose can be made at a special town meeting, and, if not, whether the town is authorized to pay the expenses of conducting such a program from the general fund.

Said Chapter 233 makes no provision for a special tax levy to carry out the purposes of said act, and we believe that the cost thereof should be paid from moneys in the general fund. If there are not sufficient moneys in the general fund to enable the town board to carry on such a program, and if the tax levy necessary to raise the amount of money voted by the electors for general town purposes at the annual town meeting is less than the amount which may lawfully be levied for general town purposes, we are of the opinion that additional money for such purposes may be voted at a special town meeting called pursuant to Section 1031, Mason's Minnesota Statutes of 1927, at any time before the tax levy is certified to the county auditor, provided the levy necessary to raise the total amount of money authorized by the electors at both the annual town meeting and such special town meeting for general town purposes does not exceed the levy authorized by law.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

April 12, 1938. 519a

466

TOWNS—Tax levies—Road and bridge—Emergency levy.

Mr. George L. Angstman, County Attorney.

You state that one of the townships in your county has commenced to construct a new town road; that this road could now be completed as a

WPA project provided the township contributes a "small part of the expense in completing the road"; and that in order for the township to pay its portion of the expenses incident to the completion of said road as a WPA project it will be necessary to make an "increased levy of taxes."

You direct attention to Subdivision (e) of Section 2573, Mason's Minnesota Statutes of 1927, and inquire:

> "* * * would the fact that failure of the town board to raise the money and thereby lose the assistance of the WPA funds and by the loss of the WPA funds cause loss of employment in the township constitute an emergency under this act which would authorize the town board to make the levy for the purpose of raising the necessary funds with which to meet the requirements of the WPA setup?"

It is difficult to attempt to give any general definition of the word "emergency" as used in Subdivision (c), Section 2573, Mason's Minnesota Statutes of 1927, which would be applicable to all situations. The word, undoubtedly, is used in its ordinary sense.

Speaking generally, we may say that an "emergency" has been defined by the courts as:

> "An event or occasional combination of circumstances calling for immediate action, pressing necessity, a sudden or unexpected happening, exigency."

See Colfax County v. Butler County, 120 N. W. 444, 447, 83 Neb. 803; Parker v. City of Monroe, 55 So. 587, 128 La. 951.

Also as signifying,

> "some sudden or unexpected necessity, requiring immediate or at least quick action."

See Mallon v. Board of Water Commissioners, 128 S. W. 764, 765, 144 Mo. Appeal 104. See also United States v. Sheridan Contract Company, 149 Fed. 809, 814.

The power to levy an emergency tax is vested by the statute in the town board. Therefore, the duty of determining whether or not under all of the surrounding facts and circumstances existing in your township an emergency exists which will authorize such levy of an additional tax by the town board rests exclusively in such board, subject only to a review by the courts in a proper proceeding.

In our opinion an emergency under the above statute would arise and exist when an urgent necessity for additional funds arose in a town after the annual town meeting and after the voters had determined the amount of money to be raised for road and bridge purposes, and the necessity could not have been foreseen at the time of the annual town meeting. The facts outlined in your letter seem to come within the above requirements. However, as hereinabove indicated the question as to whether such facts

do constitute an emergency is for the determination of the town board in the exercise of its honest, official judgment and discretion.

DAVID J. ERICKSON,
Deputy Attorney General.

October 21, 1937. 519k

467

TOWNS—Town hall—Purchase or sale of.

Mr. William P. Berghuis, County Attorney.

You state that the township of Asstad in your county desires to call a special election, pursuant to Section 1031, Mason's Minnesota Statutes of 1927, for the purpose of voting on

> "(1) a proposal to buy a store building and the site on which it is located for a town hall and (2) a proposal to sell the present dilapidated town hall and the site on which it is located.

You inquire if this may be done at a special meeting called pursuant to said Section 1031 or if the purchase and sale of such town hall building must be authorized by the electors at the annual town meeting.

Section 1002, Mason's Minnesota Statutes of 1927, provides that the electors of the town, at the anual town meeting, shall have power:

> "* * *
>
> 8. To authorize the town board to sell and convey any real or personal property belonging to the town, not conveyed to and required to be held by the town for a special purpose.
>
> 9. To authorize the town board to purchase or 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 that 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 votes cast at such election of the legal voters of the township.
>
> * * *"

Said Section 1031, Mason's Minnesota Statutes of 1927, provides as follows:

> "Special town meetings may be held for the purpose of electing officers to fill vacancies or transacting any other lawful business whenever the supervisors, town clerk, and justices of the peace, or any two of them, together with at least twelve other freeholders of the town, file in the office of the town clerk a written statement that the interests of the town require that such meeting be held."

We are of the opinion that the authority conferred on the electors to transact "any other lawful business" of the town at special meetings held pursuant to Section 1031 authorizes said electors to grant authority to the town board to purchase a site for a town hall and sell real estate no longer needed for town purposes.

DWIGHT N. JOHNSON,
Special Assistant Attorney General.

March 18, 1938. 434b-13(d)

468

UNEMPLOYMENT COMPENSATION—Benefits—Amount of.

Industrial Commission of Minnesota,

Division of Unemployment Compensation.

You refer to Sections 5 (b) and 5 (e) of the Unemployment Compensation Law which provide as follows:

> "Weekly Benefit Amount for Total Unemployment. Each eligible individual who is totally unemployed (as defined in Section 2 (m)) in any week shall be paid, with respect to such week, benefits at the rate of 50 per centum of his full-time weekly wages, but not more than $15.00 per week, nor less than either $6.00 or three-fourths of such full-time weekly wage whichever is the lesser."
>
> "The maximum total amount of benefits payable to any eligible employee during any benefit year shall not exceed one-sixth of his total wages earned in employment by an employer during his base period or 16 times his weekly benefit amount, whichever is the lesser. The commission shall maintain a separate account for each individual who subsequent to January 1, 1937, earns wages in employment by an employer. After the expiration of each calendar quarter, the commission shall credit each such account with one-sixth of such wages earned by such individual during such quarter, or $65.00, whichever is the lesser. Benefits paid to an eligible individual shall be charged against amounts which have been credited to his account on the basis of wages earned in employment by employers during his base period and which have not previously been charged hereunder, in the same chronological order as such wages were earned."

You inquire:

> "The question arises whether or not the total amount of benefits paid to an eligible individual is governed by the credits referred to in the last part of the above sub-section. In other words, if all benefits paid to an eligible individual must be charged against the amounts which have been credited to his account, can payments to the eligible unemployed individual exceed the amounts credited to that eligible in-

dividual's account? Are the benefits paid to the unemployed individual charged entirely and only against these credits accumulated in the base period? Must the payment of benefits to the eligible unemployed individual be governed entirely by the credits which are allowed each quarter in the following manner:

"'After the expiration of each calendar quarter, the commission shall credit each such account with one-sixth of such wages earned by such individual during such quarter, or $65.00, whichever is the lesser.'"

A statute, or a section of the statute, should be construed as a whole and so as to harmonize and give effect to all its parts. If possible, it is to be construed so that no word, phrase or sentence will be superfluous or meaningless. The intent of the legislature in enacting a statute is ascertained from the entire context or subject matter of the statute or section of the statute under consideration. See Dunnell's Digest, Section 8951, and cases cited.

Unless the provisions in the statute above quoted, which provide for keeping a separate account for each employe and make provision for the maximum amount which may be credited to each such account, are construed as meaning that all benefits paid to an eligible individual must be charged against the amounts credited to his account, and that payments to an individual cannot exceed the amounts credited to his account, it seems to us that such provisions are rendered superfluous and meaningless. This is especially true because the provisions referred to are found in a section of the statute that relates primarily to limitations upon the amount of benefits payable to eligible individuals. Unless an individual is to be limited to the amount standing to his credit and his account, we see no reason why the legislature should have provided for the keeping of such accounts.

In the vast majority of cases, the individual will receive the same benefit whether the total amount of benefits is governed by the credits referred to in the last part of the above subsection or the first sentence in said subsection.

It is our opinion, therefore, that benefit payments to an eligible individual may not exceed the amount credited to that individual's account in the manner provided for in Section 5 (e) of the Unemployment Compensation Insurance Act.

WILLIAM D. GUNN,
Special Assistant Attorney General.

January 5, 1938. 885c-1

469

UNEMPLOYMENT COMPENSATION—Benefits—Determination of.

Industrial Commission of Minnesota,

Division of Unemployment Compensation.

You refer to the Minnesota Unemployment Compensation Law, Chapter 2, Extra Session Laws 1936, as amended by Chapters 306, 401 and 452, Laws 1937, and inquire:

1. Whether the provision for notice to interested parties required by Section 8 (b) of said law applies only to decisions made by the Commission, or whether it also applies to initial determinations made by a referee.

2. If the above referred to provision relating to notice applies to the initial determination of the referee, you inquire whether "such notice must be sent to all former employers of the unemployed worker during the base period."

3. "* * * if the provision of notice to be sent to the interested parties does not apply to initial determinations made by the referee, is the first part of this section dealing with initial determinations constitutional or unconstitutional under the due process of law provision of the Federal Constitution, Section 1, Article XIV, and Article 1, Section VII of the Minnesota Constitution?"

Said Section 8 (b), headed, "Initial Determination," provides that the commission shall designate "referees" whose duty it is to promptly examine all claims for benefits under the act and determine whether such claims are valid and if valid the amount and duration of the benefits the applicant is to receive, or refer such claims to the tribunal provided for in Subdivisions (c) and (d) of Section 8. It is further provided that "in any case in which the payment or denial of benefits will be determined by the provisions of Section 7 (d) of this Act, the referee shall promptly transmit his full findings of fact with respect to that subsection to the commission, which, on the basis of the evidence submitted and such additional evidence as it may require, shall affirm, modify, or set aside such findings of fact and transmit to the referee a decision upon the issues involved under that subsection which shall be deemed to be the decision of the referee." Section 7 (d) relates to certain cases in which the applicant is unemployed because of the stoppage of work caused by a labor dispute at the establishment where he has been employed. The rest of Section 8 (b) reads as follows:

> "**The referee shall promptly notify the claimant and any other interested party of the decision and the reasons therefor.** Unless the claimant or such employer or employers within ten calendar days after the delivery of such notification, or within 12 calendar days after such notification was mailed to his last known address, files an appeal from such decision, such decision shall be final and benefits shall be paid or denied in accordance therewith. If an appeal is filed, benefits with respect to the period prior to the final decision of the commission, shall be paid only after such determination; provided that if an appeal tribunal affirms a decision of a referee or the commission affirms a decision of the appeal tribunal, allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed, no employer's account shall be charged with benefits so paid."

The remaining subdivisions of Section 8 set out in detail the procedure to be followed in cases of appeal. Provision is made for giving notices to

interested parties of the decisions of the appeal tribunals and the commission.

We find nothing in the act indicating a legislative intent that the right of appeal should be limited to cases where a dispute exists under Section 7 (d) or where the referee on his own initiative refers to an appeal tribunal the question of the right of an applicant to benefits, or a question as to the amount or duration thereof. On the other hand, we believe it is clear that the legislature intended that the right of appeal should exist in all cases.

It seems unreasonable to adopt a construction of the statute that fails to provide for notices to interested parties of the determination of a referee, when such parties are given the right to appeal from such determination. If the provision relating to notice does not apply to initial determinations by the referee, we find no provision in the statute limiting the time in which an appeal may be taken. It is our opinion that the provision of Section 8 (b), providing for notice to interested parties, applies to the initial determination made by a referee.

Because of the provisions in the act relating to preferred ratings for employers, it seems clear that all former employers of an applicant for benefits, who were such employers during the employe's base period are interested parties to any determination of a referee. It should also be noted that Section 8 (b) provides for appeals by an employer or employers. We answer your second question in the affirmative.

Because of our answers to questions one and two it is unnecessary to give consideration to question three.

WILLIAM D. GUNN,
Special Assistant Attorney General.

October 15, 1937. 885f-2

470

UNEMPLOYMENT COMPENSATION—Benefits—Payment of partial benefits—Eligibility.

Industrial Commission of Minnesota,

Unemployment Compensation Division.

You refer to certain provisions in the unemployment compensation act relating to the payments of benefits for partial unemployment and inquire:

> 1. "Whether or not employes who work on a part time basis regularly and have always done so, in some cases over a period of years, are entitled to benefits or does Section 5 (c) apply only to workers who formerly worked on a full time basis and whose employment then becomes reduced to a part time employment basis then causing the worker to become partially unemployed."

2. "Can the Commission adopt a rule as provided for under Section 10 (e) to limit payment of partial benefits to workers who formerly worked on a full time basis and whose employment then becomes reduced to part time employment?"

Your first two questions may conveniently be considered together. Section 5 (e) provides in part that:

"Each eligible individual who is partially unemployed (as defined in Section 2 (k)) in any week shall be paid with respect to such week a partial benefit. Such partial benefit shall be an amount equal to the difference between his weekly benefit amount (as defined in Section 2 (q)) and five-sixths of his wages for such week."

It will be noted that before an applicant for benefits for partial unemployment may receive such benefits two conditions must exist, (1) such applicant must be an "eligible individual," and (2) the applicant must be partially unemployed "as defined in Section 2 (k)."

Section 6 of the act sets forth "BENEFIT ELIGIBILITY CONDITIONS" and Section 7 relates to "DISQUALIFICATION FOR BENEFITS." We find *nothing* in these sections which limits benefits to workers "who formerly worked on a full time basis and whose employment then becomes reduced to part time employment."

Section 2 (k) provides as follows:

"'Partial unemployment'—An individual shall be deemed 'Partially unemployed' in any week of less than full-time work if his wages payable for such week are less than six-fifths of the weekly benefit amount he would be entitled to receive if totally unemployed and eligible."

The act appears to contemplate that benefits shall be paid to all eligible individuals who are partially unemployed. Obviously a person may be partially unemployed in any week, under the above referred to statutory provisions, if his wages for such week are less than six-fifths of his weekly benefit amount, whether he has worked on a part time basis regularly or whether he formerly worked on a full-time basis and his employment was thereafter reduced to part time employment. It does not necessarily follow that every person who works on a part time basis is entitled to benefits.

Under the provisions of Section 10 (c) the Commission is authorized to "adopt, amend or rescind such rules and regulations, make such expenditures, require such reports, make such investigations and take such other action as it deems necessary or suitable in the administration of this Act." A rule or regulation adopted by the Commission must, of course, be consistent with the terms of the act. We doubt if the Commission by a rule or regulation or otherwise may limit the payment of partial benefits in all cases to persons who formerly worked on a full time basis and whose unemployment was thereafter reduced to part time employment.

Although the act does not in express terms so provide, we believe that the Commission may distinguish between the "part time employee" and

the person who is "partially unemployed" and limit the payment of benefits to persons who are "partially unemployed." The line between these two types of employees is one which cannot be drawn with precision as questions of fact will necessarily be involved in each case. Generally we may say that a "part time employee" who may be excluded from benefits is one who for reasons personal to himself does not work the full time in his particular type of employment. If an applicant has always or for a long period of time worked on a part time basis, and has made no attempt to secure full-time employment, this is a fact that we believe the Commission may consider as indicating that such applicant is a "part time employee," rather than a person who is "partially unemployed." As above indicated, however, such fact would not be conclusive of the applicant's status as a "part time employee."

In our opinion the Commission may adopt rules and regulations to assist it and its employees in distinguishing between "part time employees" and persons who are "partially unemployed."

Although because of the language found in Section 2 (m), the act is not entirely clear on this point, we believe that under Section 6, payments of partial benefits may be limited to those partially unemployed persons who are registered for full-time employment and who are able and willing to accept such full-time employment.

We also point out that under Section 6 (e) an applicant, except as provided in that section, must have "within the first four out of the last five completed calendar quarters immediately preceding the first day of his benefit year, earned wages for employment by employers of not less than sixteen times his weekly benefit amount."

Except as above indicated, it is our opinion that eligible employees who work on a part time basis and have done so over a period of years are entitled to benefits under the act.

You also inquire:

> "The question arises in determining the weekly rate of benefits payable to an eligible unemployed worker whether or not we can use the method provided for in Section 5 (d) (2) in all cases or must we use the formula provided for in Section 5 (d) (1) where the nature of the work is such that a full-time weekly wage can be determined in accordance with such section."

It is our opinion that the Commission should use the formula provided in Section 5 (d) (1) in all cases unless the Commission finds that the full-time weekly wage, as defined in said Section 5 (d) (1) would be unreasonable or arbitrary or not readily determinable with respect to an individual applicant.

WILLIAM D. GUNN,
Special Assistant Attorney General.

November 23, 1937. 885-c-1

471

UNEMPLOYMENT COMPENSATION — Contributions — Employer must make.

Industrial Commission of Minnesota,

Division of Unemployment Compensation.

You refer to Section 4, (a), (1), of the Minnesota Unemployment Insurance Act, which provides:

> "Payments. On and after January 1, 1936, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this Act, with respect to wages payable for employment (as defined in Section 2 (h)) accruing during such calendar year. Such contributions shall become due and be paid by each employer to the commission for the fund in accordance with such regulations as the commission may prescribe, and shall not be deducted, in whole or in part, from the wages of individuals in his employ. No rule of the commission shall be put in force which will permit the payment of such contributions at a time or under conditions which will not allow the employer to take credit for such contribution against the tax imposed by Title IX of the Social Security Act."

You also refer to Sections 901 (page 3, Regulations 90) and 902 (page 14, Regulations 90) of the Social Security Act, which provide:

> "On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:
>
> "(1) With respect to employment during the calendar year 1936 the rate shall be 1 per centum;
>
> "(2) With respect to employment during the calendar year 1937 the rate shall be 2 per centum;
>
> "(3) With respect to employment after December 31, 1937, the rate shall be 3 per centum."
>
> * * *
>
> "The taxpayer may credit against the tax imposed by section 901 the amount of contributions, with respect to employment during the taxable year, paid by him (before the date of filing his return for the taxable year) into an unemployment fund under a State law. The total credit allowed to a taxpayer under this section for all contributions paid into unemployment funds with respect to employment during such taxable year shall not exceed 90 per centum of the tax against which it is credited, and credit shall be allowed only for con-

tributions made under the laws of States certified for the taxable year as provided in section 903."

You state that a payment of the federal tax for the year 1936 was due on or before January 31, 1937, but was extended to April 1, 1937, by order of the Commissioner of Internal Revenue; that in conformity with this order, the Industrial Commission of Minnesota adopted a regulation "to the effect that the payment of contribution for 1936 should be made on or before January 31, 1937, if the employer was to obtain credit from the Federal Government for his payment to the State Fund"; that on the 26th day of February, 1937, the Commission extended the time for employer's contribution for the year 1936, to February 28, 1937; that thereafter the time for such payment was extended to March 15, 1937; and later to April 1, 1937. No further regulations were adopted by the Commission in this respect, but a great number of employers have not made contribution either to the state fund or the fund to the Federal Government. Some employers have made contributions to the state fund but not to the Federal Government. Some employers have paid the Federal Government but have not made contribution to the state fund.

As illustrative of the problems presented you refer to the case of an employer who paid the federal excise tax after April 15, 1937, and after it was declared to be due by both the Federal Government and the state. This employer now refuses to pay his 1936 contribution to the state fund, claiming that such payment is excused by the provisions of Section 4, (a), (1), of the Minnesota Act.

You inquire whether this employer is required to pay his 1936 contribution to the state unemployment insurance fund of the State of Minnesota.

The employer takes the position that, because of the language found in the last sentence of Section 4, (a), (1), of the Minnesota Act, he is not required to make a contribution to the state fund if he elects to make a payment to the Federal Government.

An unemployment insurance tax is imposed by both the Federal and state acts. The Federal act states that a taxpayer may credit against the tax imposed by that act a percentage of the amount of contributions paid by him into an unemployment fund under a state law, if such contribution to the state fund is made before the date of filing his return for the taxable year.

As indicated, the Minnesota act provides that no rule of the Commission may permit the payment of contributions at a time or under conditions which will not allow the employer to take credit against the tax imposed by the Social Security Act. Upon the basis of the information furnished in your letter, we do not see how it can be successfully contended that your Commission has adopted a rule "which will not allow the employer to take credit for such contribution against the tax imposed by Title IX of the Social Security Act."

The employer is in difficulty, not because he has followed the rules of the Commission, but because he failed to do so. The rules of the Commission required contributions to be made to the state fund on or before April 1, 1937. If payment had been made by this employer as provided by this rule, he would have been entitled to credit for such payment.

If the commission had adopted a rule providing that payment might be made at any time before May 1, 1937, that clearly would be a rule prohibited by the last sentence of Section 4, (a), (1). We believe it was the adoption of such a rule that the legislature intended to prohibit when it used the language contained in this sentence.

You have not directed our attention to any other provision that would excuse the employer referred to in your letter from making a contribution to the state fund. Our examination of the act has not disclosed such a provision. It is our opinion, therefore, that such employer is required to pay his 1936 contribution to the unemployment insurance fund of the State of Minnesota.

You also state:

> "We have still another instance at this time which represents another phase of this matter. An employer on or about October 1st last, paid his 1936 contribution to the State Fund. This contribution was in the sum of $480.31.
>
> "After our collection of the above mentioned sum, the Treasury Department attempted to make collection of the full amount of its tax from this employer and advised this employer that he was not entitled to a credit for his payment to the State Fund. The employer, therefore, wrote us requesting the return of the above mentioned sum and later, through counsel, cited Section 4, (a), (1), claiming that the employer was entitled to a refund."

You inquire whether this employer is entitled to a refund of the contribution made to the State Unemployment Insurance Fund.

For the reasons stated in our reply to your first question, it is our opinion that this employer is not entitled to such a refund.

WILLIAM D. GUNN,
Special Assistant Attorney General.

December 16, 1937. 885g-2

472

UNEMPLOYMENT COMPENSATION—Municipal employees—Not subject to.

Industrial Commission of Minnesota, Division of Unemployment Compensation, Department of Labor and Industry.

You inquire whether employees of (1) municipal liquor stores, (2) municipal power plants and water works, (3) county fairs and (4) ceme-

teries owned and operated by municipalities are engaged in "employment" as that term is used in the Minnesota Unemployment Compensation Insurance Act.

You state:

> "It is the contention of this Division that the purposes of the Unemployment Compensation Law will be furthered if the Act covers a larger percentage of all employees in the state rather than a smaller one. In order to construe the Act liberally, in order to effectuate the purposes thereof, exemptions should, therefore, be strictly construed and each claim of exemption carefully scrutinized.
>
> "We have in the above four instances, cases where the functions exercised are proprietary rather than governmental. The status in these instances is different, and for this reason organizations of the above four classes may sue and may be sued."

Section 2 (6) of the Minnesota Act provides that the term "employment" shall not include:

> "Service performed in the employ of this State, or of any political subdivision thereof, **or of any instrumentality** of this State or its political subdivisions."

If a person is employed by a political subdivision or instrumentality of the State of Minnesota, we do not believe it is material whether the functions exercised by such political subdivision or instrumentality are proprietary or governmental. The statute does not make a distinction on such a basis. We do not see how such a distinction can be read into the statute. However, upon the question of whether a municipality in operating a municipal power plant or waterworks is engaged in a governmental or proprietary capacity, we direct your attention to the cases of County of Anoka v. City of St. Paul, 194 Minn. 554, and Brush v. Commissioner of Internal Revenue, 57 Sup. Ct. Rep. 495.

In our opinion employees of municipal liquor stores, municipal power plants and waterworks and cemeteries owned and operated by municipalities are not engaged in "employment," as that term is used in the Minnesota Unemployment Compensation Act.

A county agricultural society is, in a sense, an instrumentality of the state. Such a society is a non-profit corporation operated for scientific and educational purposes. County fairs are operated by county agricultural societies. In our opinion, employees of county fairs are not engaged in "employment" within the meaning of the Minnesota Unemployment Compensation Insurance Act.

WILLIAM D. GUNN,
Special Assistant Attorney General.

January 13, 1938. 885t

473

WEEDS—Inspection—Appropriation for—Towns.

Dr. C. P. Bull, Department of Agriculture.

You ask:

> "Apart from the application of the weed laws wherein it requires the township to pay expense of weed inspectors, and also 10% of the cost of eradicating weeds under the Primary Noxious Weed Law, is there authority whereby a County Board or a Township Board may appropriate money for the support of weed eradication?"

We answer your question in the negative. Chapter 377, Laws of 1925 specifically provide for the payment of the costs of weed eradication. In the absence of any law permitting the townships or counties to appropriate moneys for weed eradication, other than provided for by Chapters 377 and 348, we must advise you that such political subdivisions do not have the authority to make such appropriations.

ROY C. FRANK,
Assistant Attorney General.

March 19, 1937. 322b

474

WEEDS—Inspectors.

Mr. Chas. Ommodt, Department of Agriculture, Dairy and Food.

In your letter you ask our opinion as to whether or not, under the provisions of Chapter 377, Laws 1925, and acts amendatory thereof, the chairman of a town board of supervisors becomes a weed inspector if the Commissioner of Agriculture, Dairy and Food, under his authority set forth by said Chapter 377, does not require the board of county commissioners of the county in which said township is located to appoint a local weed inspector.

We answer your question in the negative. Section 6157 of Mason's Minnesota Statutes of 1927, which section is a part of said Chapter 377, provides that a board of county commissioners whenever requested by the Commissioner of Agriculture, Dairy and Food may appoint local weed inspectors. The section further provides that if the board of county commissioners refuses or neglects to make the appointment as requested by the Commissioner, the chairmen of the various town boards of said county are authorized, and it becomes their duty, to act as local weed inspectors within their respective townships.

There is no provision in said section making it the duty of the chairman of a town board to become a local weed inspector in the event that the

Commissioner of Agriculture, Dairy and Food does not make a request on the board of county commissioners for the appointment of said inspectors.

ROY C. FRANK,
Assistant Attorney General.

October 22, 1937. 322d

475

WEEDS—Noxious—Destruction of—Quarantine—Highways.

Hon. Chas. Ommodt, Commissioner, Dept. of Agriculture, Dairy and Food.

You advise us that agricultural land quarantined because of the presence of noxious weeds is usually treated by being sprayed with a chemical solution or by a prescribed tillage method. Most of the weed eradication work is done by the spraying method. A majority of the counties own and operate a spraying machine. The state enters into a contract or agreement with such counties for the use thereof. The counties furnish the equipment and the men to operate the equipment and perform the required spraying operations. Upon receipt of properly itemized claims, the state pays the counties for the rental of the equipment and pays the men for their services. The chemical used in spraying weeds is a sodium chlorate solution and being inflammable, is dangerous to handle.

You inquire:

1. "Would the men operating the spray machine, who are regular employees of the county, be considered state employees during the period when they are spraying the quarantined state projects and during which period they receive their pay from the state?"

Before answering your question, it is advisable to set forth and consider the terms of the agreement entered into by and between the various counties and the state. The agreement, in so far as it is material to this opinion, reads:

"THIS AGREEMENT, made this.....day of.....,19....,
by and between.....,
....., Minnesota,
Party of the First Part, and the Department of Agriculture, Dairy and Food of the State of Minnesota, Party of the Second Part,

"WITNESSETH: that in consideration of the payments hereinafter specified to be made by the party of the second part, the party of the first part agrees to furnish a power spray outfit and.....operators for the same; and said first party further agrees to perform the required spraying operations upon those certain tracts of weed infested lands, located in.....County, State of Minnesota, which now are, or may hereafter be, placed under quarantine by the Commissioner of Agriculture, Dairy and Food of the State of Minne-

sota, pursuant to the provisions of Chapter 348 Laws of Minnesota for 1935 and Acts Amendatory thereof. Said party of the first part further agrees that said spraying operations, above referred to, shall be thorough for the purpose of destroying certain noxious weeds with which said lands are infested and that such sprayings shall be at times and in such manner as may be directed by the said Commissioner of Agriculture, Dairy and Food of the State of Minnesota or by his duly authorized agents.

"And in consideration of the faithful and diligent performance, by the party of the first part, of the covenants of this agreement, party of the second part agrees to compensate the party of the first part and its hereinafter designated employees, for the operation of spraying as necessary, including the drawing of water, mixing of chemicals and applying of spray on the designated lands, at the following rates:

* * *

"Such compensation shall be paid by the party of the second part, in the due course of business, upon the presentation of an itemized and verified account by the party of the first part, and subject to the rules and regulations of the State of Minnesota in connection with the payment of similar claims. Party of the second part further agrees to furnish party of the first part with a list of said weed infested lands, together with future revisions thereof, upon which said spraying operations are to be performed. It is further agreed by and between the parties hereto that this agreement may be cancelled by either party upon the giving of 60 days written notice to the other."

After considering the facts as stated in your letter and the terms of the agreement set forth, we are of the opinion that the operators of the spraying equipment are not state employes during the time that they are spraying quarantined state projects.

You further state:

"Section 4 of the Primary Noxious Weed law provides, 'When from investigation or otherwise, it shall appear to the commissioner that upon any tract of **agricultural land** there is an infestation of primary noxious weeds beyond the ability of the land occupant or owner to eradicate, the commissioner, upon request of the owner, or upon his own motion, shall take such steps as may be necessary to prevent further spread of such weed growths and to this end **shall quarantine** such portion of each such tract of land as may be so infested and put into immediate operation the necessary means for the eradication of such weed growths'."

You then ask:

"If John Doe owns and operates a farm that is infested with primary noxious weeds beyond his ability to eradicate, is it mandatory that the commissioner of agriculture place the same under quarantine if requested to do so by the owner?"

We answer your question in the affirmative.

You also ask:

"May roadsides which are infested with primary noxious weeds be placed under quarantine?"

We are of the opinion that the Commissioner may take any steps that he deems necessary to eradicate noxious weeds on highway right of ways, exclusive of placing the land under quarantine.

ROY C. FRANK,
Assistant Attorney General.

March 22, 1938. 322b

476

WHOLESALE DEALERS—Ice cream manufacturers must have license.

Hon. Charles Ommodt, Department of Agriculture, Dairy and Food.

In your letter you state that certain ice cream manufacturers purchase cream from creameries rather than direct from farmers. A semi-monthly accounting is made. After converting such cream into ice cream, the finished product is sold in wholesale lots to ice cream parlors, drug stores, and other business establishments.

You inquire as to whether these ice cream manufacturers are required to obtain a Wholesale Dealer's license.

On January 14, 1937, this same question was submitted to us by Mr. L. H. Brodrick of your department. At that time we held that ice cream manufacturers must obtain a license under the provisions of the Wholesale Dealer's Act. We adhere to such opinion, a copy of which is herewith enclosed for your reference.

You further ask whether under the term "due date" as defined by Chapter 394, as amended by Chapter 186, an ice cream manufacturer would have the same status as a creamery.

It is impossible to give a yes or no answer to this question. Many ice cream manufacturers make butter in connection with ice cream. In such case, the manufacturer of the ice cream would be conducting a creamery and the due date would be that determined for creameries. If the manufacturer confines his activities solely to ice cream, we do not believe that his establishment could be called a creamery and consequently the term "due date" as applied to creameries could not be applied to business.

Our opinion is also asked as to whether or not the fact that a semi-monthly accounting is made would relieve the licensees of their obligations under their bond under the voluntary extension of credit provision of the Wholesale Dealer's Act.

As defined by the Wholesale Dealer's Act, the term "due date" means:

> "seven days from the date of delivery of produce by the seller to the licensee in the case of a sale: * * * except as to creameries where the due date shall mean fifteen days following the monthly day of accounting subsequent to deliveries following the date fixed by each creamery for such accounting."

Said act further provides:

> "provided that the bond shall not cover transactions wherein it appears to the Commissioner that a voluntary extension of credit has been given on said produce by the seller to the licensee beyond the due date."

Assuming that the manufacturers of ice cream are not operating creameries, we are of the opinion that the bonds of said manufacturers do not protect sales made more than seven days previous to the date of accounting. The bonds would protect sales made seven days or less before the date of accounting, provided that the claims were filed within the statutory period.

ROY C. FRANK,
Assistant Attorney General.

October 28, 1937. 832j

477

WHOLESALE DEALERS—Pickle companies and canning companies do not come under Act.

Hon. Chas. Ommodt, Department of Agriculture, Dairy and Food.

You state that pickle factories purchase large quantities of cucumbers from farmers. The cucumbers are sorted, made into various kinds of pickles, bottled and sold in wholesale quantities.

You ask:

> "Are pickle companies, as hereinbefore described, required to be licensed under this law (Wholesale Dealer's Act)?"

On July 28, 1931, this office advised the then Commissioner of Agriculture, Dairy and Food that pickle factories are not dealers at wholesale within the meaning of the Wholesale Dealer's Act and consequently need not obtain the licensed provided for by said act. We adhere to that opinion.

You further state that canning companies purchase large quantities of peas, sweet corn, and other vegetables for canning purposes. These products are treated, cooked, packed in various size containers, and sold in wholesale lots.

Our opinion is requested as to whether or not canning factories must be licensed under the Wholesale Dealer's Act.

We answer your question in the negative. Commercial canneries are licensed and inspected under the provisions of Laws of 1921, Chapter 495 and not under the Wholesale Dealer's Act. Having enacted a complete commercial cannery law governing commercial canneries, it is not to be presumed that the legislature intended that such canneries should also be subject to the Wholesale Dealer's Act.

ROY C. FRANK,
Assistant Attorney General.

October 29, 1937. 832

478

WHOLESALE DEALERS—Sale and purchase of butter fat at wholesale—Converting into ice cream.

Mr. L. H. Brodrick, Director of Markets.

You ask:

"Under the provisions of Chapter 394, Laws of 1931, is an individual, partnership or corporation, engaged in the business of buying butterfat at wholesale for the purpose of manufacturing ice cream and selling the manufactured product at wholesale, a dealer at wholesale and should such individual, partnership or corporation be licensed by this department?"

We answer your question in the affirmative.

Section 1 of Chapter 394 defines a wholesale dealer as

"any person who shall buy or sell or contract to buy or sell, or who shall handle in wholesale lots for the purpose of resale * * *, any produce as herein defined * * *."

Section 2 defines the term "produce" to mean and include

"* * * the raw and finished products of a dairy, creamery, cheese factory, condensery and dry milk factory; * * *."

This office has heretofore held that ice cream comes within the scope of the above definition.

In the present case, the butterfat used to make the ice cream is purchased at wholesale and the finished product, ice cream, is sold at wholesale. There can be no question but the person engaged in such business is a dealer at wholesale and must secure a wholesale dealer's license from the commissioner.

ROY C. FRANK,
Assistant Attorney General.

January 19, 1937. 832j-1

479

WORDS AND PHRASES—Warrant means check.

Industrial Commission of Minnesota, Division of Unemployment Compensation.

You state and inquire:

"The Minnesota Unemployment Compensation Law, Chapter 2, Extra Session Laws 1936, Section 3 (a), (b), and (c) establishes the Unemployment Compensation Fund, the manner in which it shall be administered, etc.

"Subsection (b) contains, among other things, this language: 'Accounts and Deposits. The State Treasurer shall be ex officio the treasurer and custodian of the fund, who shall administer such fund in accordance with the directions of the commission and **shall issue his warrants** upon it in accordance with such regulations as the commission shall prescribe. He shall maintain within the fund three separate accounts: (1) a clearing account, (2) an unemployment trust fund account, and (3) a benefit account. All moneys payable to the fund, upon receipt thereof by the commission, shall be forwarded to the treasurer who shall immediately deposit them in the clearing account. Refunds payable pursuant to section 14 of this Act may be paid from the clearing account **under warrants issued by the treasurer** under the direction of the commission. * * *.'

"Subsection (c) reads in part as follows: 'Withdrawals. Moneys shall be requisitioned from this State's account in the unemployment trust fund solely for the payment of benefits and in accordance with regulations prescribed by the commission. The commission shall from time to time requisition from the unemployment trust fund such amounts, not exceeding the amounts standing to its account therein, as it deems necessary for the payment of benefits for a reasonable future period. Upon receipt thereof the treasurer shall deposit such moneys in the benefit account and **shall issue his warrants** for the payment of benefits solely from such benefit account. Expenditures of such moneys in the benefit account and refunds from the clearing account shall not be subject to any provisions of law requiring specific appropriations or other formal release by State officers of money in their custody. **All warrants issued by the treasurer for the payment of benefits and refunds shall bear the signature of the treasurer and counter-signature of a member of the commission or its duly authorized agent for that purpose. * * *'**

"It is our understanding that a warrant is nothing more or less than a draft by one party to another drawn on a third party ordering the third party to pay the second party a certain sum of money. If this is correct, it would seem to be impossible for the State Treasurer to issue a warrant against himself. Probably the intent of the Law is that the State Treasurer shall issue his check instead of a warrant, and then

it may be construed that the Industrial Commission shall issue its warrant against the State Treasurer which would constitute an order on the State Treasurer to pay.

"Kindly submit your opinion interpreting the meaning of the above referred to language."

In our opinion the word "warrant," as used in the above statute, which makes it the duty of the State Treasurer to issue his warrant upon the Unemployment Compensation Fund in accordance with the directions and regulations of the Industrial Commission, is synonymous to "ordinary check" or "written order." It is the intent of the statute that the State Treasurer shall issue his ordinary check instead of a warrant. The provisions in said statute making it the duty of the State Treasurer to issue his warrant upon the Unemployment Compensation Fund **in accordance with the directions and regulations of the Industrial Commission** authorize the Industrial Commission to issue an order which is in effect equivalent to a warrant.

LOUIS F. SOUKUP,
Special Assistant Attorney General.

December 20, 1937. 885u

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