# REPORT

OF THE

# ATTORNEY GENERAL

TO THE

# GOVERNOR
# STATE OF MINNESOTA

1945 - 1946

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J. A. A. BURNQUIST
Attorney General

To His Excellency

Honorable Edward J. Thye

Governor

Sir:

In compliance with statutes relating thereto, I herewith transmit the report of this department for the biennium 1945-1946.

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

Respectfully yours,

J. A. A. BURNQUIST,
Attorney General.

December 31, 1946.

## ATTORNEYS GENERAL OF MINNESOTA

### TERRITORIAL

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

### STATE

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

## STAFF

December 31, 1946

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### ATTORNEY GENERAL

J. A. A. Burnquist

### DEPUTY ATTORNEYS GENERAL

Arthur Christofferson
George B. Sjoselius

### ASSISTANT ATTORNEYS GENERAL

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

### SPECIAL ASSISTANT ATTORNEYS GENERAL

John Burwell
Sam W. Campbell
Irving M. Frisch
Victor J. Michaelson
George T. Simpson
Charles Stone

### DEPARTMENT CLERK

Genevieve K. Spangenberg

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## UNITED STATES SUPREME COURT

| DOCKET | TITLE | ACTION | DECISION |
|---|---|---|---|
| 5815 | S. R. A. Incorporation | Tax *exemption*—unequal assessment | 90 L. ed. 663<br>326 U. S. 703<br>327 U. S. 558 |
| 5983 | Continental Oil Company and seven other companies | Omitted personal property tax | 323 U. S. 803 |
| 6065 | Albert Baker v. Warden, State Prison | Certiorari | 327 U. S. 810 |
| 6129 | State of New York v. United States (Saratoga Springs) (Appearance amicus curiae) | Taxation of mineral water by federal government | 326 U. S. 572 |
| 6181 | Federal Power Commission v. Arkansas Power & Light Co. et al. (Appearance amicus curiae) | Certiorari—states' rights | 156 F. 2d 821<br>329 U. S. 703 |

## UNITED STATES CIRCUIT COURT OF APPEALS

| | | | |
|---|---|---|---|
| 6065 | Albert Baker v. Warden, State Prison | Habeas Corpus | Denied |

## UNITED STATES DISTRICT COURT

| DOCKET | TITLE | ACTION | DECISION |
|---|---|---|---|
| 6090 | Horsman v. U. S. A. (Social Welfare Division as Gdn. of Caroline Lang) | Claim | 68 F. Supp. 522 |
| 6122 | Elton F. MacMillan v. Warden, State Prison | Habeas corpus | Denied |
| 6187 | Fred Berry v. Warden, State Prison | Habeas corpus | Denied |

LEGAL STAFF OF STATE HIGHWAY DEPARTMENT APPEARED:

| DOCKET | TITLE | ACTION | DECISION |
|---|---|---|---|
| | United States v. Lands in Traverse County | Condemnation—flowage easements | Pending |
| | United States v. Lands in Dakota County | Condemnation | Pending |
| | United States v. Lands in Wabasha County | Condemnation | Pending |

## MINNESOTA SUPREME COURT, CIVIL

| DOCKET | TITLE | ACTION | DECISION |
|---|---|---|---|
| 5921 | Robert Dufault v. Warden, State Prison | Habeas corpus | 19 N. W. 2d 706 |
| 5925 | William C. Wendland v. Supt., Moose Lake Hospital | Habeas corpus | 22 N. W. 2d 448 |
| 6030 | Dept. of Commerce v. Cloverleaf Memorial Park Association, et al. | Receivership under Securities Law | 22 N. W. 2d 170 |
| 6053 | Grove Salisbury v. Division of Public Institutions | Certiorari | 20 N. W. 2d 349 |
| 6060 | City of St. Paul v. Comm'r of Taxation | Mandamus | 26 N. W. 2d 115 |
| 6065 | Albert Baker v. Warden, State Prison | Habeas corpus | 21 N. W. 2d 328 |
| 6070 | State v. Chicago, Great Western Railway Company | Removal of trackage | 25 N. W. 2d 294 |
| 6077 | State v. Longyear Holding Co. | Quiet title—lake bed iron ore | Decision for state |
| 6081 | State v. Louis Anderson-John Koch, et al., Intervenors | Intervention—Lac qui Parle Flowage | 19 N. W. 2d 70 |
| 6091 | State v. Lanesboro Produce & Hatchery Co. | Discrimination in prices of farm products (certified questions) | 21 N. W. 2d 792 |
| 6097 | Marshall-Wells Co. v. Tax Commission | Income tax from intangibles—foreign corporation | 20 N. W. 2d 706 |
| 6105 | Jay W. Smith v. Secretary of State | Reapportionment—legislative districts | 19 N. W. 2d 914 |
| 6106 | John T. Lyons v. Commissioner of Taxation | Injunction—labor credits—occupation taxes | 20 N. W. 2d 481 |
| 6113 | John Peters v. Archer-Daniels | Certiorari | 26 N. W. 2d 29 |
| 6114a | Roy Munroe v. Minnesota Tent & Awning Co. | Spec. Comp. Fund | 24 N. W. 2d 273 |
| 6114b | Thorwald E. Thoresen v. Minnesota Tent & Awning Co. | Spec. Comp. Fund | 24 N. W. 2d 273 |
| 6116 | State Securities Commission v. Herbert W. Lorentz | Sale of securities without license—cemetery lots | 22 N. W. 2d 313 |
| 6119 | City of St. Paul v. Commissioner of Highways | Injunction—Safety Responsibility Act | 25 N. W. 2d 661 |
| 6120 | State v. Northern Pacific Ry. Co. | Switching charges | 22 N. W. 2d 569 |
| 6122 | Elton F. MacMillan v. Warden, State Prison | Habeas corpus | 21 N. W. 2d 239 |
| 6123 | Pullman Co. v. Comm'r of Taxation | Certiorari | 25 N. W. 2d 838 |
| 6124 | William C. Bethert v. Comm'r of Taxation | Certiorari | 21 N. W. 2d 101 |
| 6128 | Walter J. Smith v. Ramsey County Assessor | Mandamus—money and credit tax | 25 N. W. 2d 474 |
| 6133 | Charles M. Drew et al. v. Comm'r of Taxation | Certiorari | 23 N. W. 2d 565 |
| 6136 | Heinzen v. City of Minneapolis et al. | Injunction—civil service | 27 N. W. 2d 819 |
| 6137 | Arlandson v. Minneapolis Civil Service Commission, et al. | Injunction—civil service | 27 N. W. 2d 819 |
| 6139 | Peter Loew v. Hagerle Bros. | Spec. Comp. Fund | 24 N. W. 2d 278 |
| 6141 | State v. Village of St. Anthony | Quo warranto | 26 N. W. 2d 193 |
| 6155 | Edwin Norstad et al. v. Railroad & Whse. Com. et al. | Mandamus | Appeal dismissed |
| 6165 | C. F. Willoughby vs. Warden, State Prison | Habeas corpus | 27 N. W. 2d 779 |
| 6178 | Emmett O'Neill v. Pipestone County Auditor | Writ of prohibition—election nomination by petition | 24 N. W. 2d 715 |

### MINNESOTA SUPREME COURT, CIVIL—Continued

| DOCKET | TITLE | ACTION | DECISION |
|---|---|---|---|
| 6184 | Owens-Illinois Glass Co. v. Comm'r of Taxation | Certiorari | Writ served |
| 6186 | State v. John W. Bentley et al.—Frank Nelson et al., intervenors | Intervention—Big Stone County Flood Control | 28 N. W. 2d 179 |

**LEGAL STAFF OF DIVISION OF EMPLOYMENT AND SECURITY PREPARED BRIEFS AND PRESENTED ARGUMENTS:**

| | | |
|---|---|---|
| State v. Industrial Tool and Die Works, Inc. | Constitutionality of war risk provision and liability thereunder | 21 N. W. 2d 81 |
| State v. Theron Castner et al. | Master and servant relationship | 24 N. W. 2d 228 |
| State v. El Queeno Distributing Co., Inc., et al. | Successorship to employment experience record | 21 N. W. 2d 601 |
| State v. Henry Meyers et al. | Successorship to employment experience record | Dismissed by court |
| State v. Lewis Fine et al. | Timely payment of voluntary contributions | 27 N. W. 2d 198 |

### BEFORE FEDERAL DEPARTMENTS

| DOCKET | TITLE | PROCEEDING | DECISION |
|---|---|---|---|
| | | **Civil Aeronautics Board** | |
| 6117 | North Central Proceedings | Adequate local air transportation | Briefs filed |
| | | **Federal Power Commission** | |
| 6167 | Natural Gas Investigation | Distribution of natural gas—use in production of iron ore | Memoranda submitted |
| | | **Interstate Commerce Commission** | |
| 6168 | Ex parte No. 148 and 162—Increased Railway Rates, Fares and Charges | Cost of removal and transportation of iron ore | State's objection sustained |

### MINNESOTA SUPREME COURT, CRIMINAL

| DOCKET | TITLE | ACTION | DECISION |
|---|---|---|---|
| 820A | Regina Schabert | Murder | 24 N. W. 2d 846 |
| 832A | Patrick Iosue | Rape | 19 N. W. 2d 735 |
| 833A | Wm. E. Bolsinger | Criminal negligence | 21 N. W. 2d 480 |
| 834A | Leslie D. Cantrell | Manslaughter | 18 N. W. 2d 681 |
| 835A | Henry Prickett | Game and fish laws | 21 N. W. 2d 474 |
| 836A | H. L. Gitelman | False advertising | 21 N. W. 2d 198 |
| 838A | Robert Doan | Murder | Briefs filed |
| 839A | Myrtle Priebe | Larceny | 22 N. W. 2d 1 |
| 840A | William Murray | Operating automobile while under influence of intoxicants | 26 N. W. 2d 864 |

## MINNESOTA DISTRICT COURT, CIVIL

| DOCKET | TITLE | ACTION | DECISION |
|---|---|---|---|
| 5878 | Fred and Rose Masters v. Director of Division of Social Welfare | Habeas corpus—restoration | Granted |
| 5961 | State v. Wm. W. and Althea B. O'Neil | Maintenance—insane | Settled |
| 5990 | Tax Commission v. Village of Hibbing | Delinquent excise taxes on gasoline | Judgment for plaintiff |
| 5991B | Clarence W. Matson, Hazel v. Jones, Harvey W. Kirchner, and Joseph H. DeWitt v. Director of Civil Service | Mandamus | Dismissed |
| 6007 | E. G. Steinhilber v. Game Wardens | Return of seized property | Settled |
| 6022 | Richard F. Spurck v. Civil Service Board | Certiorari | Tried |
| 6045 | State v. St. Louis County, Andrew Gowan, et al. | Quiet title | Dismissed |
| 6066 | Swift and Company v. Labor Conciliator | Certiorari | Affirmed |
| 6067 | State v. Lake Mining Company | Royalties — iron ore — Syracuse Lake bed | At issue |
| 6070 | State v. Chicago, Great Western Ry. Co. | Abandoned trackage | Demurrer overruled |
| 6071 | State v. Chicago, Milwaukee, St. Paul & Pacific Rr. Co. | Abandoned trackage | Dismissed |
| 6072 | State v. Chicago and Northwestern Ry. Co., Clause A. Rothsay, Trustee | Abandoned trackage | Dismissed |
| 6073 | State v. Duluth, Winnipeg & Pac. Ry. Co. | Abandoned trackage | Dismissed |
| 6074 | State v. Illinois Central Ry. Co. | Abandoned trackage | Dismissed |
| 6075 | State v. Alma and Edward Alanen | Maintenance—insane | Uncollectible |
| 6078 | State v. Youngstown Mines Corporation et al. | Iron ore—Rabbit Lake bed | At issue |
| 6080 | Rose DeWanz v. Director of Civil Service | Mandamus | Dismissed |
| 6087 | Richard F. Spurck v. Civil Service Board | Mandamus | Quashed |
| 6091 | State v. Lanesboro Produce & Hatchery Co. | Price discrimination | Verdict for defendant |
| 6098 | State v. Chicago, St. Paul, Mpls. & Omaha Ry. Co. | Penalty—increase in freight rates | Pending |
| 6099 | State v. Great Northern Ry. Co. | Penalty—increase in freight rates | Denied |
| 6102 | State v. Chicago, St. Paul, Mpls. & Omaha Ry. Co. | Penalty—increase in freight rates | Pending |
| 6103 | State v. Mpls., St. Paul & Sault Ste. Marie | Penalty — switching charges, Hennepin County | Pending |
| 6104 | State v. Mpls., St. Paul & Sault Ste. Marie | Penalty — switching charges, Ramsey County | Pending |
| 6107 | Albin John and Marie A. Johnson | Adoption | Dismissed |
| 6108 | Gilbert and Theresa Lebens | Delinquent child | Release ordered |
| 6109 | T. G. Peterson v. Atkinson Milling Co. | Subrogation claim—workmen's compensation | Settled |
| 6111 | Clifford F. Hansen v. Industrial Commission et al. | Mandamus | Dismissed |
| 6112 | Northwest Airlines Inc. v. Comm'r of Taxation et al. | Declaratory judgment to determine tax status | Demurrer sustained |
| 6115 | Harold F. Vadnais v. State of Minnesota | Mortgage foreclosure | State's claim sustained |

MINNESOTA DISTRICT COURT, CIVIL—Continued

| DOCKET | TITLE | ACTION | DECISION |
|---|---|---|---|
| 6118 | International Union of Operating Engineers, Local 36, A. F. L. v. Labor Conciliator | Certiorari | Discharged |
| 6125 | State v. Beltrami County | Maintenance—feeble-minded | Judgment for defendant |
| 6126 | State v. Blanche L. Bicknell, et al. | Condemnation | Damages paid |
| 6127 | State v. Walter Schmidt et al. | Maintenance—insane | Judgment for State |
| 6130 | State v. Mons Albertson, et al. | Maintenance—insane | Dismissed |
| 6131 | State v. Northern Pacific Ry. Co. | Mandamus—to maintain agent | Agent reinstated |
| 6132 | Harland H. Goetzinger v. Bureau of Criminal Apprehension | Certiorari | Affirmed |
| 6134 | State v. American National Ins. Co. of Galveston, Texas | Delinquent premium tax | Paid |
| 6135 | State v. American National Ins. Co. | Delinquent premium tax | At issue |
| 6142 | Appeal of Guardian of Frank Mix | Maintenance—insane | Settled |
| 6143 | Charles Gross | Maintenance—insane | Settled |
| 6144 | State v. Barrett and Zimmerman Inc., et al. | Condemnation | Judgment on award |
| 6146 | Merchants and Farmers Mutual Casualty Company | Injunction—rehabilitation | Granted |
| 6147 | Edward Bakke v. City of Virginia et al. | Declaratory judgment—L. 1943, c. 381 | *Held unconstitutional* |
| 6148 | State v. Laura C. Haggarty, et al. | Condemnation | Award entered |
| 6149 | Allstate Finance Co. | Appeal from decision of comm'r of banks | At issue |
| 6150 | State v. Robert B. and Hilma Lillydale | Maintenance—insane | Judgment for state |
| 6151 | State v. Emanuel and Agnes Anderson | Maintenance—insane | Judgment for state |
| 6152 | Leslie J. Juhl v. Public Institutions, et al. | Certiorari | Affirmed |
| 6153 | Frank Stoehr v. Warden, State Prison | Habeas corpus | Dismissed |
| 6154 | Charles William Forbes v. Warden, State Prison | Habeas corpus | *Quashed* |
| 6155 | Edwin Norsted el al. v. Railroad & Warehouse Comm'n | Mandamus—grain weighers' salaries | Granted |
| 6156 | Security Casualty Company | Injunction—liquidation | Granted |
| 6157 | Midwestern National Life Insurance Company | Application for rehabilitation | Granted |
| 6158 | Preferred Insurance Co. of N. Y. v. Warden, St. Cloud Reformatory | Subrogation claim on prisoner's earnings | Demurrer interposed |
| 6159 | George Heleniak, et al. v. Director of Social Welfare, et al. | Mandamus | Dismissed |
| 6161 | Bernetta Wretlind, Feebleminded | Restoration | Affirmed |
| 6162 | Co-executors Harry Sansby Estate v. State Board of Health | Mandamus — rest home license | Discharged |
| 6164 | Shawmut Company et al. v. Director of Lands and Minerals | Boundary line—mine property | Submitted |
| 6166 | Oscar W. Johnson v. Civil Service Board | Certiorari | *Dismissed* |
| 6170 | State v. Independent School District No. 35, St. Louis County | Audit claim | Disallowed |
| 6171 | Milton Culver's Food Market v. Pharmacy Board | Injunction | Pending |
| 6174 | St. Louis County Estates | Escheat | Collected |
| 6175 | State v. Emil H. Trump, et al. | *Condemnation* for University | Award |
| 6176 | State v. Village of Pine Beach Landing | Quo warranto—validity of incorporation | Judgment for state |

### MINNESOTA DISTRICT COURT, CIVIL—Continued

| DOCKET | TITLE | ACTION | DECISION |
|---|---|---|---|
| 6179 | Town of Stuntz v. St. Louis County Auditor and Attorney General | Declaratory judgment—tax levy | Dismissed as to state |
| 6180 | Norman Arneson v. Minnesota Canvassing Board et al. | Injunction and declaratory judgment — congressional election | Dismissed as to Board |
| 6182 | Joseph A. Kozlak, Jr. v. Guy V. Howard (Amici curiae appearance) | Contest of congressional election | Dismissed |
| 6183 | Louis Boucher v. Civil Service Board et al. | Certiorari | Pending |
| 6185 | Eugene Debs Carstater v. Civil Service et al. | Mandamus—back pay | Settled |

(22 Actions brought to recover escheated bank deposits)

### MINNESOTA DISTRICT COURT, CRIMINAL

| DOCKET | TITLE | ACTION | DECISION |
|---|---|---|---|
| 837A | Walter Reinke and Alice Broderius | Manslaughter | Acquitted |
| 838A | Robert Doan | Murder | Found guilty |

### PROBATE COURT

| DOCKET | TITLE | PROCEEDING | DECISION |
|---|---|---|---|
| 6062 | Estate of Henry W. Schultz | Escheat | Heirship claim denied |
| 6140 | Inez Irene Smith | Discharge of delinquent child | Denied |
| 6160 | Estate of Anna Hvezda | Old age assistance | State's claim paid |
| 6169 | Sylvia Madson, Feebleminded | Restoration | Denied |
| 6172 | Veronica Saatzer Stupak, Feebleminded | Restoration | Denied |
| 6173 | Ferdinand Rogge, Feebleminded | Restoration | Denied |
| 6177 | Beatrice Mayfield, Feebleminded | Restoration | Denied |

### JUVENILE COURT

| DOCKET | TITLE | PROCEEDING | DECISION |
|---|---|---|---|
| 6163 | Florence Stapuk, Delinquent Child | Pet'n for release | Denied |

### BEFORE STATE DEPARTMENTS

| DOCKET | TITLE | PROCEEDING | DECISION |
|---|---|---|---|
| | **Civil Service Board** | | |
| 6095 | George C. Riley v. Dept. of Labor and Industry | Appeal from discharge | Dismissed |
| 6132 | Harland H. Goetzinger v. Bureau of Criminal Apprehension | Appeal from discharge | Discharge sustained |
| 6145 | Clinton Smith v. St. Cloud Teachers College | Appeal from dismissal | Reinstated |
| 6152 | Leslie J. Juhl v. Division of Public Institutions | Appeal from dismissal | Dismissal sustained |
| | **Industrial Commission** | | |
| 6094 | Walter Coe v. Red Lake Elec. Co-op. Inc. | Special compensation fund | Dismissed |
| 6109a | Albert Craig v. E. A. Erdman & Co. | Special compensation fund | Disallowed |

## MINNESOTA DISTRICT COURT, CIVIL—*Continued*

| DOCKET | TITLE | ACTION | DECISION |
|---|---|---|---|
| 6109b | James Byrne v. Church of Our Lady of Lourdes | Special compensation fund | Dismissed |
| 6109c | Wm. F. Kirby v. Breen Stone & Marble Co. | Special compensation fund | Compensation awarded |
| 6109e | Donald Lantz v. Morris Construction Co. | Special compensation fund | Compensation awarded |
| 6109f | Lubica Loncar v. Independent School District No. 40, St. Louis County | Special compensation fund | Compensation awarded |
| 6109g | Frieda Hydal v. W. W. Magee | Special compensation fund | Compensation awarded |
| 6109h | Mathilda Drager v. Fergus Breweries, Inc. | Special compensation fund | Dismissed |

### Pharmacy Board

| | | | |
|---|---|---|---|
| 6061 | Edwin H. Whittaker | Revocation of license | Placed on probation |

## EMPLOYMENT AND SECURITY DIVISION

### Supreme Court

| | |
|---|---|
| See actions reported under Minnesota Supreme Court, Civil | 5 |

### *District Court*

| | |
|---|---|
| Actions for collection of delinquent contributions | 281 |
| Actions for collection of delinquent contributions reduced to judgment | 187 |
| Judgment satisfied | 477 |

### Miscellaneous Court Proceedings

| | | |
|---|---|---|
| Claims filed in probate, bankruptcy, receivership, dissolution, and assignment for benefit of creditors proceedings | | 40 |

## HIGHWAY DEPARTMENT

| | | |
|---|---|---|
| United States District Court: | | |
| Pending (see actions reported under U. S. District Court) | | 3 |
| Minnesota Supreme Court: | | |
| Decisions (see action reported under Minnesota Supreme Court, Civil) | | 1 |
| Condemnation proceedings: | | |
| Commissioners' reports of awards filed | 106 | |
| Dismissed | 8 | |
| Pending | 25 | 139 |
| District Court appeals from awards: | | |
| Dismissed | 74 | |
| Settled out of court | 78 | |
| Tried to a jury | 42 | |
| Pending | 211 | 405 |
| Drivers license cases: | | |
| Settled or closed | 5 | |
| Pending | 1 | 6 |
| Legislative claims: | | |
| Closed or settled | 1 | |
| Pending | 5 | 6 |
| Ditch or drainage claims: | | |
| Closed | 10 | |
| Pending | 19 | 29 |
| Miscellaneous suits and actions: | | |
| Settled or closed | 7 | |
| Pending | 3 | 10 |

## TABLE NO. 1
PROSECUTIONS REPORTED BY COUNTY ATTORNEYS FOR 1945 AND 1946

| COUNTY—COUNTY ATTORNEY | DISTRICT COURT | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | Found Guilty | | Plead Guilty | | Acquitted | | Dismissed | |
| | 1945 | 1946 | 1945 | 1946 | 1945 | 1946 | 1945 | 1946 |
| Aitkin—John T. Galarneault | 1 | ..... | 10 | 25 | 1 | ..... | 3 | 6 |
| Anoka—Charles P. LeRicheux | * | * | ..... | ..... | ..... | ..... | ..... | ..... |
| Becker—Carl G. Buck—Lowell W. Benshoof, Acting | 2 | 3 | 25 | 25 | ..... | 3 | 8 | 8 |
| Beltrami—Clarence R. Smith | 2 | 2 | 12 | 26 | ..... | 1 | 2 | 6 |
| Benton—J. Arthur Bensen | ..... | 2 | 2 | 5 | 1 | 1 | 2 | ..... |
| Big Stone—C. J. Benson | ..... | 4 | 5 | 1 | ..... | ..... | 1 | 1 |
| Blue Earth—Milton D. Mason | 1 | ..... | 11 | 16 | ..... | ..... | ..... | 1 |
| Brown—Geo. K. Erickson | ..... | ..... | 9 | 8 | 1 | ..... | ..... | ..... |
| Carlton—Frank Yetka—Thomas M. Bambery | 1 | 2 | 18 | 33 | ..... | 2 | 3 | 5 |
| Carver—John J. Fahey | 4 | * | 1 | ..... | ..... | ..... | 1 | ..... |
| Cass—Edward L. Rogers | * | 2 | ..... | 10 | ..... | 2 | ..... | 1 |
| Chippewa—C. A. Rolloff | 1 | 2 | 2 | 1 | ..... | ..... | 1 | ..... |
| Chisago—Carl W. Gustafson | ..... | ..... | 3 | 5 | ..... | ..... | 1 | ..... |
| Clay—James A. Garrity | ..... | ..... | 8 | 14 | ..... | ..... | 1 | 2 |
| Clearwater—O. E. Lewis | ..... | ..... | 3 | 7 | ..... | ..... | 1 | 1 |
| Cook—J. Henry Eliasen | 1 | 1 | 9 | 1 | 1 | ..... | ..... | ..... |
| Cottonwood—M. F. Juhnke | 1 | ..... | 1 | 2 | ..... | ..... | ..... | ..... |
| Crow Wing—Arthur J. Sullivan | * | * | ..... | ..... | ..... | ..... | ..... | ..... |
| Dakota—David L. Grannis, Jr. | ..... | ..... | 15 | 3 | 1 | ..... | 5 | 5 |
| Dodge—Kenneth A. Myster | ..... | ..... | ..... | 10 | ..... | ..... | ..... | ..... |
| Douglas—C. Fred Hanson | ..... | ..... | 4 | 19 | ..... | ..... | 2 | ..... |
| Faribault—Harold C. Lindgren | ..... | 1 | 4 | 12 | ..... | 1 | 1 | ..... |
| Fillmore—Glen C. Sawyer | ..... | ..... | 4 | 47 | ..... | 1 | 1 | 4 |
| Freeborn—Wm. P. Sturtz | 2 | 2 | 30 | 39 | 1 | 1 | 3 | 6 |
| Goodhue—Milton I. Holst | ..... | 2 | 5 | 15 | ..... | ..... | ..... | ..... |
| Grant—R. J. Stromme | ..... | ..... | 1 | 3 | ..... | ..... | ..... | 2 |
| Hennepin—Michael J. Dillon | 18 | 15 | 277 | 468 | 6 | 7 | 20 | 16 |
| Houston—L. L. Roerkohl | ..... | 2 | 4 | 7 | 1 | ..... | 1 | 3 |
| Hubbard—Charles L. Clark | ..... | ..... | 3 | 9 | ..... | ..... | 1 | 5 |
| Isanti—Harold L. Westin | ..... | ..... | 1 | 6 | ..... | ..... | ..... | ..... |
| Itasca—Ben Grussendorf—W. B. Taylor, Ass't and Acting | 1 | ..... | 5 | 14 | 1 | ..... | 3 | 24 |
| Jackson—E. H. Nicholas | ..... | ..... | 3 | 2 | ..... | ..... | ..... | ..... |
| Kanabec—Geo. L. Angstman | ..... | 2 | 5 | 4 | ..... | 1 | ..... | ..... |
| Kandiyohi—Roy A. Hendrickson | 2 | ..... | ..... | 4 | ..... | ..... | ..... | 5 |
| Kittson—Lyman A. Brink | ..... | ..... | 1 | 3 | ..... | ..... | 1 | ..... |
| Koochiching—J. J. Hadler—L. P. Blomholm ** | 1 | * | 10 | ..... | 1 | ..... | 10 | ..... |
| Lac qui Parle—H. W. Swenson | ..... | ..... | 4 | 8 | ..... | ..... | ..... | ..... |
| Lake—Emmett Jones | ..... | ..... | 2 | 1 | ..... | ..... | ..... | ..... |
| Lake of the Woods—W. B. Sherwood | ..... | ..... | 2 | 2 | ..... | ..... | ..... | ..... |
| Le Sueur—George T. Havel | ..... | ..... | 4 | 4 | ..... | ..... | ..... | 1 |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Lincoln—B. M. Hejnzen | | 1 | 2 | 5 | | | | |
| Lyon—A. L. Bromen | | | 8 | 10 | | | 2 | 5 |
| McLeod—Hubert G. Smith | * | * | | | | | | |
| Mahnomen—L. A. Wilson | | | 3 | 11 | | | 3 | 1 |
| Marshall—Rasmus Hage | | * | 9 | | 1 | | | |
| Martin—C. L. Erickson | | | 6 | 22 | 1 | | 1 | 3 |
| Meeker—Sam G. Gandrud | | 1 | 1 | 6 | 2 | | | |
| Mille Lacs—John S. Nyquist | | | 4 | 10 | | | | 3 |
| Morrison—Attell P. Felix—Austin L. Grimes | | | 9 | 17 | | | 3 | 6 |
| Mower—A. C. Richardson | 1 | 1 | 28 | 26 | | 1 | 1 | 5 |
| Murray—H. G. Whitney | | | 12 | 4 | | 1 | | |
| Nicollet—A. L. McConville | | | 4 | 7 | | | | |
| Nobles—Raymond E. Mork | | | 6 | 8 | | | 1 | |
| Norman—Lloyd J. Hetland | | | 2 | 5 | | | | 1 |
| Olmsted—Thomas J. Scanlan | | | 5 | 24 | 2 | 2 | 3 | |
| Otter Tail—Wm. P. Berghuis—Chester G. Rosengren | 1 | | 16 | 20 | | | 3 | 1 |
| Pennington—Paul A. Lundgren | * | | | 11 | | | | 1 |
| Pine—Albert Johnson | * | * | | | | | | |
| Pipestone—J. H. Manion | * | * | | | | | | |
| Polk—F. H. Stadsvold | | 2 | 38 | 22 | 1 | | 4 | 1 |
| Pope—Wm. Merrill | | 3 | 1 | | 1 | | 1 | |
| Ramsey—James F. Lynch | 10 | 3 | 140 | 200 | 3 | 2 | 5 | 3 |
| Red Lake—Charles E. Boughton, Jr. | * | * | | | | | | |
| Redwood—Thos. F. Reed | * | | | 2 | | | | 2 |
| Renville—Russell L. Frazee | | * | 7 | | | | 2 | |
| Rice—John E. Coughlin—Urban J. Steimann, Acting | | | 5 | 14 | 1 | | 3 | |
| Rock—Mort B. Skewes | | | 2 | 2 | | | 1 | |
| Roseau—R. J. Knutson | * | * | | | | | | |
| St. Louis—Thomas J. Naylor | 11 | 13 | 119 | 185 | 4 | 6 | 30 | 41 |
| Scott—Harold E. Flynn | 3 | | 1 | 6 | | | 1 | 3 |
| Sherburne—George H. Tyler—Howard S. Wakefield | | 2 | 3 | 7 | | | 2 | 3 |
| Sibley—Everett L. Young | | * | 2 | | | | | |
| Stearns—David T. Shay | * | * | | | | | | |
| Steele—John P. Walbran | | 1 | 6 | 11 | | | 2 | |
| Stevens—Clayton A. Gay | * | | | 6 | | | 1 | 1 |
| Swift—Frank A. Barnard—Carl A. Holmquist, Ass't | | | | 1 | 2 | | | |
| Todd—Henry F. Prinz | | | 13 | 10 | | | 3 | 4 |
| Traverse—Earl E. Huber | | | 2 | 2 | | | | |
| Wabasha—Arnold W. Hatfield | * | * | | | | | | |
| Wadena—Hugh G. Parker | 2 | * | 5 | | | | | |
| Waseca—Harvey E. Gardner | 1 | | 1 | 8 | | | | |
| Washington—Wm. T. Johnson | 2 | | 16 | 8 | | | | 2 |
| Watonwan—E. M. Perrier | | 1 | 4 | 3 | | | | 1 |
| Wilkin—R. N. Nelson | 1 | | 2 | | 1 | | 1 | |
| Winona—W. Kenneth Nissen | 2 | 2 | 6 | 12 | 1 | | 1 | 1 |
| Wright—Walter S. Johnson—S. A. Johnson, Acting | | | 7 | 4 | | | | 1 |
| Yellow Medicine—Robert M. Baker—Salmer N. Knutson, Ass't, Acting | | | 4 | 4 | | | | |
| Totals | 72 | 72 | 1,002 | 1,552 | 35 | 32 | 146 | 191 |

*No report received.

**1945 Report of J. J. Hadler to Oct. 18th; no report for balance.

TABLE NO. 1—Continued

PROSECUTIONS REPORTED BY COUNTY ATTORNEYS FOR 1945 AND 1946

| COUNTY—COUNTY ATTORNEY | MUNICIPAL AND JUSTICE COURTS | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | Found Guilty | | Plead Guilty | | Acquitted | | Dismissed | |
| | 1945 | 1946 | 1945 | 1946 | 1945 | 1946 | 1945 | 1946 |
| Aitkin—John T. Galarneault | 3 | ..... | 68 | 131 | ..... | 3 | ..... | ..... |
| Anoka—Charles P. LeRicheux | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| Becker—Carl G. Buck—Lowell W. Benshoof, Acting | 32 | 26 | 174 | 316 | 1 | 3 | 20 | 10 |
| Beltrami—Clarence R. Smith | 2 | 4 | 30 | 12 | ..... | 1 | 7 | 4 |
| Benton—J. Arthur Bensen | 5 | 8 | 31 | 75 | 2 | ..... | 13 | 9 |
| Big Stone—C. J. Benson | 2 | 4 | 35 | 80 | ..... | 1 | 3 | 5 |
| Blue Earth—Milton D. Mason | 17 | 36 | 649 | 2,253 | 1 | 4 | 6 | 7 |
| Brown—Geo. K. Erickson | 2 | ..... | 76 | 92 | ..... | ..... | 3 | 2 |
| Carlton—Frank Yetka—Thomas M. Bambery | 21 | 31 | 195 | 308 | ..... | 1 | 22 | 25 |
| Carver—John J. Fahey | 27 | ..... | 39 | ..... | ..... | ..... | ..... | ..... |
| Cass—Edward L. Rogers | ..... | 7 | ..... | 82 | ..... | ..... | ..... | 5 |
| Chippewa—C. A. Rolloff | ..... | 9 | 112 | 132 | 1 | ..... | ..... | 2 |
| Chisago—Carl W. Gustafson | 2 | 6 | 113 | 168 | ..... | 1 | 5 | 6 |
| Clay—James A. Garrity | ..... | ..... | 217 | 368 | ..... | ..... | ..... | ..... |
| Clearwater—O. E. Lewis | 3 | ..... | 106 | 77 | ..... | ..... | 1 | 1 |
| Cook—J. Henry Eliasen | 3 | 1 | 21 | 26 | ..... | ..... | 3 | 5 |
| Cottonwood—M. F. Juhnke | 1 | 2 | 80 | 82 | ..... | ..... | ..... | ..... |
| Crow Wing—Arthur J. Sullivan | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| Dakota—David L. Grannis, Jr. | 55 | 43 | 951 | 822 | 1 | 5 | 23 | 21 |
| Dodge—Kenneth A. Myster | ..... | 1 | 108 | 58 | ..... | 1 | 1 | 10 |
| Douglas—C. Fred Hanson | 27 | 15 | 113 | 136 | 1 | 6 | 3 | 6 |
| Faribault—Harold C. Lindgren | ..... | 4 | 41 | 84 | ..... | ..... | ..... | ..... |
| Fillmore—Glen C. Sawyer | 1 | 1 | 64 | 71 | ..... | 1 | 3 | 3 |
| Freeborn—Wm. P. Sturtz | ..... | 3 | 209 | 251 | 2 | 4 | ..... | 3 |
| Goodhue—Milton I. Holst | 2 | 2 | 274 | 385 | ..... | ..... | 8 | 11 |
| Grant—R. J. Stromme | ..... | ..... | 28 | 16 | ..... | ..... | ..... | ..... |
| Hennepin—Michael J. Dillon | 61 | 58 | 1,164 | 1,436 | 6 | 13 | 14 | 21 |
| Houston—L. L. Roerkohl | 3 | 4 | 84 | 152 | ..... | ..... | 2 | 1 |
| Hubbard—Charles L. Clark | 5 | 15 | 59 | 160 | 2 | 1 | 6 | 11 |
| Isanti—Harold L. Westin | 5 | 3 | 56 | 67 | 1 | 2 | ..... | 6 |
| Itasca—Ben Grussendorf—W. B. Taylor, Ass't and Acting | 5 | 22 | 260 | 558 | 1 | ..... | 13 | 5 |
| Jackson—E. H. Nicholas | 1 | 2 | 63 | 158 | ..... | 2 | 5 | 5 |
| Kanabec—Geo. L. Angstman | 2 | ..... | 54 | 176 | ..... | ..... | ..... | ..... |
| Kandiyohi—Roy A. Hendrickson | 2 | 3 | 80 | 99 | ..... | ..... | 9 | 17 |
| Kittson—Lyman A. Brink | 2 | 2 | 31 | 55 | 1 | 6 | ..... | ..... |
| Koochiching—J. J. Hadler—L. P. Blomholm ** | 14 | ..... | 42 | ..... | ..... | ..... | 10 | ..... |
| Lac qui Parle—H. W. Swenson | ..... | 1 | 113 | 175 | ..... | ..... | 5 | 4 |
| Lake—Emmett Jones | ..... | ..... | 26 | 86 | ..... | ..... | 1 | 2 |
| Lake of the Woods—W. B. Sherwood | 1 | 4 | 61 | 57 | 1 | ..... | 2 | ..... |
| Le Sueur—George T. Havel | 2 | 1 | 74 | 231 | ..... | 1 | 4 | 2 |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Lincoln—B. M. Heinzen | 3 | | 55 | 107 | | | 1 | 3 |
| Lyon—A. L. Bromen | | | 265 | 265 | | | | |
| McLeod—Hubert G. Smith | | | | | | | | |
| Mahnomen—L. A. Wilson | 6 | 1 | 43 | 110 | | | 1 | |
| Marshall—Rasmus Hage | 10 | | 28 | | 1 | | 1 | |
| Martin—C. L. Erickson | 1 | | 76 | 206 | | 1 | | 8 |
| Meeker—Sam G. Gandrud | 2 | | 64 | 59 | | | | |
| Mille Lacs—John S. Nyquist | 9 | 13 | 168 | 225 | 4 | 1 | 7 | 5 |
| Morrison—Attell P. Felix, Austin L. Grimes | 9 | 6 | 142 | 154 | | 5 | 17 | 35 |
| Mower—A. C. Richardson | 8 | 7 | 113 | 179 | 2 | 3 | 6 | 12 |
| Murray—H. G. Whitney | 4 | 9 | 142 | 131 | 1 | 2 | 7 | 1 |
| Nicollet—A. L. McConville | | | 101 | 147 | | 2 | | |
| Nobles—Raymond E. Mork | | 1 | 136 | 163 | | | 1 | 7 |
| Norman—Lloyd J. Hetland | 1 | | 40 | 51 | | | 10 | 5 |
| Olmsted—Thomas J. Scanlan | 3 | 11 | 402 | 550 | 1 | 4 | | 2 |
| Otter Tail—Wm. P. Berghuis—Chester G. Rosengren | 2 | 7 | 166 | 187 | 1 | | 25 | 14 |
| Pennington—Paul A. Lundgren | | | | 44 | | | | 5 |
| Pine—Albert Johnson | | | | | | | | |
| Pipestone—J. H. Manion | | | | | | | | |
| Polk—F. H. Stadsvold | | 3 | 54 | 65 | 1 | 1 | 2 | 10 |
| Pope—Wm. Merrill | 10 | | 71 | 103 | | | 4 | |
| Ramsey—James F. Lynch | 39 | 45 | 568 | 742 | 1 | 8 | 6 | 8 |
| Red Lake—Charles E. Boughton, Jr. | | | | | | | | |
| Redwood—Thos. F. Reed | | | | 209 | | 3 | | 13 |
| Renville—Russell L. Frazee | 9 | | 20 | | 1 | | 4 | |
| Rice—John E. Coughlin—Urban J. Steimann, Acting | 10 | 21 | 301 | 412 | 2 | 1 | 3 | 6 |
| Rock—Mort B. Skewes | | | 57 | 84 | | | | |
| Roseau—R. J. Knutson | | | | | | | | |
| St. Louis—Thomas J. Naylor | 4 | 2 | 214 | 375 | | 1 | 49 | 50 |
| Scott—Harold E. Flynn | 8 | | 65 | 84 | | | | 2 |
| Sherburne—George H. Tyler—Howard S. Wakefield | 2 | 6 | 189 | 117 | 1 | | | 1 |
| Sibley—Everett L. Young | 6 | | 62 | | 2 | | 4 | |
| Stearns—David T. Shay | | | | | | | | |
| Steele—John P. Walbran | | 1 | 352 | 532 | 1 | 3 | 11 | 4 |
| Stevens—Clayton A. Gay | 12 | 8 | 77 | 88 | | 1 | 2 | 4 |
| Swift—Frank A. Barnard—Carl A. Holmquist, Ass't | | | 146 | 180 | 1 | | | |
| Todd—Henry F. Prinz | | | 89 | 153 | | | 15 | 19 |
| Traverse—Earl E. Huber | | | 70 | 101 | 1 | | 1 | 1 |
| Wabasha—Arnold W. Hatfield | | | | | | | | |
| Wadena—Hugh G. Parker | | | 113 | | 2 | | 3 | |
| Waseca—Harvey E. Gardner | 7 | 5 | 61 | 102 | | 1 | 4 | 2 |
| Washington—Wm. T. Johnson | 12 | 7 | 137 | 246 | | | 14 | 9 |
| Watonwan—E. M. Perrier | 2 | | 56 | 85 | | | | 1 |
| Wilkin—R. N. Nelson | 1 | | 86 | | | | | |
| Winona—W. Kenneth Nissen | 18 | 14 | 777 | 1,716 | 6 | 4 | 7 | 22 |
| Wright—Walter S. Johnson—S. A. Johnson, Acting | 1 | 1 | 72 | 128 | | | 2 | 1 |
| Yellow Medicine—Robert M. Baker—Salmer N. Knutson, Ass't, Acting | 1 | 1 | 58 | 76 | | | 5 | 1 |
| Totals | 508 | 487 | 11,537 | 17,611 | 50 | 97 | 404 | 460 |

TABLE NO. 2

TABULATED STATEMENT OF CRIMINAL CASES AS REPORTED BY COUNTY ATTORNEYS FOR 1945 AND 1946

| NATURE OF ACCUSATION | IN JUSTICE, MUNICIPAL, AND DISTRICT COURTS | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | Pleaded Guilty | | Found Guilty | | Acquittals | | Dismissals | |
| | 1945 | 1946 | 1945 | 1946 | 1945 | 1946 | 1945 | 1946 |
| **I. Crimes Against the Person:** (Ch. 619) | | | | | | | | |
| Murder—1st degree | 3 | | | | | | | |
| 2nd degree | | 1 | 2 | 1 | 2 | | | 2 |
| 3rd degree | 10 | 4 | 2 | 2 | | | 1 | |
| Manslaughter—1st degree | 2 | | 1 | | 2 | 1 | | 1 |
| 2nd degree | 2 | 3 | | 1 | | | 1 | |
| Assault—1st degree | 11 | 12 | 1 | 2 | 2 | 2 | | 4 |
| 2nd degree | 38 | 59 | 7 | 2 | 1 | 3 | 9 | 11 |
| 3rd degree | 343 | 465 | 72 | 61 | 17 | 23 | 51 | 73 |
| Robbery—1st degree | 13 | 15 | 1 | 1 | 1 | | | 1 |
| 2nd degree | 10 | 9 | 3 | 4 | | | | 2 |
| 3rd degree | 6 | 10 | | | 1 | | 2 | |
| Kidnaping | 2 | | | | | | 3 | 1 |
| Slander | 3 | 4 | 1 | | | | 1 | 1 |
| Miscellaneous | 2 | | | | | | 2 | |
| **II. Crimes Against Morality, etc.:** (Ch. 617) | | | | | | | | |
| (a) Sex Crimes, Indecency, etc.: | | | | | | | | |
| Rape | 4 | 4 | | 2 | 1 | | 3 | 2 |
| Carnal knowledge | 6 | 5 | 2 | 1 | 1 | | 5 | 1 |
| Female under 10 | | | 1 | | | | | |
| Female 10 to 13 | 3 | 5 | 1 | 1 | | | 1 | |
| Famale 14 to 17 | 27 | 38 | 2 | | 4 | | 9 | 7 |
| Indecent assault | 25 | 30 | 3 | 2 | 3 | 2 | 7 | 8 |
| Adultery | 10 | 20 | 1 | 2 | 1 | | 7 | 6 |
| Abortion | 4 | 14 | 1 | | | | | |
| Bigamy | 5 | 7 | | 1 | | | | |
| Fornication | 5 | 11 | | | | | 2 | 2 |
| Incest | 1 | 4 | 1 | | | | | |
| Sodomy | 4 | 6 | 1 | | 1 | 1 | 3 | 3 |
| House of ill fame | | 1 | 1 | | | | | 2 |
| Psychopathic personality | | 6 | 2 | 2 | 1 | | | |
| Abduction | 2 | | | | | | | 1 |
| Miscellaneous | 14 | 23 | 2 | 3 | | | 3 | |
| (b) Crimes against Children, etc.: | | | | | | | | |
| Paternity, illegitimate child (Ch. 257) | 100 | 186 | 15 | 8 | 2 | 1 | 26 | 26 |
| Absconding to evade paternity proceedings | 9 | | | | | | | |
| Abandonment, wife or child | 34 | 68 | 3 | 2 | | 2 | 21 | 29 |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Non-support, wife or child | 100 | 143 | 32 | 16 | ..... | 5 | 32 | 26 |
| Neglect of minor | 3 | 3 | 1 | ..... | ..... | ..... | ..... | ..... |
| Contributing to minor's delinquency | 4 | 34 | 3 | 6 | ..... | 1 | 4 | 4 |
| Cruelty to child | 1 | 2 | ..... | 1 | ..... | ..... | 1 | 1 |
| Child labor laws | 3 | 8 | ..... | ..... | ..... | ..... | ..... | ..... |
| Prohibited marriage | 1 | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| Miscellaneous | ..... | 1 | ..... | ..... | ..... | ..... | ..... | ..... |
| (c) Miscellaneous Crimes against Morality, etc.: | | | | | | | | |
| Public dance laws, violations | 4 | 2 | 2 | ..... | ..... | ..... | ..... | 1 |
| Gambling and lottery laws, violations | 26 | 51 | ..... | ..... | ..... | ..... | ..... | ..... |
| **III. Crimes Against Property:** (Ch. 620-622) | | | | | | | | |
| Arson—1st degree | ..... | ..... | ..... | 1 | ..... | ..... | ..... | ..... |
| 2nd degree | 1 | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| 3rd degree | 7 | 2 | 1 | ..... | ..... | 1 | ..... | ..... |
| Burglary—1st degree | 1 | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| 2nd degree | 1 | 2 | ..... | ..... | ..... | ..... | 4 | ..... |
| 3rd degree | 60 | 59 | 1 | 1 | ..... | ..... | 8 | 8 |
| Unlawful entry | 14 | 17 | ..... | ..... | ..... | 1 | 7 | 4 |
| Forgery—1st degree | 1 | 2 | ..... | ..... | ..... | ..... | ..... | 1 |
| 2nd degree | 48 | 72 | 1 | 3 | ..... | ..... | 5 | 7 |
| 3rd degree | 8 | 5 | 1 | 1 | ..... | ..... | 2 | 2 |
| Larceny, grand—1st degree | 40 | 60 | 3 | 3 | 1 | 1 | 10 | 13 |
| 2nd degree | 202 | 250 | 6 | 3 | 1 | 1 | 44 | 30 |
| Larceny, petit | 182 | 243 | 16 | 24 | 7 | 5 | 22 | 32 |
| Giving check without funds | 112 | 179 | 5 | 2 | ..... | ..... | 30 | 37 |
| Receiving stolen property | 14 | 9 | 1 | ..... | 2 | ..... | 5 | ..... |
| Mortgaged chattels, sale, removal, etc. | 10 | 17 | ..... | ..... | ..... | ..... | 7 | 8 |
| Malicious mischief | 57 | 94 | 4 | ..... | ..... | 2 | 12 | 12 |
| Extortion | 4 | 3 | ..... | 5 | ..... | ..... | ..... | ..... |
| Trespass | 4 | 6 | 2 | 2 | ..... | ..... | ..... | 4 |
| Fraud | 7 | 4 | 1 | 1 | ..... | ..... | ..... | 2 |
| Fraud on innkeeper (Ch. 327) | 6 | 5 | ..... | 2 | ..... | ..... | ..... | 4 |
| Miscellaneous | 1 | 3 | ..... | 1 | ..... | ..... | 1 | 1 |
| **IV. Crimes Against Sovereignty** (Ch. 612); **Public Justice** (Ch. 613); **Safety** (Ch. 616); **Peace** (Ch. 615), etc.: | | | | | | | | |
| Bribery (giving or receiving) | 1 | ..... | ..... | ..... | ..... | 1 | ..... | ..... |
| Perjury | 1 | 3 | ..... | ..... | ..... | ..... | ..... | ..... |
| Resisting or interfering with officer | 37 | 62 | ..... | 9 | 1 | ..... | 3 | 3 |
| Concealed weapons, carrying, etc. | 6 | 42 | 2 | 2 | ..... | ..... | 1 | 4 |
| Language provocative of assault | 22 | 36 | 12 | 2 | ..... | 1 | 11 | 5 |
| Contempt of court | 2 | 8 | ..... | 1 | ..... | ..... | ..... | 1 |
| Escape | 12 | 41 | ..... | 3 | ..... | ..... | 1 | 2 |
| Breach of peace | 45 | 85 | 6 | 15 | 3 | ..... | 6 | 6 |
| Disorderly conduct | 114 | 367 | 9 | 22 | ..... | 5 | 8 | 5 |
| Public Nuisance | 10 | 30 | 2 | 10 | ..... | 1 | 4 | 8 |
| Miscellaneous | 2 | 3 | ..... | ..... | ..... | ..... | 1 | ..... |

TABLE NO. 2—Continued

TABULATED STATEMENT OF CRIMINAL CASES AS REPORTED BY COUNTY ATTORNEYS FOR 1945 AND 1946

| NATURE OF ACCUSATION | IN JUSTICE, MUNICIPAL, AND DISTRICT COURTS | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | Pleaded Guilty | | Found Guilty | | Acquittals | | Dismissals | |
| | 1945 | 1946 | 1945 | 1946 | 1945 | 1946 | 1945 | 1946 |
| **V. Miscellaneous Crimes (and various special statutes)** | | | | | | | | |
| Cruelty to animals (Ch. 614) | 40 | 5 | 2 | ..... | ..... | ..... | 10 | 2 |
| Vagrancy | 59 | 61 | 1 | 1 | ..... | ..... | ..... | 4 |
| Violations of laws re: | | | | | | | | |
| Compulsory education | 19 | 9 | 9 | 4 | ..... | ..... | 4 | 7 |
| Forestry | 22 | 51 | 3 | 2 | ..... | 3 | ..... | 7 |
| Wild animals (game and fish) (Chaps. 97-102) | 963 | 1,373 | 38 | 37 | 10 | 19 | 30 | 62 |
| Health | 22 | 27 | 2 | 1 | ..... | 2 | 4 | 1 |
| Food | 38 | 26 | 8 | 2 | 1 | ..... | 1 | 2 |
| Motor vehicles, traffic | 6,703 | 10,471 | 178 | 171 | 6 | 21 | 51 | 78 |
| Motor vehicles, tampering | 4 | 23 | 1 | ..... | ..... | ..... | ..... | 1 |
| Motor vehicles, intoxicated driver | 573 | 946 | 35 | 39 | 4 | 5 | 8 | 9 |
| Motor vehicles—Criminal negligence causing death | 5 | 10 | 1 | 4 | 2 | 7 | 2 | 2 |
| Motor vehicles, unauthorized use | 83 | 184 | 2 | 2 | ..... | 1 | 14 | 9 |
| Drunkenness | 1,541 | 2,110 | 41 | 42 | 1 | 1 | 18 | 25 |
| Intoxicating liquor | 112 | 142 | 8 | 6 | 4 | 4 | 11 | 15 |
| Non-intoxicating liquor | 44 | 13 | 2 | 6 | ..... | 1 | 2 | 4 |
| Narcotics | 5 | 5 | ..... | 4 | ..... | ..... | ..... | ..... |
| Gas tax | 7 | 22 | ..... | ..... | ..... | ..... | ..... | ..... |
| Miscellaneous | 427 | 722 | 12 | 4 | 2 | 5 | 9 | 9 |
| Totals | 12,539 | 19,163 | 580 | 559 | 85 | 129 | 550 | 651 |

# SELECTED OPINIONS

# AERONAUTICS

AIRPORTS

## 1

**Acquisition—Village—Bond issue**—L 45, C 303, §§ 10 to 23, inc., and § 6, Subd. 6-9.

**Questions**

1. May the Village of Spring Valley purchase direct lands to be used for an airport?

2. If such lands are so purchased, can they be purchased out of the general fund, or shall the question be submitted to the voters whether the village, through its proper officers, may purchase the same?

3. Would it be necessary to have bonds voted to raise money to pay for the lands?

4. Can the village erect necessary buildings for such an airport?

**Opinion**

The entire subject of municipal acquisition, construction, operation, etc., of airports is covered by Laws 1945, Chapter 303, Sections 10 to 23, inclusive, and by Section 6, Subdivisions 6-9.

Answering your specific questions:

1. The village has the right to purchase lands for an airport.

2. If such lands are so purchased, they may be paid for out of the general fund, if sufficient moneys are available in that fund. It is not necessary that the question as to whether lands shall be purchased be submitted to the voters. However, under Section 6, Subdivision 6, of Chapter 303, a municipality, before acquiring property for the purpose of constructing or establishing an airport, must make an application to the commissioner of aeronautics for a certificate of approval of the site selected.

3. If it is necessary to issue bonds to provide for the purchase of property and the construction of an airport, the applicable statutes with reference to the issuance of village bonds would have to be followed.

4. The erection of buildings for airport purposes is properly a part of the construction of an airport.

WM. C. GREEN,
Assistant Attorney General.

Spring Valley Village Attorney.

October 26, 1945. 234-B

## 2

**Liability—Municipalities for torts of employes and tenants.**

### Facts

The City of Alexandria is the owner of and operates and manages the Alexandria Municipal Airport. As a part of its operations, it leases to tenants ground and, in one instance, a hangar. You enclose with your letter a copy of one of the leases. The lease provides for the tenant carrying certain insurance. You state that, in addition to that insurance, the City of Alexandria, in order to be fully protected, desires to carry a public liability policy. You ask the opinion of this office on the following

### Questions

"1. In your opinion is the operation of the airport of a governmental nature so as to eliminate the liability of the city for accidents arising thereon or by reason of the operation thereof?

"2. If the operation is not governmental but proprietary, so that there is a liability on the city,

(a) To what extent is the city liable for accidents which occur by reason of the operations of any of the tenants?

(b) To what extent is the city liable for accidents resulting in part through negligence of the tenants and in part through negligence of the city?

(c) To what extent is the city liable for accidents resulting solely through negligence on its part?"

### Opinion

In the case of **Erickson v. King**, 15 N. W. 2d 201, our Supreme Court held that the operation of a municipal airport is a governmental function and that the fact that certain facilities are leased to private individuals for uses connected with the airport does not destroy the governmental character of the function. Ordinarily, having held that such an operation is governmental in character, we would expect the court to hold that there is no liability for tort on the part of the municipality. However, that question has not been directly passed upon, and we have suggested to municipal officers that, as a matter of precaution, until the question is definitely settled, it would probably be wise for the city to carry public liability insurance.

The courts of Iowa, Georgia, and Tennessee, in the cases of **Abbott v. City of Des Moines**, 298 N. W. 649, 138 A. L. R. 120, **Mayor etc. v. Lyons**, 189 S. E. 63, and **Stocker v. City of Nashville**, 126 S. W. 2d 339, have held that cities are not liable for damages caused by negligence of city employes, on the theory that the city, in operating the airport, is engaged in

a governmental, rather than a proprietary, function. On the contrary, the courts of Florida, Texas, California, Oregon, Oklahoma, Michigan, and Alabama have held that in such an operation a city is engaged in a proprietary function and subject to the same liabilities as a private airport operator. The best answer I can give to your first question, therefore, is that our court would probably hold as have the courts of Iowa, Georgia, and Tennessee.

Answering your second question, even though the court should hold that a municipality is liable for the negligent acts of its own employes, I am of the opinion that it would not be held liable for negligent acts of its tenants if it in no manner participated in those negligent acts. The subject is quite thoroughly discussed in **Meloy v. City of Santa Monica**, 12 P. 2d 1072, which was an airport case, the court holding that, under the general law applicable to the relationship of landlord and tenant, the city could not be held liable for acts of its tenant in which it did not participate.

Answering the second subdivision of your second question and assuming for the purposes of the question only that a municipality would be held liable for the negligent acts of its employes, I am of the opinion that, just as in any case of joint tort feasors, both the city and the tenant would be liable under any of the facts as stated in your question.

Answering the third subdivision of your second question, the city would, of course, be liable for accidents resulting from negligence on its part unless it is exempt by reason of the fact that the operation of the airport is a governmental function.

As to the example you give of a pilot who, being intoxicated, goes out to the airport and is either refused permission to take off and takes off in violation of instructions, or does not comply with the rules for asking permission and takes off without refusal or consent, or is given permission to take off, in the first two instances I cannot see how there could be any liability on the part of the municipality unless its employes failed to perform some duty resting upon them. If, knowing that the pilot's condition was such as to endanger others, the employes expressly permitted him to take off, we would get back to the question as to whether or not there is any liability for tort at all.

You also give as an example a case where an accident occurs which can be attributed to the fault or negligence of the manager of the airport or the traffic manager in confusing his signals or directions to the operators or pilots of planes operating from or arriving at the airport. Again we get back to the question of whether there is any liability on the part of the city under any circumstances.

As to the matter of limiting liability by the erection of appropriate signs, it certainly would be the part of wisdom to erect signs, particularly at places which might be used by members of the public if they were not

warned by such signs. See **Pignet v. City of Santa Monica**, 84 P. 2d 166; **Strong v. Chronicle Publishing Co.**, 93 P. 2d 649.

WM. C. GREEN,
Assistant Attorney General.

Alexandria City Attorney.

February 10, 1945. 234-B

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## 3

**Police—Authority of city to police municipal airports outside city limits—** L 1945, C 303, § 11, Subd. 1; § 17, Subd. 3; § 23.

### Facts

The City of New Ulm has acquired by purchase and by condemnation title to 200 acres of land in Milford Township in Brown County for municipal airport purposes. The lands are outside the city limits and do not abut on those limits at any point. The lands are being used as an airport, with several planes owned by private persons stored in hangars located thereon. Automobiles are driven out there and parked, often in places likely to create danger to others, and there should be someone with authority to arrest, if reasonable requests or commands are ignored, or with authority to otherwise compel compliance.

### Question

Whether police officers of New Ulm are entitled to act, because the airport is outside the city limits?

### Opinion

Laws 1945, Chapter 303, Section 11, Subdivision 1, authorizing municipalities to acquire airports, among other things authorizes them to regulate such airports and other air navigation facilities and structures and other property incidental to their operation, either within or without the territorial limits of such municipality and within or without this state.

Section 17, Subdivision 3, of the same act authorizes a municipality which has established, or may hereafter establish, airports, restricted landing areas, or other air navigation facilities, or which has acquired or set apart, or may hereafter acquire or set apart, real property for such purpose or purposes, to adopt and amend all needful rules, regulations, and ordinances for the management, government, and use of any properties under its control, whether within or without the territorial limits of the municipality; to appoint airport guards or police, with full police powers; to fix by ordinance or resolution, as may be appropriate, penalties for the violation of said rules, regulations, and ordinances and enforce said penalties in the

same manner in which penalties prescribed by other rules, regulations, and ordinances of the municipality are enforced. This subdivision also confers jurisdiction for these purposes of such part of all highways, roads, streets, avenues, boulevards, and territory as adjoins or lies within one mile of the limits of the airport.

Section 23 of the act confers exclusive jurisdiction and control over an airport upon the municipality controlling and operating it.

In view of these provisions of the statute, there can be no question that the City of New Ulm is entitled to adopt such rules, regulations, and ordinances as may be necessary and that its police officers have full authority to enforce any such rules and regulations.

WM. C. GREEN,
Assistant Attorney General.

New Ulm City Attorney.

August 24, 1945. 234-B

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# AGRICULTURE

## DAIRY AND FOOD

## 4

**Milk—Licenses—Licenses for manufacture of dairy products issued pursuant to MS 1945, Sec. 32.09 or licenses for sale of milk or cream issued pursuant to MS 1945, Sec. 32.25 do not terminate upon death of licensee, but representative appointed by probate court may continue the operation of the business licensed under the original license until expiration of license.**

### Question

"1. In the event of the death of the owner of a dairy plant, licensed pursuant to Minnesota Statutes 1945, Section 32.09, will

(a) the license issued to the decedent prior to his death remain in force during the probate of his estate or until the expiration of the license period, whichever occurs first, or

(b) will it be necessary for the special administrator and later the executor to each obtain a license to continue the operation of the said dairy plant?"

### Opinion

In our opinion upon the death of a licensee the duly appointed representative of the estate of such deceased licensee may continue to operate

the business so licensed until the expiration of the license or until the termination of his appointment, whichever event occurs first. Therefore, the representative of the estate of the deceased licensee may continue such business without obtaining a new license. However, when the period for which the license was issued has expired then, of course, it would be necessary for the representative to obtain a new license.

**Question**

"2. We desire the same information regarding Minnesota Statutes 1945, Section 32.23."

**Opinion**

What we have said in our answer to your first question fully answers and disposes of your second question.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Department of Agriculture, Dairy and Food.

September 30, 1946. 292-C

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## 5

**Milk—Licenses—Licenses issued pursuant to MS 1945, section 32.23 should be to the person owning and operating the business, and separate licenses need not be issued to the employees of the licensee or to each truck owned by the licensee and used in connection with his licensed business.**

**Facts**

"In issuing milk licenses to persons or firms selling milk and cream, we have followed the practice, where a person or firm has several vehicles which are used in the sale and distribution of its products, to issue a license for the plant and for each of the vehicles. In the case of some of the larger firms, this may amount to a considerable sum, as some firms have as many as 75 or 100 vehicles."

You submit the following:

**Question**

"Pursuant to Minnesota Statutes 1945, Section 32.23, it is necessary to issue a license for the plant and for each of the vehicles used by said firm in selling and distributing its products, or will one license to such an establishment suffice?"

**Opinion**

In our opinion only one license should be issued to the person or firm engaged in selling milk or cream. Under such license the employees of the licensee may sell milk or cream without the necessity of an additional license. This seems clear to us from the language contained in Minnesota Statutes 1945, Section 32.23, which reads in part as follows:

> "Each license shall be numbered and shall contain the name, residence, and place of business of the licensee, **the names of all employees authorized to act thereunder, and the number of vehicles and places to be used.** The name and number of the license shall be plainly inscribed on both sides of each vehicle in use for these purposes, and the license shall be conspicuously posted in each place where such milk or cream is sold, and the making of every sale from a vehicle not so inscribed or from a place where such license is not so posted, shall be deemed the commission of a misdemeanor."

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Department of Agriculture, Dairy and Food

September 30, 1946. 292-C

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ECONOMIC POISONS

## 6

**Sale—Licenses for—Time for making application**—L 1945, C 427.

**Question**

Attention is called to Section 2, Paragraph (c) of the Economic Poisons and Devices Law, Chapter 427, Session Laws of 1945, which paragraph relates to the filing of an application for a license or certificate of registration for a product falling within the scope of the law. If the application is put in the mails on or before July 1st with sufficient postage, does such application comply with the law so as to avoid the penalty? In other words, is an application we receive on or after July 2nd subject to the 50 per cent penalty as provided in the law, if the envelope same was mailed in bears a postmark dated on or before July 1st?

**Opinion**

Laws 1945, Chapter 427, Section 2 (a), provides in part as follows:

> "Any person, before selling or offering for sale any economic poison for use as an insecticide or fungicide within this state, shall annually file with the Commissioner of Agriculture, Dairy and Food, an application for registration * * * ."

It has been held by our Supreme Court that where a statute prescribes the time within which a filing must be made such statutory provision must be complied with. Mailing an application to be filed before the time for such filing does not comply with the statute unless the same is actually received within the time specifically stated in such statute. **State ex rel. O'Hearn v. Erickson,** 152 Minn. 349.

There was involved in that case the question of the timely filing of an initiatory affidavit of candidacy for public office. The statute required that such affidavit should be filed at least 40 days prior to the primary election. The affidavit with the necessary filing fee was mailed at least 40 days before the primary election, but was not received by the auditor until one day after the time for filing had expired as provided for in the statute. The court held that it was not important when the affidavit was deposited in the United States post office. That the date when the same was received by the auditor must be regarded as the date of filing and that it was not filed until it reached the office of the county auditor.

The quoted portion of Section 2 (a), supra, must be considered in connection with subdivision (c) as follows:

> "Each registration fee of $5 or $25, if more than four products are registered by one registrant, shall expire on the 30th day of June following its issue and no certificate of registration shall be issued for a term longer than one year, and shall not be transferable from one person to another, or from the ownership to whom issued to another ownership, or from one place to another place or location. A penalty of 50 per cent of the license or registration fee shall be imposed if license or certificate of registration **is not applied for on or before July 1st of each year,** or within the same month such economic poisons are first manufactured or sold within this state."

We hold the emphasized portion of the statute just quoted, when read in conjunction with "shall annually file with the Commissioner of Agriculture, Dairy and Food, an application for registration," to mean that such application must be delivered to the commissioner on or before July 1 and that the mailing of such application on or before July 1 does not meet the statutory requirement so as to avoid payment of the penalty as therein provided. Consequently you will disregard the date of mailing and consider the date when such application is actually received as the date of filing.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Department of Agriculture, Dairy and Food

**July 11, 1946.** 136-i

# BANKS AND CORPORATIONS

## BANKS, INDUSTRIAL LOAN AND THRIFT COMPANIES

## 7

**Investments—Contracts for deed as security—Purchase of mortgages—Purchase and sale of real estate—MS1941, C 53.**

### Questions

1. May industrial loan and thrift companies organized under the provisions of Minnesota Statutes 1941, Chapter 53, purchase contracts for deed?

I assume this would include the question as to whether or not such companies may make loans upon the security of contracts for deed.

2. May industrial loan and thrift companies purchase real estate mortgage loans from outside sources?

3. May industrial loan and thrift companies buy and sell real estate, such as houses, store buildings, apartment buildings, etc.?

### Opinion

1. Minnesota Statutes 1941, Section 53.04, commences:

> "Industrial loan and thrift companies, in addition to the general and usual powers incidental to ordinary corporations in this state, which are not specifically restricted in this chapter, shall have the following special powers," etc.

Inasmuch as ordinary corporations may buy and sell real estate if their articles of incorporation are broad enough to cover such transactions, it might appear that the broad grant of power to industrial loan and thrift companies would authorize such transactions by them. However, Chapter 53, in my opinion, must be read as a whole. Section 53.01 authorizes the organization of a corporation "for the purpose of carrying on primarily the business of loaning money in small amounts to persons within the conditions hereinafter set forth," etc. Section 53.04 (1) grants specific authority to purchase notes, bills of exchange, acceptances, or other choses in action. If it had been the intent of the legislature that these companies should have all the powers of ordinary corporations, it would have been unnecessary to have made this provision. By Section 53.09 the Commissioner of Banks is authorized to make examinations and to satisfy himself that the corporation "is complying with the requirements of this chapter and operating according to sound business principles."

From a consideration of the entire chapter, I am of the opinion that these companies do not have general authority to engage in the business of buying and selling real estate. I am of the opinion that they may, under their general powers, carry on such real estate transactions as are inci-

dental to the business, such as, for instance, the purchase of a place of business in which to carry on the operations of the company, and that they would have authority to sell land which they might acquire by the foreclosure of mortgages or the cancellation of contracts for deed taken by them in the ordinary course of business either as investments or as collateral security. I do not believe they would be authorized, as are savings, building and loan associations by a special statute, to purchase real estate and then sell it on contract for deed.

My answer to the question, therefore, would be in the negative, except as real estate transactions such as have been mentioned are incidental to the general primary business of loaning money in small amounts under the conditions prescribed by Chapter 53.

2. By clause (1) of Section 53.04 these companies are given the special power "to discount or purchase notes, bills of exchange, acceptances or other choses in action."

Under our law, a real estate mortgage, though in form a conveyance of an estate or interest in land, is in effect a mere lien or security. It is a chattel, or thing in action. Dunnell's Minnesota Digest, Volume 4, Section 6145. In states where a mortgage is regarded as security and not as conveying title to real estate it is considered a chose in action. 7 Words and Phrases, pp. 142-143, Supplement p. 15.

The answer to your second question is, therefore, in the affirmative.

3. It has been held several times by our supreme court that the vendor's interest in a contract for the conveyance of real property is personal property. **State ex rel. Hilton v. Probate Court,** 145 Minn. 155; **Summers v. Midland Co.,** 167 Minn. 453; **First and American National Bank of Duluth v. Whiteside et al.,** 207 Minn. 537; **In re Petition of S. R. A. Inc.,** 213 Minn. 487.

In the last cited case the court held that an executory contract for the sale of land, under which the vendee is entitled to or does take possession thereof, is deemed for the purpose of the mortgage registration tax a mortgage of the land for the unpaid balance of the purchase price. Contracts for deed come within the ordinary definition of choses in action and have been specifically held to be such. **Smith v. Glen Alden Coal Co.,** 347 Pa. 290, 32 A. 2d 227.

I am, therefore, of the opinion that under clause (1) of Section 53.04 an industrial loan and thrift company has the right to discount or purchase from vendors contracts for deed and that, under clause (2) of the same section, it has the right to take from vendors contracts for deed as security.

It should be kept in mind that the vendee's interest under a contract for deed is real estate, and, therefore, an industrial loan and thrift company would not be entitled to make loans on the security of a vendee's interest under a contract for deed.

WM. C. GREEN,
Assistant Attorney General.

Commissioner of Banks.
July 16, 1945. 53-F

## 8

**Powers—Provisions of Business Corporations Act apply. Such companies have the powers of corporations organized under this act except as restricted by provisions c. 53, Minn. St. 1941, or where in conflict with that chapter and its purposes. Officers and directors may not borrow from corporation. Legal loan limits cannot be extended beyond those provided by § 53.05. Articles of incorporation need only be filed in county in which place of business is located at time of incorporation. Statute indefinite as to place of filing of additional certificates of authority. Suggestion as to practice—**MS 1941, C 53 and 301 (as amended by L 1943, C 67).

**Question**

"1. Do the provisions of Chapter 301, Minnesota Laws 1941, apply to industrial loan and thrift companies? If so, how does this chapter apply to such companies organized prior to 1933? Must these companies be organized according to the provisions of Chapter 301, Minnesota Laws 1941, in addition to the provisions contained in Chapter 53, Minnesota Statutes, as amended?"

**Opinion**

The provisions of Minnesota Statutes 1941, Chapter 301, apply to all industrial loan and thrift companies incorporated subsequent to April 18, 1933, and to all such companies incorporated prior to that date which did not file refusals to accept or be bound by the provisions of the act pursuant to Minnesota Statutes 1941, Sections 301.60 and 301.62. In addition, any special provisions of Minnesota Statutes 1941, Chapter 53, should be observed.

**Question**

"2. What powers does an industrial loan and thrift company have in addition to the special powers outlined in 53.04, Minnesota Statutes? The first paragraph of 53.04 reads as follows:

'Industrial loans and thrift companies, in addition to the general and usual powers incidental to ordinary corporations in this state, which are not specifically restricted in this chapter, shall have the following special powers, which powers must be set forth in their articles of incorporation or amendments thereto'."

**Opinion**

It appears to me that Section 53.04 speaks for itself. Wherever in Chapter 53 there appear specific restrictions on the general powers granted by the Business Corporations Act, those restrictions prevail, and, as has been held in previous opinions, if any general power granted to corporations by the Business Corporations Act conflicts with the spirit and purpose of Chapter 53, that spirit and purpose must be considered as prevailing.

**Question**

"3. May officers and directors of an industrial loan and thrift company borrow from the company?"

**Opinion**

Minnesota Statutes 1941, Section 301.32, provides:

"No corporation shall lend any of its assets to any officer or director of the corporation, nor shall any corporation lend any of its assets to a shareholder on the security of its shares. If any such loan be made, the officers and directors who make such loan, or assent thereto, shall be jointly and severally liable for repayment or return thereof. No corporation shall take as security for any debt a lien upon its shares unless such lien shall be taken to secure a debt previously contracted." There being no exception in Chapter 53, this section is mandatory and the answer is in the negative.

**Question**

"4. What is the legal loan limit of an industrial loan and thrift company? We refer to subsection (c), 53.05, and we already have an opinion as to marketable collateral. However, our inquiry deals primarily with the question of whether such companies may make loans in excess of the five or ten per cent specified in the above subsection, because of their ordinary corporate powers. Some of these companies contend that they may make loans in any amount, providing interest is not charged in excess of 8% simple interest per annum."

**Opinion**

Section 53.05 is definite in its restrictions. The section commences: "No industrial loan and thrift company shall have power to do any of the following:". Then, among other prohibitions, is that of paragraph (3), fixing the loan limits. There is no justification whatsoever for any claim that such a company may make loans in any amount providing interest is not charged in excess of 8% simple interest per annum. The interest rate has nothing to do with the loan limit.

**Question**

"5. Chapter 53.01 provides for the filing of the articles of incorporation and 53.03 provides for the filing of the certificate of authority. In 1943 the law was amended to provide that not more than one place of business shall be maintained under the same certificate of authority. The Department of Commerce may issue more than one certificate of authority to the same company.

"**Question:** Must the articles of incorporation and certificate of authority for additional offices be filed in the county where the principal

place of business is located or in the county where the additional office is located? Example: A company now located in Hennepin County receives authority to open an office in Blue Earth County. This company has already recorded its articles of incorporation and certificate of authority in Hennepin County. Should it now be required to file the articles of incorporation and certificate of authority in Blue Earth County?"

**Opinion**

The matter of the filing of articles of incorporation and certificates of authority is somewhat confused. Section 53.01, as originally enacted, provided that the certificate of incorporation should be filed with the secretary of state "and the register of deeds of the county in which the business is to be carried on." Under this language it would appear that, if it was contemplated that business should be carried on in more than one county, it would have been necessary to file the certificate in each such county. By Laws 1943, Chapter 67, Section 1, the language was amended to provide that the certificate shall be filed with the secretary of state, and with the register of deeds "in the county in which the place of business of the corporation is located." Inasmuch as this filing is a part of the organization of the corporation, all that is now required is a filing in the county or counties in which the place or places of business of the corporation is or are located at the time of incorporation.

Section 53.03 originally provided that the authorization "shall then be filed in the same places as specified for the filing of the certificate of incorporation in section 53.01." At the time of its original enactment this meant filing in the counties in which the business was to be carried on. By the amendments imposed in Laws 1943, Chapter 67, it is provided, as to the original certificate of authorization, that it "shall be filed in the places as specified for filing the certificate of incorporation in Mason's Supplement 1940, Section 7774-25." This, of course, would refer to that section as amended by the same act and would mean that the original certificate of authorization should be filed in the county in which the place of business is located at the time of applying for the certificate of authority.

A further amendment of 53.03 in the 1943 act provides:

> "Not more than one place of business shall be maintained under the same certificate of authority issued hereafter pursuant to the provisions of this act, but the department of commerce may issue more than one certificate of authority to the same company upon compliance with all the provisions of this act governing an original issuance of a certificate of authority."

It seems quite clear under the 1943 amendment that the certificate of incorporation need be filed only once and that in the county or counties in which the place or places of business of the corporation is or are located at the time of its organization. The same is true of the original certificate

or certificates of authority. *As to a certificate of authority issued after organization the statute is silent. It would seem, however, that it would be a safe practice to file the new certificate of authority with the secretary of state and with the register of deeds of the county in which the new place of business is to be located. It certainly must be filed with the secretary of state; there is no purpose in filing it in the county for which the original certificate of authority was granted, and the practice suggested seems logical.

WM. C. GREEN,
Assistant Attorney General.

Commissioner of Banks.

October 19, 1945. 53-F

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## 9

**Loans—Contracts of Minors—Contracts for loans made on application of minor war veterans valid—L 1945, C 177.**

### Question

As to the constitutionality of L. 1945, C. 177: L 1945, C. 177, including the title, reads as follows:

"An act relating to contracts for loans made on the application of war veterans under 21 years of age and guaranteed by the Administrator of Veterans' Affairs pursuant to any federal law in an amount authorized thereby.

"Be it enacted by the Legislature of the State of Minnesota:

"Section 1. No contract for a loan made upon the application of any person under 21 years of age who was in the active military or naval service of the United States on or after September 16, 1940, and guaranteed by the Administrator of Veterans' Affairs pursuant to any federal law in an amount authorized thereby shall be impaired or invalidated on the ground of the minority of such person."

### Opinion

In my opinion, the title is sufficient.

It is also my opinion that the act itself is valid and constitutional and that any contract for a loan made pursuant to its provisions would be valid and enforceable against a qualified minor making it. In my opinion, the words "contract for loan" would include any note and mortgage executed in connection with any loan made to a minor veteran pursuant to the act

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*(Now clarified by Laws 1947, Ch. 20, Sec. 2, Subd. 5.)

and any other contracts incidental to such loan. If the question should arise as to a minor spouse of a minor veteran, this is provided for by Minn. St. 1941, § 507.02 (Mason St. 1927, § 8196), which provides that, "The minority of the wife shall not invalidate any conveyance executed by her." I call attention to this because of the decision in **Valley National Bank of Phoenix v. Glover** (Ariz.), 159 P. 2d 292, which may be readily distinguished because of the community property act of Arizona (Arizona Code Annotated 1939, § 63-301).

A conveyance by a minor of his realty is not void but merely voidable (Dunnell's Minnesota Digest, § 4441). While, in the absence of statute, such a conveyance may be disaffirmed by the minor upon arriving at majority, it is well settled that a state legislature may regulate the contracts of minors and declare under what conditions they may contract (43 **C. J. S.** p. 160; **Peterson et al v. Weimar,** 181 Wis. 231, 194 N. W. 346; 27 **Am. Jur.** p. 750 **et seq.**).

The statute just quoted as to minor spouses and Minn. St. 1941, § 48.30 (Mason St. 1927, § 7711), are illustrations of cases in which the legislature has seen fit to modify the common law rules as to contracts of minors.

WM. C. GREEN,
Assistant Attorney General.

Commissioner of Banks.

April 9, 1946. 29-A-20

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## 10

**Savings, Building & Loan Associations—Loans—By means of contracts for deed—Limitations**—MS 1941, § 51.35, as amended by L 1945, C 290, § 7; MS 1941, § 51.34, as amended by L 1945, C 290; MS 1941, § 51.01, Subd. 2.

### Question

May a savings, building and loan association make advances to members up to fifty per cent of total assets by use of contracts for deed, and, if so, may such advances or loans be made in excess of the percentage of loan to appraised value established in the by-laws of an association?

### Opinion

The question is, therefore, directly presented as to whether the transaction entered into by an association under the provisions of Minnesota Statutes 1941, Section 51.35, as amended by Laws 1945, Chapter 290, Section 7, is to be considered as a loan, an investment, or a sale of property. If it is to be considered as a loan, it will be subject to the provisions of Minnesota Statutes 1941, Section 51.34, as amended by Laws 1945, Chapter 290, and

particularly the provision of Clause (8) of Subdivision 2, providing that "all real estate loans shall be subject to the limitations which may be fixed in the by-laws, which shall be a fixed percentage of the valuation of the property."

In a consideration of Section 51.35, as amended, there must be taken into consideration the entire act relating to savings, building and loan associations (Minnesota Statutes 1941, Chapter 51), as it now stands as amended by Chapter 290, and a discussion of the former act (Mason's Statutes 1927, Sections 7748, et seq.) appearing in **Minnesota Building & Loan Association v. Closs et al.**, 182 Minn. 452.

Minnesota Statutes 1941, Section 51.01, Subdivision 2, defines these associations as follows:

> " 'Savings, building and loan associations' are financial corporations under public control, authorized solely to accumulate funds to be loaned to their members upon their homes or upon other improved real estate, and to otherwise carry on, in accordance with law, the business of savings, building and loan associations."

This definition is the same as that given to building and loan associations by Mason's Statutes 1927, Section 7749-1, which was considered in the Closs case. In that case the court quoted from 1 Dunnell's Minnesota Digest (2nd Edition), Section 1163, as to the nature of a building and loan association, as follows:

> "A building and loan association is defined by statute to be a corporation, under public control, authorized solely to accumulate funds to be loaned to members to assist in acquiring homes. The general design of such an association is the accumulation, from fixed periodical contributions of its shareholders or members, and from the profits derived from the investment of the same, of a fund, to be applied from time to time in accommodating such shareholders with loans, to enable them to acquire and improve real estate by building thereon; the conditions of the loans being such that the liability incurred therefor may be gradually extinguished by means of the borrower's periodical contributions upon his stock, so that when the latter shall be fully paid up the amount paid shall be sufficient to cancel the indebtedness. Members who do not become borrowers secure the incidental benefit of a profitable investment of their contributions to the capital stock in the loans made to borrowing members. Such associations have been characterized as 'creatures of statute,' and 'creatures of the state.' Mutuality is one of the basic ideas of such an association."

Having the nature of these associations thus in mind and reading Chapter 51 in its entirety, it is obvious that the primary business of these associations is the making of loans to their members and that the making of investments and transactions in real estate are incidental to those principal purposes.

Section 51.34, Subdivisions 3 and 4, specify the investments which may be made by these associations. There is nothing in these subdivisions as amended indicating a legislative intent that associations might invest in real estate and sell that real estate on contracts for deed, treating the contracts for deed purely as investments. It is only by the amendment to Section 51.35, appearing in the last paragraph of that section, that they are permitted to invest in contracts for deed at all, and those investments by an association may not be a substantial part of its business and are limited to the purchase from governmental agencies or instrumentalities of contracts for deed the security for which is situate in this state.

The question as to the purchase and sale of loans of the character an association is entitled to make which might be secured by contracts for deed is not involved here.

It must be kept in mind that Section 51.35, here under consideration, is a separate section, which opens by prohibiting an association from engaging in the business of buying and selling or dealing in real estate. The remainder of the section states the exceptions to the general prohibition. The particular sentence here under consideration relates to transactions involving the purchase by a member of improved real estate for home purposes, or for the construction of a home—transactions ordinarily financed by loans secured by the share accounts of members and by real estate mortgages. The authorization to acquire the title to such property and execute contracts to convey it is that the association "may give to the shareholder a contract to convey the same as upon a sale thereof."

This language in and of itself makes it clear that the transaction is not to be considered as a sale but that the contract to convey is to be of the same character as a contract executed upon a sale. The reasons for the introduction of this section into the act are set forth by the court in the Closs case at page 459, and the validity of such a provision, which results in favoring savings, building and loan associations, by giving them a thirty-days' foreclosure, as against the objection that it would constitute class legislation, was sustained by the court. The right to foreclose under Mason's Minnesota Statutes 1927, Section 9576 (Minnesota Statutes 1941, Section 559.21) was denied because the legislature had not given specific authority to foreclose as under that section. The court there said:

> "Whether they should is a question of policy for and against which arguments may be made. A little plain language would bring the result."

That language was included in the 1945 amendments of Section 51.35. If the transactions were considered by the legislature as sale transactions, there was no necessity for the insertion of the amendment authorizing the foreclosure of the contract under Section 559.21.

From a consideration of all the foregoing, I am of the opinion that transactions conducted by savings, building and loan associations under the provisions of Section 51.35 which have been here discussed are loan trans-

actions, are governed by the provisions of Section 51.34, Subdivision 2, Clause (8), and are, therefore, subject to the limitations fixed in the by-laws of the various associations.

WM. C. GREEN,
Assistant Attorney General.

Commissioner of Banks.

July 16, 1945. 53-A-19

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## 11

**Corporations—Foreign—Change of Venue**—Minn. St. 1941, § 542.09—542.10.

**Question**

Whether a foreign corporation may be sued in a transitory action and the action tried in any county which the plaintiff may designate or whether it has a right to a change of venue to a county where it has an office, resident agent, or place of business.

**Opinion**

Since the decision of the Supreme Court of this state in State v. District Court of Otter Tail County, 178 Minn. 72, it has been the law of this state that a foreign corporation sued in this state upon a transitory cause of action in a county where it has no office, resident agent, or place of business, has the right to have it removed under the provisions of Minnesota Statutes 1941, Section 542.10, to a county where it has such office, resident agent, or place of business; this despite the provisions of Section 542.09.

WM. C. GREEN,
Assistant Attorney General.

Mankato City Attorney.

November 28, 1945. 92-C

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## 12

**Corporations—Social and charitable — Stockholders' Meetings — Voting by proxy**—MS1941 §§ 301.26 sd. 4, 309.03.

**Question**

May a non-profit corporation organized under the provisions of Minnesota Statutes 1941, Chapter 309, provide for voting by proxy by its paid-up members?

**Answer**

Minnesota Statutes 1941, Section 309.03, provides that upon filing for record its certificate of incorporation such a corporation shall have the ordinary powers of corporations, and may establish by-laws and regulations for the management of its affairs in accordance with law and consistent with an honest purpose.

There is no prohibition in the law against voting by proxy. Both the old corporation act, Mason's Minnesota Statutes 1927, Section 7461, and the business corporation act, Minnesota Statutes 1941, Section 301.26, Subdivision 4, permit voting by proxy. The right to vote by proxy is now generally given by general statutory or constitutional provisions or by charters or provided for in the by-laws of corporations.

I am, therefore, of the opinion that in view of the statutory provisions the members of a social and charitable corporation may be granted the right to vote by proxy either by the certificate or by the by-laws.

WM. C. GREEN,
Assistant Attorney General.

Secretary of State.

February 14, 1945. 102

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# CIVIL SERVICE

MUNICIPALITIES

## 13

**Military leave—Rights—Accumulated vacation—Policemen or firemen under civil service who have been on military leave entitled to vacations accrued during service. Department head may fix time of vacations if so provided in the rules as to other similar employees**—MS1941, § 192.261, Subd. 2, as amended by L 1945, C 489.

**Question**

Whether or not a ruling from the Civil Service Commission, from either one of the branches, requiring the returned veteran to use all of his vacation period at one time would be legal.

**Opinion**

I do not have before me the Civil Service Rules and Regulations of the City of Rochester. I do have a manual containing the rules and regulations for the government of the Police Force of Rochester dated 1931. I note rule 28 provides that after 12 months of continuous service any employee holding

a position in the Police Civil Service shall be entitled in each calendar year to an annual vacation of two weeks with full pay, to be taken at such time or times as the Chief of Police may designate, with a provision as to employees working more than three months but less than 12 months. The rule also states that no accumulation of the annual vacation period from year to year shall be allowed.

I will assume that the rules governing policemen and firemen now in effect contain similar provisions.

You are correct in your assumption that this office has held that any public employees on military leave, upon reinstatement, are entitled to the vacations they would have received if they had been employed. With reference to accumulation of leave, it was held in an opinion of this office dated October 2, 1945, to the City Attorney at Duluth, that, in view of the provisions of Minnesota Statutes 1941, Section 192.261, Subdivision 2, as amended by Laws 1945, Chapter 489, an employee in the classified service of a city who is on military leave accumulates annual leave from year to year during his absence on military leave and, subject to designation by the appointing authority of the time when it may be taken, is entitled to such accumulated annual leave upon his reinstatement in his position.

It follows that it would be legal to reinstate the officer or fireman and immediately give him his earned vacation and then start him on active duty at the conclusion of that period.

The practical proposition you mention as to an employee taking his leave and then resigning faces the state as well as municipalities, but there appears to be no answer to it. The legislature has said a man is entitled to all the benefits he would have received if he had remained on the job, and it cannot be anticipated that his reinstatement is not in good faith.

WM. C. GREEN,
Assistant Attorney General.

Rochester City Attorney.

January 8, 1946. 120

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## 14

**Military leave—Rights—Reinstated veteran to accumulation of seniority rights and to promotions occurring during military leave**—MS1941, § 192.261, as amended by L 1945, C 489.

**Question**

1. If an employee of the city who has been absent on military leave pursuant to the provisions of Minnesota Statutes 1941, Section 192.261, as

amended by Laws 1945, Chapter 489, returns and is reinstated, have his seniority rights accumulated during his absence?

**Opinion**

The answer to this is in the affirmative. Minnesota Statutes 1941, Section 192.261, Subdivision 2, as amended by Laws 1945, Chapter 489, provides in part:

> " * * * Upon such reinstatement the officer or employee shall have the same rights with respect to accrued and future seniority status, efficiency rating, vacation, sick leave, and other benefits as if he had been actually employed during the time of such leave * * * ."

This office has held (opinion October 2, 1945) that an employee who is reinstated upon return from military leave is entitled to accumulation of seniority from the time he entered the Armed Forces of the United States to the date of reinstatement to his employment.

**Question**

2. Upon reinstatement would the veteran be entitled to such job as he would have acquired if he had been at home during all the time and been able to avail himself of advancements as they presented themselves?

**Opinion**

The answer to this is also in the affirmative. This office has held (opinion August 30, 1945):

> a. That the right to promotion is a benefit within the meaning of the words "and other benefits."
>
> b. That, if during the military service of the employee a vacancy occurred in the position for which he was eligible and he would have been appointed to that position if he had then been employed, upon reinstatement he is entitled to that appointment effective as of the date he would have been appointed if he had then been actually employed.

**Question**

3. If, during the absence of the veteran, a job has been bulletined which the veteran would have been able to have applied for had he not been in the military service, is he, upon reinstatement, entitled to "bump" the person holding that job and take it himself because he would have been able to have done that had he been here?

**Opinion**

The answer to this question is also in the affirmative. (See opinion August 30, 1945). If the person who was appointed to the position he would otherwise have received was a city employee at the time, he should be re-

stored to his former position; and, if some other person had been appointed to his former position, that person must step out.

In determining questions arising under this law, they will not be found so difficult of solution if it is kept in mind that the reinstated veteran shall be treated in exactly the same manner as though he had been continually in the service of the city.

WM. C. GREEN,
Assistant Attorney General.

Two Harbors City Attorney.

January 3, 1946. 120

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STATE

## 15

**Employee—Classified Service—Residence—Right of employee to retain position in classified service after change of residence to another state.**

### Question

Whether an employee of the State of Minnesota would impair his right to work for the state if he became a legal resident of another state, the employee in question having gained permanent status under the Civil Service Act on the effective date of the act by virtue of the length of his employment prior to April 2, 1939.

1. "Will the fact that the employee is no longer a resident of Minnesota jeopardize the rights he has already acquired under the Civil Service Act?"

2. "Will the provisions of the Act and the Rules prevent him from participating in examinations in the future?"

### Opinion

In the first instance, it must be remembered that the word "residence" has varying meanings. In one sense it is synonymous with "domicile," which embraces the element of dwelling in a certain place with the intention to remain there permanently for an unlimited time. In another sense it simply refers to the place where a person dwells, without reference to any intention and without reference to the dwelling place of the person's family. Since you use the term "legal resident," I am assuming for the purposes of this opinion that the employee in question would actually establish a domicile in another state with the intention of making his permanent residence there. This would be the situation if he should buy a home in another state, move his family there, and use that home as his dwelling place. Of course, if he were, by reason of the present emergency, to move himself and his

family into another state temporarily with the purpose of returning to Minnesota as soon as he could find proper accommodations, the opinion to be given would not apply. At any rate, in every case the question of residence becomes a question of fact.

Section 13 (2) of the Civil Service Act provides in part:

> "The competitive examinations (for positions in the classified service) shall * * * be open to all applicants who are citizens of the United States, who have been residents of this state for two years immediately preceding the date of examination * * * ."

This portion of the act has been implemented by Rule 6.2 of the Civil Service Rules, which uses the language above quoted.

There is no other reference to residence in either the statutes or the rules. Section 10 of the act, providing for the blanketing in of employees who had been employed by the state for a total of five years or more prior to the effective date of the act, makes no reference to residence but provides that such persons shall be subject to and protected by the provisions of the act. A careful search of the authorities has disclosed no decision directly in point.

We must, therefore, endeavor to ascertain the legislative purpose in determining whether or not a loss of residence in the state would constitute a ground for removal under Section 24 of the act.

In my opinion, the fact that the legislature prescribed two years' residence in this state as a condition of the right to take an examination indicates a clear legislative purpose that employees in the classified service of this state shall be residents of it. Any other holding would mean that a person who had been a resident of the state for two years could take an examination, receive an appointment, attain permanent status, and then immediately change his residence to another state, retaining his employment with the State of Minnesota. Such certainly was not the legislative intent.

The policy which has prevailed in this state for many years with reference to officers is embodied in Minnesota Statutes 1941, § 351.02 (4), which provides that every office shall become vacant upon the incumbent's ceasing to be an inhabitant of the state, or, if the office is local, of the district, county, city, or village for which he was elected or appointed, or within which the duties of his office are required to be discharged.

Assuming that an actual change of residence to another state could be shown, the answer to your first question is in the affirmative.

Clearly, under the language of the statute and the rules, the answer to the second question must be in the affirmative.

WM. C. GREEN,
Assistant Attorney General.

Director of Civil Service.

May 8, 1946. 644-C

# 16

**Military leave—Rights—Application of Minn. statutes**—MS1941, §§ 43.09, Subd. 3; 43.17, Subd. 2; 43.22 Subd. 4; 43.30, as amended by L 1943, C 157; 192.26; 192.261, as amended by L 1945, C 489; 192.263.

**Facts**

You have requested the opinion of this office on six matters relating to the application of Minnesota Statutes 1941, Section 192.261 (referred to in previous opinions as Laws 1941, Chapter 120), as amended by Laws 1945, Chapter 489, to certain problems set out in your questions. For purposes of brevity, Section 192.261, as amended, will be referred to herein as "the act."

Subdivision 2 of the act, as amended, is as follows, the 1945 amendments being emphasized:

> "Except as otherwise hereinafter provided, upon the completion of such service[1] such officer or employee shall be reinstated in the public position, which he held at the time of entry into such service, **or a public position of like seniority, status, and pay if such is available** at the same salary which he would have received if he had not taken such leave, upon the following conditions: (1) that the position has not been abolished or that the term thereof, if limited, has not expired; (2) that he is not physically or mentally disabled from performing the duties of such position; (3) that he makes written application for reinstatement to the appointing authority within **ninety** days after termination of such service, **or 90 days after discharge from hospitalization or medical treatment which immediately follows the termination of, and results from, such service; provided such application shall be made within one year and 90 days after termination of such service notwithstanding such hospitalization or medical treatment**; (4) that he submits an honorable discharge or other form of release by proper authority indicating that his military or naval service was satisfactory. Upon such reinstatement the officer or employee shall have the same rights with respect to accrued and future seniority status, efficiency rating, vacation, sick leave, and other benefits as if he had been actually employed during the time of such leave. No officer or employee so reinstated shall be removed or discharged within one year thereafter except for cause, after notice and hearing; but this shall not operate to extend a term of service limited by law."

In order to avoid repetition and as a means of quick reference to former opinions of this office relating to the questions submitted by you, we summarize the following principal opinions heretofore rendered interpreting and applying the provisions of the act.[2]

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[1] "Active service in time of war or other emergency declared by proper authority in any of the military or naval forces of the state or of the United States for which leave is not otherwise provided by law."

[2] All opinions from file 310-H-1-a.

**Opinion to Robert D. Stover, Acting Director of Civil Service—March 15, 1944**

1. Practice of certifying names of eligibles absent on military leave from promotion register and permitting the appointing authority to appoint such individuals is consistent with the provisions of the act.

2. As to the practice of permitting the appointing authority to consider such individuals not available and to supplement certification by additional names in lieu thereof, the fact that employee was on leave at the time of certification and was not then presently available to assume the position would not of itself justify the hiring authority in refusing to make the appointment. If appointed, the person on military leave becomes the incumbent on leave, subject to the serving of a six-month probationary period. If the hiring authority deems it necessary in the public interest to provide for the performance of the duties of his position during his absence, a substitute, to be known as acting incumbent, may be appointed only for the duration of the leave of the incumbent, as provided by Minnesota Statutes 1941, Section 192.263.

3. The practice of approving salary increases within the range when submitted by the appointing authority during the period of absence of the employee on military leave is consistent with the provisions of the act and of the Civil Service Act.

4. Service of a probationary period must be actual and not constructive, and practice of accepting certification of satisfactory conclusion of the probationary period submitted by the authority at a date six months after the date of appointment in case of a probationary employee's absence on military leave for all or a part of the described probationary period is not authorized.

5. It is proper for an appointing authority to make his certification of satisfactory completion of the probationary period after the employee who has been on military leave has actually performed the duties in the class for a total period of six months following initial appointment to the class.

6. If the employee on military leave fails to make application for reinstatement within 45 days (now 90 days with additional time in case of hospitalization or medical treatment immediately following and resulting from military service) following the termination of his military service, any application made under the act after the lapse of the designated period would be ineffective, and the appointing authority has no discretion to waive the statutory mandate. However, by virtue of the provisions of Minnesota Statutes 1941, Section 43.22, Subdivision 4, a permanent employee in the classified service may be reinstated pursuant to the provisions of that subdivision within one year from the running of the 45-day period following termination of military service.

7. An employee on military leave is entitled to immediate employment upon reinstatement.

**Opinion to City Attorney, Minneapolis—**
**August 30, 1945**

1. Right to promotion is a benefit within the meaning of the words "and other benefits."

2. The returning veteran is entitled to promotion as of the date when he might have been certified if he had not been in the military service (this under a city civil service law under which the veteran, if he had not been in the military service, would have received a promotion which went to another during his absence).

3. An acting incumbent should have been appointed to serve until the reinstatement of the veteran.

4. Upon the return of the veteran who was entitled to promotion, the acting incumbent should be reinstated to his position on the eligible list as it would have been if he had not been erroneously certified.

**Opinion to City Attorney, Duluth, October 2, 1945**

1. "The obvious intention of the legislature in adopting Laws 1941, Chapter 120, was, among other things, to insure public employees against being deprived of benefits which would have been theirs if they had not entered the armed forces of our country provided that upon their return they met the conditions precedent to reinstatement. This simply means that if a public employee would have been entitled at any time to any of the benefits referred to in Subdivision 2 of the above section (Minnesota Statutes 1941, Section 192.261) if he had been at his work instead of serving in the armed forces, then his right to such benefits accrued at that time and he becomes entitled to them as of that time upon compliance by him with the conditions precedent to reinstatement. This, then, is the yardstick which we must apply in answering your questions."

This same yardstick will be used in answering the questions submitted in your current request.

2. A city employee who is reinstated upon return from military duty is entitled to accumulation of seniority and sick leave from the time he entered the armed forces of the United States to the date of reinstatement to his employment.

3. An employee in the classified civil service of a city who is on military leave accumulates annual leave from year to year during his absence on such military leave and, subject to the designation by the appointing authority of the time when it may be taken, is entitled to such accumulated annual leave upon his reinstatement in his position as provided in the act.

4. Any attempt to deprive an employee in the classified service on military leave of vacation or sick leave while providing them for other

employees in the classified service would be contrary to the act and invalid.

**Opinion to Robert D. Stover, Director of Civil Service—November 6, 1945**

1. When a probationer is reinstated he returns as a probationer, and when a provisional employee is reinstated he returns only as a provisional.

2. The terms of service of both probationary employees and provisional employees are limited by law, and the one-year prohibition against removal or discharge except for cause, after notice and hearing, does not apply to them.

3. Labor service employees are entitled on return from military leave to reinstatement as labor service employees but are subject to all the provisions of Laws 1941, Chapter 533 (Minnesota Statutes 1941, Section 43.09, Subdivision 3), with reference to layoff, demotion, promotion, etc.

**Opinion to City Attorney, Minneapolis—November 13, 1945**

In answer to the question as to whether a person has "a right under the state law, not being a city employee on military leave of absence, to an appointment from an eligible list upon which his name was reached while in military service, but which list has since expired under the rules of the Civil Service Commission," held that, if the person in question was ready to go to work for the city when his name was reached on the eligible list and would have done so except for the sole reason that he was in the military service, the spirit of the act requires a holding that, upon compliance with the conditions required of employees for reinstatement, he is entitled to the benefits conferred by the act, on the ground that a person who has attained a status under civil service examinations and regulations, where military service was the only reason for his not entering the city's employment at the time he could and would otherwise have done so, is in a position equivalent to that of an employee and, therefore, should be considered to be an employee within the meaning of the act.

Civil Service Rule 6.13, referred to and summarized in your first question implements the act and is in accord with the interpretations of the act by this office in the opinions last above referred to. I will quote each of your questions and examples given in full, following each quotation with the opinion on the questions submitted.

**Question 1**

"Civil Service Rule 6.13 grants an employee with a permanent or probationary status a right to take promotional examinations given

during the time the employee was on an approved military leave of absence. It also provides for the certification of the veteran's name to his department head who may appoint him to a position which has already been filled by a person appointed from the original promotional list if the veteran's rating is equal to or higher than that of the lowest ranking person certified. If such certification is made, and the veteran appointed, should the appointment be dated at the time at which the original appointment to the position was made, or should this appointment be effective sometime after the veteran's name is placed on the eligible list?

"Example: A entered military service August 1, 1943, and was honorably discharged September 1, 1945. He was reinstated to his position as Clerk III, and within 60 days after his reinstatement he applied for and took the promotional examination for the class Executive I, attaining a rating higher than that of B, who had been appointed to a position in the department as an Executive I on August 1, 1944. A's name was certified to his department head as an eligible and was appointed to the position occupied by B October 1, 1945. What is the effective date of A's appointment, August 1, 1944, or October 1, 1945? If the effective date is October 1, 1945, B has greater seniority than A and, therefore, could not be laid off prior to A."

**Opinion**

Using the yardstick quoted from the opinion of October 2, 1945, **supra**, I am of the opinion that the appointment should be dated as of the time the original appointment to the position was made. If the veteran had been employed at the time the promotional examination was originally given and had passed it, he would have been entitled to certification. From the fact that he was appointed upon taking the examination after his reinstatement it is to be assumed that he would have been appointed in the first instance. To hold otherwise might result in a loss of seniority as against an employee who was not in the service at all. It was unquestionably the legislative intent to guard against any such contingency.

**Question 2**

"Another question has arisen in connection with Rule 6.13. Should veterans' preference be granted to those persons who take promotional examinations under the provisions of Rule 6.13, and who were not eligible for veterans' preference at the time the original promotional examination was given?

"Example: An examination for Labor Foreman was given in May, 1944, while A was in military service. An eligible list for the class was established on July 2, 1944. On September 1, 1945, A was honorably discharged from military service and reinstated to his position of Laborer II on September 16, 1945. Within 60 days from the date of reinstatement he applied for and took the promotional examination for

Labor Foreman. Is A eligible to have an additional credit added to his final score by reason of his being honorably discharged from the armed forces?"

**Opinion**

It is my opinion that Minn. St. 1941, § 43.30, as amended by L. 1943, c., 157, must be read in connection with Minn. St. 1941, § 192.261, as amended by L. 1945, c. 489. Under this latter law, as interpreted in this opinion and the previous opinions herein referred to, a reinstated veteran taking and passing a promotional examination is entitled to an appointment as of the time the original appointment to the position was made. In other words, he is placed in the same position as though he had been working for the state at the time the promotional examination was originally given, at which time he would not have been entitled to a veteran's preference. Under these circumstances, we are of the opinion that it was not the legislative intent that he should receive this benefit and at the same time be given an advantage over other employees by reason of the fact that his examination was deferred until after his discharge from military service. In other words, he is entitled to every benefit he would have received if he had been actually employed, but not to additional rights which did not exist at the time of the original examination.

**Question 3**

"There are a number of state employees whose names appeared on promotional lists at the time they were granted military leaves of absence. During their absence, vacancies for higher classes of positions were filled by appointment from these promotional lists. In all cases the names of employees on military leave were certified to the department head for consideration for appointment in accordance with an Attorney General's Opinion dated March 15, 1944, which stated that promotions in absentia were possible under the law. In many instances department heads construed absence in the military service as non-availability for appointment, and consequently returned the veteran's name as not available for appointment. In these cases an additional name was furnished by this department to the appointing authority. In some of these cases the fourth person on the promotional list was certified to the department head and appointed to the vacancy. The question now arises as to whether or not the veteran who was originally determined as not being available for appointment is eligible to be certified again upon his reinstatement for appointment to the position filled during his absence. Your attention is called to the factor regarding retroactive appointment in cases of this nature. It will be noted that unless the veteran is certified to the department under the provisions outlined above, effective rules of seniority pertaining to layoff will result in the veteran actually being placed on the layoff list for the position.

"Example: A promotional list for the class Accountant I was established on April 1, 1944. C, the veteran in question, ranked number three

on the list. C was inducted into military service on May 1, 1944. On June 1, 1944, his department submitted a requisition to the Civil Service Department to fill a vacancy in the class Accountant I. As a result the names of A, B, and C were certified to the appointing authority, who returned the certification list to the Civil Service Department with the notation after C's name of "not available" and asked for one additional name. The name of D, who ranked fourth on the promotional list, was submitted to the department, and D was appointed. Is C eligible after his reinstatement to be certified to the department head for this position, and, if appointed, supplant the employee originally appointed?"

**Opinion**

The answer is in the affirmative. The veteran was in fact available at the time of the original certification, and, if his name was returned with the notation that he was not available, the department head was in error. His name should, therefore, be again certified, upon his reinstatement, for appointment to the position filled during his absence, and, if the department head elects to appoint him, he may do so, and the appointment will be effective as of the date the position was originally filled.

**Question 4**

"The above questions are complicated further by the fact that promotional lists under the basic Civil Service law and rules are in existence for one year unless they are extended by the director to a maximum of three years from the date of their establishment. If your answer to the question above is in the affirmative, does the expiration of a promotional list on which a veteran's name appeared preclude the possibility of his name being certified to a vacancy which was filled while he was on a military leave of absence?

"Example: A promotional list for the class Clerk III was established on August 1, 1942. C, who ranked third on this list, was inducted into military service on October 1, 1942. During the life of this list two persons ranking lower than C were appointed from the list. Because of the three-year limitation imposed by statute, the list expired on August 1, 1945. C returned from military service on September 1, 1945, and was reinstated to a position in the class Clerk III on September 16, 1945. Is C eligible to have his name certified to his department head for appointment to the positions for which he would have been considered had he been available despite the fact that the list is no longer in existence?"

**Opinion**

The answer[3] is in the negative. Using the yardstick referred to in the opinion of October 2, 1945, quoted **supra**, I am of the opinion that the provision of Section 17 of the Civil Service Act (Minnesota Statutes 1941, Sec-

[3]To the question as first stated.

tion 43.17, Subdivision 2), limiting promotion lists to a maximum of three years, must be considered as having been modified by the act here under consideration. To hold otherwise would be to deny to the veteran a right which he would have had if he had been actually employed.

**Question 5**

"The same situation exists in regard to employees who may have applied for and completed a portion of an examination prior to their induction in the armed services. During their absence in military service, the examination was completed and an eligible list was established; and after a period of three years the list was abolished. Does the veteran who has taken a part of the examination have the right to complete the promotional examination after his reinstatement and become eligible for certification to vacancies which occurred during his absence if the score he attains on the test would have made him eligible for certification had he not been on military leave of absence?

"Example: A took the written part of the promotional examination for Dairy and Food Inspector I in May, 1942. A part of his total score was to consist of an oral interview, but before he was called for this interview, he was inducted into military service and could not appear for that part of the examination. The eligible list was established on July 1, 1942. A returned from military service on August 1, 1945. Is A eligible to complete the examination for a Dairy and Food Inspector I even though the list has expired, and if so, how long may his eligibility continue?"

**Opinion**

The answer to this question is in the affirmative for the reasons given in the answer to Question 4. Eligibility one year.

**Question 6**

"We would appreciate, also, your opinion as to whether or not employees granted leaves of absence under the provisions of Chapter 120 for service with the State Guard are eligible for the same rights and benefits regarding reinstatement, annual and sick leave, and examinations, as persons reinstated from a military leave of absence following a discharge, other than dishonorable, from the armed forces."

I take it you are referring to leaves granted pursuant to Section 1 of Chapter 120 (Minnesota Statutes 1941, Section 192.26). Under this section, if the leave does not exceed a total of 15 days in any calendar year, the employee shall not suffer any loss of pay, seniority status, efficiency rating, vacation, sick leave, or other benefits for all the time he was engaged with one of the organizations or components referred to in the section, in training or active service ordered or authorized by the proper authority pursuant to law, whether for state or federal purposes, upon compliance with the conditions set out in the section.

Under Section 2, if the employee is required by proper authority to continue in such military or naval service beyond the time for which leave with pay is allowed, he shall be entitled to a leave of absence from his public office or employment, without pay, for all such additional service, with right of reinstatement thereafter upon the same conditions as are provided in Section 192.261 for reinstatement after active service in time of war or other emergency. I am of the opinion that this language adopts all the provisions of Section 192.261, and the answer to this question is, therefore, in the affirmative.

WM. C. GREEN,
Assistant Attorney General.

Director of Civil Service.

January 9, 1946. 644-D

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# COURTS

## 17

### DISTRICT

**Clerk—Compensation**—L 1931, C 15, in so far as the same relates to compensation of clerk of court and is inconsistent with L 1943, C 191, is repealed.

**Facts**

"Laws 1909, Chapter 335, is a general salary law fixing the salaries of clerks of court. In 1931 the legislature enacted Laws 1931, Chapter 15. This law is limited in application to Pennington County and fixes the salaries of the auditor, treasurer, and clerk of court, as well as clerk hire for these officials.

"In 1943 the Legislature passed a law (Law 1943, Chapter 191) entitled 'An act fixing the salaries of clerks of the district court of certain counties in lieu of fees for services rendered to and paid for by such counties, except real estate tax proceedings, and the manner of payment thereof; and amending Laws 1909, Chapter 335 as amended.'

"The 1945 salary law for clerks (Laws 1945, Chapter 568) is also a general salary law, the general purpose of which is only to establish new maximum amounts that can be paid to clerks for salaries and fees.

"At the time of the passage of the 1943 law, Pennington County's population was 12,913. Counties having a population between 12,500 and 20,000 are placed in Class C in the 1943 law. Clerks in counties of this class are entitled to a salary of $800.00, and, if their fees and emoluments at the end of the year do not equal $2,000.00, whatever the necessary amount should be to bring their total compensation up to $2,000.00. They also are

entitled to have their salary increased by the county board if the amount set forth in the law is deemed inadequate.

"The 1943 law does not specifically repeal the 1931 law which, as you know, is of doubtful validity because of its special application. However, if the 1943 law by implication repeals or abrogates the 1931 law, the clerk of court would be entitled from and after the passage of the 1943 law to receive up to the maximum amount set forth for Class C counties."

**Question**

If the 1943 law repeals the 1931 law, or whether the 1931 law remained in effect and the clerk's base salary is limited to $800.00 and his maximum compensation limited to $1500.00 until the passage of the 1945 law?

**Opinion**

It is our opinion that Laws 1931, Chapter 15, relating to compensation of clerks of the district court, and which is inconsistent with Laws 1943, Chapter 191, is repealed. Section 4 of Chapter 191 provides:

> "All acts and parts of acts, either general or special, except Special Laws 1891, Chapters 423 and 424, and Revised Laws 1905, Section 2694, Subdivision 49, inconsistent herewith are hereby repealed."

The effect to be given to the repealing clause above quoted is that all acts, either general or special, which relate to the compensation of clerks of the district court and which are inconsistent with said Chapter 191, are repealed.

In State ex rel. Stortroen v. Lincoln, 133 Minn. 178, on page 182 our court said:

> "We have held, and the ruling is in accord with the authorities generally, that a subsequently enacted general statute will not operate as a repeal by implication of a prior special act, unless an intent to repeal is made manifest by the subsequent statute."

On page 183 the court said:

> "Had there been a general repealing clause of all inconsistent statutes, the intention to repeal all conflicting special laws would in a measure be apparent, and probably justify the conclusion of an intentional repeal."

The same conclusion was reached by the court in considering the effect of a general law upon a special act relating to the same subject matter where the general law contained a clause repealing all acts or parts of acts inconsistent with the general law. State ex rel. Baker v. Sullivan, 62 Minn. 283.

You will note that the repealing clause contained in Chapter 191 supra, excepted therefrom Special Laws 1891, Chapters 423 and 424. These last

mentioned chapters relate to the fees of certain county officers in Otter Tail and Polk counties. There is also excepted from the repealing clause Revised Laws 1905, Section 2694, Subdivision 49, which provides in effect that where the fees of the clerk of the district court do not exceed $1000 in any one year the clerk of the district court shall, at the end of each year, file with the county auditor a statement of the total amount of fees received, and thereupon the county board shall direct the county auditor to issue a warrant to the clerk of the district court for the difference between the amount of fees so received and $1000.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Public Examiner.

October 4, 1946. 144-A-4

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## 18

**Clerk—Deposit of money with—Clerk may keep money in currency in safe deposit box if he sees fit unless court orders to the contrary—MS1941, § 485.02.**

**Question**

"Can the Clerk of the District Court convert checks made payable to him as Clerk of the District Court into cash and hold the cash in a safety deposit box in a local bank awaiting an order of the court determining final disposition of the monies?"

**Opinion**

In my opinion this question should be answered in the affirmative. The statute governing the situation reads as follows (Minnesota Statutes 1941, Section 485.02, being Mason's Supplement 1940, Section 192):

> "Where money is paid into court to abide the result of any legal proceedings, the judge, by order, may cause the same to be deposited in some duly incorporated bank, to be designated by him, or such judge, on application of any person paying such money into court, may require the clerk to give an additional bond, with like condition as the bond provided for in Section 485.01, in such sum as the judge shall order. For receiving and paying over any money deposited with him, the clerk shall be entitled to a commission of one per cent on the amount deposited, one-half of such commission for receiving, the other for paying, the same to be paid by the party depositing such money; provided, that where the money is paid or deposited in any court by or for a city of the first class or the state of Minnesota, no fee or commission shall be paid to or for the clerk for any service performed by him in receiving or paying over any such money deposited with him."

The clerk is absolutely liable for moneys which are paid into court pursuant to this Section. N. P. Ry. Co. v. Owens, 86 Minn. 188.

Unless the court should order the money deposited in a certain bank, the clerk has the right to take care of it in such manner as he sees fit, as the responsibility therefor is his.

RALPH A. STONE,
Assistant Attorney General.

Dakota County Attorney.

January 8, 1945. 144-B-18

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## 19

**Clerk—Duties—Vital Statistics—Record of births and deaths—L 45, C 512.**

**Facts**

"Laws of 1945, Chapter 512, Section 32, provides that clerks of district court upon receipt of certificates of birth shall verify their correctness through the parents of the child, and transcribe some of the facts in a book called the county record.

"Section 33 of said Chapter provided that clerks of district court shall verify the correctness of death certificates through any available documents or persons who know the facts, and transcribe some of the facts in a book called the county record.

"Section 34 of said Chapter provides that if the parents of a newborn child or a person who dies, were residents of a county in Minnesota other than the one in which such birth or death occurred, the clerk of court of the county in which the birth or death did occur, shall send to the clerk of court of the county of such residence a certified transcript of the original birth or death certificate which was filed with him in such cases.

"It is further provided in Subdivision 3 of Section 34 of said Chapter that the county auditor shall issue to the county clerk, his warrant in the sum of $1.00 for each certificate and transcript received, checked, recorded, and indexed, except those certificates in which the residence of mother or of the decedent is shown to be in another county of the state.

"There is a difference of opinion on the part of some of the clerks of district court as to what is required of them in connection with certified transcripts of birth and death certificates sent to them because the parents or the deceased were residents of their counties."

**Question**

"1. In relation to such birth and death certificates is it the duty of the clerk of court of the county in which such a non-resident birth or death

occurred, to verify the correctness of the certificate as provided in said Sections 32 and 33?"

**Opinion**

In your question you use the word "verify" the correctness of the certificate, whereas the statute contains the word "satisfy" or "satisfied." "Verify" as defined in Webster's Dictionary means "to prove to be true; exact or accurate," whereas the word "satisfy" means "to free from uncertainty, doubt or anxiety as, to satisfy oneself by inquiry". I believe that the law contemplates that the clerk of court shall ascertain from available documents, or from persons who are familiar with the facts, the correctness of the information contained in a birth or death certificate. The extent of the inquiry to be made by the clerk of court so as to satisfy himself of the correctness of the facts as stated in the certificate must rest largely within the judgment and discretion of the clerk and the attendant circumstances.

**Question**

"2. In connection with such certificates is it the duty of the clerk of court of the county of residence to verify the correctness of the certificates as provided in said Sections 32 and 33?"

**Opinion**

What has been stated in answering your first question is applicable to your second question.

**Question**

"3. In connection with such births and death certificates is it the duty of the clerk of court of the county in which such non-resident birth or death occurred to transcribe in the county record book the facts as given in the original record?"

**Opinion**

Laws 1945, Chapter 512, Section 32, Subdivision 2, provides that the clerk shall prepare an exact duplicate of the original certificate, and shall record in a suitable book in form approved by the registrar and furnished at the expense of the county, the following facts as they appear upon each certificate:

1. Name of child;
2. Place of birth;
3. Date of birth;
4. Sex;
5. Color of child;
6. Name of father;
7. Color of father;
8. Age of father;
9. Maiden name of mother;

10. Age of mother;
11. Color of mother;
12. Birthplace of father;
13. Birthplace of mother;
14. Number of children of mother;
15. Single, twin or other of plural birth;
16. Date of filing.

which record shall constitute the legal birth record. The only facts to be recorded by the clerk in the book to be approved by the registrar and furnished by the county are the facts as above stated, 1 to 16 inclusive. If other facts or information should appear upon a certificate in addition to those required in 1 to 16 inclusive, the clerk would not be required to record such additional facts.

As to death certificates, the clerk shall, upon receipt thereof from the local registrar, date and sign such certificates and shall ascertain from "available documents or from persons who know the correct spelling of name, date of birth, age, residence, and date of death, the correctness of such facts on the certificate." When the clerk is satisfied with the correctness of the aforementioned data as it appears upon such certificate he shall record in a suitable book in form approved by the state registrar the following facts as they appear upon the certificate:

1. Name of deceased, and name of spouse, if any;
2. Sex;
3. Color of deceased;
4. Conjugal condition;
5. Date of birth;
6. Date of death;
7. Birthplace of deceased;
8. Name of father;
9. Maiden name of mother;
10. Residence of deceased, town, village or city, and county;
11. Date of filing.

The statute provides that such record shall constitute the legal death record. If facts in addition to those required in 1 to 11, inclusive, appear upon the original death certificate the clerk is not required to record such additional facts in said record book.

The last paragraph of Section 33 provides:

> "The clerk of the district court shall file and index all duplicate certificates prepared by him of births and deaths."

Under the quoted portion of this statute the clerk is required to file and index all duplicate certificates prepared by him in addition to the facts which he is required to record in said book.

**Question**

"4. In connection with such birth and death certificates is it the duty of the clerk of court of the county of residence to transcribe in the county

record book the facts given in the certified transcript of the original certificate?"

**Opinion**

Sections 32 and 33, supra, relate to the recording by the clerk of the district court in said book the facts required and which the clerk of court obtained from the original certificate forwarded to him by the local registrar. These sections make no provision for recording the data and facts disclosed in a certified transcript of the original record which, pursuant to Section 34, the clerk of the district court shall, on or before the 10th of each month, furnish to the clerk of the district court of the place of residence of the mother or the decedent. There being no provision in the statute requiring the clerk of court at the place of the residence of the mother or the decedent to transcribe in the county book the facts disclosed in a certified transcript of the original certificate, it would seem that it would not be necessary for the clerk to do so. The entry by the clerk of court of the facts disclosed in the original birth or death certificates constitutes the legal birth or death record. This statute does not make the record of a certified transcript of the original certificates the legal birth or death record.

**Question**

"5. In connection with such certificates of births and deaths, if the clerk of court of the county of residence fails to verify as provided for in said Sections 32 and 33, the correctness of the certificate or fails to record in his county record book facts contained therein, may the county auditor legally refuse to pay such clerk of court of his county, the $1.00 per record fee which is provided for in Section 34 of said Chapter 512?"

**Opinion**

Section 34, Subdivision 3, provides that the county auditor, upon certification to him by the clerk of district court of the number of birth and death certificates and transcripts received during the preceding month, shall issue his warrant in the sum of $1 to said clerk of district court. It is my opinion that the certification made by the clerk of the district court to the county auditor is all that is necessary in order that the clerk of court may receive payment from the auditor as provided for in said subdivision 3. This subsection does not vest in the county auditor any authority to pass upon the manner or method in which the clerk of court has performed his duties required by this act to be performed by the clerk. If the certification made by the clerk is regular in form and complies with the requirements of the statute, then I believe it is the duty of the auditor to issue his warrant in payment of the fees so certified by the clerk.

**Question**

"6. In connection with such birth and death certificates, if through provisions of the statutes or other legal authority, a clerk of court may

not receive the $1.00 per record fee which is provided for in said Section 34, is such clerk nevertheless required to verify the facts given in birth and death certificates and transcribe them in his county record book as provided in said Sections 32 and 33?"

**Opinion**

The duties imposed upon the clerk pursuant to sections 32 and 33 must be performed by the clerk in accordance with the provisions of these sections. The question of the clerk's compensation follows the performance of these duties, which must be performed by the clerk even though some question might arise with respect to the clerk's compensation for services so rendered.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Department of Health.

May 15, 1946. 144-B-27

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## 20

**Clerk—Fees—Vital Statistics—Recording birth or death certificates.**

**Question**

"With reference to Subdivision 3, Section 34, Chapter 512, Session Laws of Minnesota for 1945, may the Clerk of Court of one county bill another county where transcripts of death or birth certificates have been certified and sent to such county of residence of decedent or mother?"

**Opinion**

Your inquiry is answered in the negative.

The subsection referred to does not make provision for compensation to the clerk of the district court for recording the original birth or death certificates where the decedent or the mother of the child was a resident of another county and the clerk of court is required by Chapter 512, Section 34, subsection 1 to forward to the clerk of court of the resident county of such decedent or mother of the child a certified transcript of the birth or death certificate.

Said subsection 3 further provides that as to the fees therein authorized to be paid the same "shall be full compensation for all services rendered as provided herein."

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Kandiyohi County Attorney.

May 18, 1946. 144-B-27

## 21

**Clerk—License—Marriage—Proxy marriage cannot be performed unless the female party is pregnant at the time of the application for license.**

### Facts

A young woman is the mother of a child born prior to the passage of Laws 1945, Chapter 409 (the marriage by proxy law). The father of the child is with the armed forces in the South Pacific. He has signed quite a lengthy document in which he acknowledges paternity and consents to a marriage by proxy. The woman is not now pregnant.

### Question

Has the clerk of court authority to issue a license so that these two may be married by proxy?

### Opinion

Laws 1945, Chapter 409, provides:

> "Whenever the application for the license is accompanied by an affidavit of a duly licensed physician that the female party to said application is pregnant, the marriage ceremony may be performed by proxy. * * * "

In this case the application for the license cannot be accompanied by the affidavit of a physician that the female party to the application is pregnant. Therefore, under the statute it is not a case in which a proxy marriage can be performed.

RALPH A. STONE,
Assistant Attorney General.

Clay County Attorney.

July 18, 1945. 300

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## 22

**Clerk—Appointing a minor as deputy clerk**—MS1941, § 485.03, State Const., Art. VI, § 13, Art. VII, § 7 (Opinions dated January 4, 1916, July 13, 1931, March 29, 1927, July 30, 1940, reversed).

### Question

"May the clerk of court legally appoint a minor as deputy clerk?"

### Answer

Article VI, Section 13, of the State Constitution provides that:

"There shall be elected in each county where a district court shall be held, one clerk of said court, whose qualifications, duties and compensation shall be prescribed by law, and whose term of office shall be four years."

Article VII, Section 7, of the Constitution reads 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 law of the United States."

The above quoted provisions are applicable only to elective officers. There appears to be no statute requiring that a deputy clerk who holds an appointive office must be of voting age. The statute relative to appointment of such a clerk is the following:

"By an instrument in writing, under his hand and seal, and with the approval of the judge endorsed thereon, the clerk may appoint deputies, for whose acts he shall be responsible, and whom he may remove at pleasure. The appointment and oath of every such deputy shall be filed with the register of deeds." (Minnesota Statutes 1941, Section 485.03.)

If the deputy clerk were required to give a bond, he should be a person of full age, because the contracts of minors are voidable. However, the above quoted statute does not require that the deputy clerk furnish a bond.

The following cases hold that in the absence of any statutory or constitutional provision to the contrary, a deputy clerk may be a minor:

**Wilson v. Genesee Circuit Judge,** 49 N. W. 869 (Mich.)

**Talbott v. Hooser,** 12 Bush 408 (Ky.)

**Harkreader v. State,** 33 S. W. 117 (Tex.)

Therefore, it is my opinion that in this state where a bond of a deputy clerk is not required and his duties are only ministerial in nature, a clerk of the district court, with the approval of the judge, may legally appoint a minor of suitable age and discretion to that position.

Any former opinion inconsistent herewith is hereby superseded.

J. A. A. BURNQUIST,
Attorney General.

Roseau County Attorney.

January 31, 1945. 144-A-1

# 23

**Liens—Judgments—Levy on joint bank account under judgment against one joint owner only.**

**Facts**

"The Sheriff, by virtue of an execution, issued on a judgment against a certain debtor levied upon an account of said debtor, which account was owned in joint tenancy by the debtor and his wife. There was no judgment against the wife, the other joint tenant. The third party upon whom the levy was made has now issued to our Sheriff a check made payable to the Sheriff and both joint tenants."

**Question**

"The question is whether or not property held in joint tenancy is subject to execution and levy on a judgment against only one of the joint tenants. If the interest of one joint tenant is subject to such a levy, how will the Sheriff make distribution of the account owned by both joint tenants which was levied upon—that is, should he pay over the entire proceeds to the judgment creditor or only half thereof, if at all?"

**Opinion**

It is well settled that the interest of a joint owner in property, real or personal, may be levied upon under a judgment against him alone. Insofar as you as County Attorney are concerned, the only question for you to determine is as to what action the sheriff should take in order to protect himself as an official. As to the procedure to be followed thereafter, that is something for the attorney for the plaintiff to determine.

The statutes of this state do not prescribe, as do those of many states, the specific method of levying upon the interest of a joint owner. However, it was held in **Caldwell v. Auger et al.**, 4 Minn. 217 (Gil. 156), that, where an officer has an execution against one part owner of a chattel, he must seize the whole chattel, though he can sell only the interest of the defendant, in the execution. The sheriff, therefore, has no right to make any distribution of the account levied upon but should proceed to sell the right, title, and interest of the judgment debtor. It will then be for the attorney for the judgment creditor to determine what course to pursue in order to realize upon that interest.

WM. C. GREEN,
Assistant Attorney General.

Washington County Attorney.

December 27, 1945. 520-D

**PROBATE**

## 24

**Judge—Fees—Salary**—L 1945, C 515—L 1943, C 255.

**Opinion**

Laws 1911, Chapter 241, fixes the salaries of judges of the probate court in all counties where such salaries are not fixed by special law. The act provides that in counties having a population of less than 100,000 inhabitants where the salary of the judge is fixed by general or special law, the judge or clerk may charge, receive and retain fees for taking acknowledgments and administering oaths outside of probate duties, and for certified copies of the records and files of the court for which the compensation shall be as provided in R. L. 1905, Sec. 3634.

Laws 1943, Chapter 255, is an act authorizing the county board to fix salaries of officers in certain counties. It is limited in its application to counties containing not less than 30 nor more than 35 full and fractional congressional townships, and having a population of not less than 11,000 nor more than 12,000 and a taxable value of not less than one million dollars nor more than two million dollars. In such counties, the county board is authorized to fix the salary of the judge of the probate court at not less than $1,500 nor more than $1,800. It was also authorized to fix the salary of another county officer not material to this opinion. It further provides that all fees received by such officers shall be paid into the general revenue fund of the county. The fee provision is necessarily inconsistent with the provision in Laws 1911, Chapter 241.

Laws 1945, Chapter 515, is an act relating to salaries of judges of the probate court in certain counties. The counties are those having less than 50,000 inhabitants. Section 4 repeals inconsistent acts which apply to such counties. Section 5 reads:

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

So, if in April, 1945, a judge was entitled to collect and receive fees, the purport of this section was that the right to collect such fees should not be disturbed. But it is observed that the title of the act expresses nothing in respect to fees, but only in respect to salaries.

We go back to the 1943 law mentioned and see that all fees must be paid into the general revenue fund of the county. That being inconsistent with the 1911 act, it appears that the right of the judge to retain fees ceased upon the passage of the 1943 act and the provisions of the 1911 act being inconsistent with the 1943 act were repealed. Therefore, in 1945,

the judge having no right to retain such fees, nothing was saved to him by Section 2 of the 1945 act.

CHARLES E. HOUSTON,
Assistant Attorney General.

Public Examiner.

September 5, 1946. 347-i

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# CRIMINAL LAW

## LARCENY

## 25

**Malicious destruction—Person taking motor boat without consent of the owner is guilty of larceny even though he intended to restore possession to the owner.**

**Facts**

X deliberately took a motor boat from the possession of the true owner and without his consent. He wrecked it and then dragged it back to the owner's dock, doing more damage in so doing.

**Question**

On what charge can X be prosecuted?

**Opinion**

If X, with intent to deprive the true owner of his property and with intent to appropriate the same to the use of X, took this personal property from the possession of the true owner, he is guilty of larceny. Minnesota Statutes 1941, Section 622.01, Mason's Statutes 1927, Section 10358. Assuming that X did not have the owner's consent to use the motor boat, he would be guilty of larceny in taking it. His intention to restore possession to the owner later on would not be a defense. Minnesota Statutes 1941, Section 622.17, Mason's Statutes 1927, Section 10373.

You are in much better position than this office to determine whether the prosecution should be instituted.

If the damage done to the motor boat was deliberate and intentional, X could be charged with malicious destruction of property. Minnesota Statutes 1941, Section 621.26, Mason's Statutes 1927, Section 10432.

RALPH A. STONE,
Assistant Attorney General.

Aitkin County Attorney.

October 15, 1945. 133-B-45

LIQUOR, INTOXICATING

## 26

**License—Statute makes it unlawful for more than one license to be issued to the same person, but does not make it a crime for the licensee to hold more than one license—False statement in application for license is perjury.**

**Questions**

"1. Does the holding of more than one On-sale liquor license by one individual constitute a violation of State Liquor Laws, which may be the subject of a criminal prosecution?

"2. If an individual has an interest in more than one On-sale liquor license, does that fact constitute a violation of the liquor laws?

"3. If the answer to the second question is in the affirmative, would the mere loaning of money by a licensee to holders of additional liquor licenses be a sufficient interest to constitute a violation, or would it require an actual ownership by partnership or otherwise, to constitute such violation?"

**Opinion**

The three questions will be discussed together.

The only provision which I have been able to find relative to the holding of more than one license occurs in the language of Minnesota Statutes 1941, Section 340.13, Mason's Supplement 1940, Section 3200-27, reading thus:

"No more than one retailer's license shall be directly or indirectly issued to any one person or for any one place, in each municipality."

There is no section of the law which declares that it is a crime for the same person to hold two licenses. It is the issuance of the license that is prohibited by the section quoted.

Minnesota Statutes 1941, Section 340.19(6), Mason's Supplement 1940, Section 3200-33, provides:

"Whoever shall violate any of the provisions of sections 340.07 to 340.40 as to licensing, or any of the regulatory provisions pertaining thereto, as herein provided, shall be guilty of a misdemeanor."

Criminal laws must be strictly construed. No act is a crime in Minnesota unless made so by statute. Even though the statute provides that two licenses may not be issued to the same individual, yet the lawmakers have not seen fit to declare it to be a crime for the same person to hold two or more licenses. The act declared to be unlawful is the issuance of more than two licenses to the same person. The licensee does not issue the license.

Holding as I do that the statute is weak in not making it a crime for the same person to hold more than one license even though it is declared

to be unlawful to issue more than one license to him, this opinion is a sufficient answer to all three questions.

I think that it is the duty of the council to revoke licenses in any case where any person holds more than one, either directly or indirectly. The council should do this in order to bring about compliance with the requirement that not more than one license shall be issued to each person.

Minnesota Statutes 1941, Section 340.12, Mason's Supplement 1940, Section 3200-26, provides:

> "Every person desiring a license from a local governing body shall file with the clerk of the municipality a verified written application in the form to be prescribed by the liquor control commissioner, with such additional information as the local governing body shall require."

If the applicant for a license should make and swear to a false statement in his application for license, and the false statement is with respect to information required by the prescribed form or by the city council, the applicant would be guilty of perjury and could be prosecuted therefor. Thus, if it is required that the applicant for an intoxicating liquor license shall disclose what other licenses he has, and if he should falsely make oaths that he has but one intoxicating liquor license when in fact he has more than one, or is the true owner of more than one, it is my opinion that a perjury indictment would lie against him.

RALPH A. STONE,
Assistant Attorney General.

Ramsey County Attorney.

April 26, 1945. 218-G

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**MINOR**

## 27

**Prosecution—Minor 18 years of age is capable of committing the crime of selling mortgaged property without the consent of the mortgagee.**

**Question**

Whether a minor over 18 years of age but under 21 years of age can be prosecuted for selling mortgaged property without the consent of the mortgagee?

**Opinion**

A person over 12 years of age is presumed to be responsible for his acts. The criminal act is making the sale and thereby putting the property beyond the reach of the mortgagee. It is not a defense that the seller was

under 21 years of age, if he was over 12 and otherwise capable of committing crime.

RALPH A. STONE,
Assistant Attorney General.

Aitkin County Attorney.

April 30, 1945. 605-B-35

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MISDEMEANOR

## 28

**False reports — Accountant making false report for creamery association guilty of misdemeanor.**

**Facts**

"An accountant who is not a C.P.A. prepared a report which included the report of the overrun which is required to be filed by the Department of Agriculture by all creameries. He very definitely prepared a false report. The so-called accountant, after preparing the report, had the president of the creamery association sign the report and duly took the acknowledgment.

"The creamery was prosecuted for having an excessive overrun and the president and the secretary appeared in Municipal Court and pleaded guilty to such charge.

"It seems that something should be done with the accountant who prepared this false report, but I am in a quandary as to what to do about it."

**Question**

What charge may be placed against the accountant?

**Opinion**

I assume that the accountant was employed by and was an agent of the corporation which operated the creamery. He knowingly concurred in the making and publishing of a written report of its affairs. This report contained a material statement which was false. I think he could be prosecuted under Minnesota Statutes 1941, Section 620.71, Mason's Statutes 1927, Section 10409, for the crime of making a false report. Under that statute the act would be a misdemeanor.

RALPH A. STONE,
Assistant Attorney General.

Yellow Medicine County Attorney.

September 24, 1945. 133-B-51

SENTENCE

## 29

**Prisoner committed under four separate justice court commitments to jail, each being independent of the other and all commitments being for the same term, status considered**—MS1941, § 610.33.

### Facts

The defendant was tried in justice court upon four separate criminal complaints, upon each of which he entered a plea of guilty. The justice thereupon sentenced the defendant upon each charge to 30 days in jail or $30.00 fine. The fine not being paid, he was committed.

### Question

As to how long a defendant shall be imprisoned under such conditions.

### Opinion

I assume that four separate commitments were made in the four separate cases, that all the commitments were delivered to the jailer at one time, and that all four pleas of guilty were entered before any of the sentences was pronounced.

Minnesota Statutes 1941, Section 610.33, reads:

> "When a person shall be convicted of two or more offenses before sentence has been pronounced for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction shall commence at the termination of the first or other prior term or terms of imprisonment to which he is sentenced; and when 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."

The above cited statute appears to apply to sentences in all courts. It means that four sentences pronounced at the same time after four pleas of guilty have been entered must be served consecutively. If the justice of the peace has so issued four commitments each for thirty days for four different offenses without indicating thereon the order of conviction, the jailer, notwithstanding this situation, should not, in my opinion, release the prisoner at the end of the first thirty day period but retain him until he has served all sentences consecutively, as the above quoted statute prescribes.

If the defendant has reason to believe that he is illegally confined after the expiration of the first thirty day period, he, of course, may apply to the court for a writ of habeas corpus claiming that he has served the sentences imposed. The court will then have presented to it all the pertinent

law and facts involved and thereby be enabled to return a decision that will be binding.

J. A. A. BURNQUIST,
Attorney General.

Cass County Attorney.
February 16, 1945. 641-K

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# EDUCATION

PUPILS

## 30

**Attendance—Another district—Child who resides more than two miles from home district school may attend another school in another district, unless transportation is furnished by his district to his home school—MS1945, § 132.02, Sd. 1.**

### Facts

In common school district No. 8, ten pupils reside closer to the New London schoolhouse than their own. The distance between the schoolhouse and the various residences of the ten pupils exceeds two miles. No regular transportation system in district No. 8 prevails. If the school district could enter into contracts with the parents of the children to transport them from their homes to the schoolhouse in district No. 8, the board considers that the cost of transportation would be less than though a system of transportation be established to carry them to school in the New London district. But the parents appear to be of the opinion that they cannot transport children to the schoolhouse in the home district at a cost which is offered by the district for such purpose. Further, some of them cannot afford the time and the pupils could walk to the schoolhouse in the New London district. In view of these facts, you have passed to the Attorney General the

### Questions

1. Is the parent of a child in district No. 8 obliged to accept an offer made by the school board and thus enter into a contract for the transportation of his own children to the schoolhouse in the district?

2. Does Minnesota Statutes 1945, Section 132.02, apply only to districts where there is a regular transportation service provided by the home district, such as in a consolidated district?

### Opinion

An element which goes to make up any contract is assent. No contract is complete without the mutual assent of the parties. An offer imposes no obligation until it is accepted according to its terms. Hence the offer of the school district without the assent of the parent to transport his children in accordance with the offer for the consideration named is no contract. The answer to your first question is "no."

Minn. St. 1945, § 132.02, Subdivision 1, reads:

"The children of any person in this state not resident within the limits of any incorporated city or village of this state, and residing more than two miles by the nearest traveled road from the school house in the district where such children reside, are hereby authorized to attend school at a school or school house in an adjoining district nearer to such residence than the school house in the district where such children reside, upon such reasonable terms as shall be fixed by the school board of such adjoining district, upon application of the parents or guardian of such children, provided that this section shall not apply where transportation is furnished by the home district."

Your second question refers to "transportation service provided by the school board of the home district, such as in consolidated districts." So we examine § 125.09 with reference to transportation in consolidated districts. It is there provided that "The board in a consolidated school district **shall** arrange for the attendance of all pupils living two miles or more from the school, through suitable provision for transportation or * * * . The board in a consolidated school district is authorized to provide for the transportation of pupils or * * * ." The alternative to providing transportation is that board and room be furnished in the district where the pupils attend school.

It is noticed that the concluding words in § 132.02, Subdivision 1, are "provided that this section shall not apply where transportation is furnished by the home district." My understanding is that this proviso means that in case transportation is provided for the resident pupils of the district to attend school in the home district then the portion of the subdivision previous to the proviso does not apply. It seems to me that the subdivision is complete in itself and has no reference and is not in any way dependent upon the other provision mentioned: § 125.09, Subd. 1, relating to consolidated schools. You will note that the law does not say regular transportation. It does not say bus transportation. It says, "where transportation is furnished." So it makes no difference what kind of transportation is furnished provided it is suitable. But, on the other hand, there is no obligation on the part of the parent of the pupil to furnish transportation. When transportation is not furnished by the district, it is the right of a child residing in the home district to attend a school in another district which is nearer to his home than the school in his district provided he lives more than two miles by the nearest traveled road from the schoolhouse, and provided further that the district does not furnish transportation to him between his home and the schoolhouse in his district.

(Note MS1945, § 132.02, was amended by L 1947, C 356, but the change is not important to this opinion.)

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.

September 20, 1946. 166-A-10

## 31

**Attendance—At nearer school—Distance to bus route immaterial**—MS1945, § 132.02.

**Facts**

In Common School District No. 1, which is not in a city or village, A resides with his family, including children of school age, a distance of more than two miles by the nearest traveled road from the schoolhouse in the district. That district adjoins Independent School District No. 2 in that county. In Independent School District No. 2 the schoolhouse is four miles from A's home. A school bus is operated which carries pupils to and from school in District No. 2. This bus route passes within one-half mile of A's home. A wishes to send his children to school in District No. 2 using the bus transportation system. No transportation of pupils is furnished in District No. 1.

**Question**

May A by authority of M. S. 1945, Sec. 132.02 avail his children of the benefits of education furnished in District No. 2, using the transportation system, tuition to be paid by District No. 1?

**Opinion**

It is my opinion that your question must be answered "no." Residents of one school district, as of right, are not entitled to the benefits of the educational facilities of another district under the provisions of Sec. 132.02 unless strictly within its provisions. If, in the situation considered, the distance between the home of the pupil and the schoolhouse in the adjoining district were less than the distance between the home and the schoolhouse in the home district, then the pupil would be entitled to attend in the adjoining district. The distance between the home and the bus route is not the statutory test.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.

October 31, 1946. 169-P

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SCHOOL DISTRICTS

## 32

**Officers—Board — Vacancy — Independent school districts — Resignation of Director—Appointment of successor**—MS1941, §§ 125.03, 125.04, 125.05.

**Facts**

A director was elected in 1944 for the term of three years. In July,

1945, he was elected by the board as clerk for the ensuing school year. He has resigned, the resignation to become effective January 1, 1946.

**Opinion**

Without reiterating the questions submitted, they will be answered as follows:

The office of director is one to which the occupant is elected by the people. When a vacancy occurs in that office, it is to be filled by the board at a meeting thereof. Thereupon a resolution is entered in the minutes showing the appointment of the new member. The new member so chosen will hold office until the next annual election, when a successor for the remainder of the unexpired term will be chosen by the voters. Minnesota Statutes 1941, Section 125.03. But there is no vacancy so long as there are six members on the board. A present holder of the office of director who has presented his resignation has conditioned the resignation to take effect January 1, 1946. So, until January 1, 1946, there is no vacancy in the office to be filled. The resignation having been accepted, a vacancy is sure to occur on January 1, 1946. This vacancy may be filled by appointment by the board. The resigning member should not vote.

If no regular meeting of the board is provided by its rules to be held until the last day of January, 1946, there is nothing irregular if the board at that time takes action to fill the vacancy. But, if the board fails to fill the vacancy for the space of ten days after January 1, 1946, three qualified voters can call a special meeting or election for the purpose of filling the vacancy by election. In so acting, they assert the authority granted in Section 125.04. So, if the board wants to make its own appointment, it must do so before the people of the district fill the vacancy by election. A special meeting of the school board could be called in the manner recognized for calling special meetings and the appointment could be made by the board at the special meeting. In order for the board to act at a meeting upon the question of filling the vacancy, it is necessary, of course, that a quorum be present. A quorum is a majority of the school board. Section 125.05. The majority of five is three. Since, when the board meets to fill a vacancy caused by the resignation of one member out of the six, there are only five members remaining, the majority of five is three. Hence, it would require the affirmative vote of at least three members of the board to appoint the new member.

Since the vacancy is not to be filled until there is a vacancy, and since the resigning member will not be a member of the board after the vacancy occurs, he will not vote on the question of the appointment of his own successor.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Commissioner of Education.

December 27, 1945. 161-A-25

# 33

**Property—Lease—School board may lease property not needed for school purposes without being authorized by an election of the voters**—MS1945, § 125.06.

**Questions**

1. Can an independent school district lease an unneeded school building and site to a private corporation at a fair rental for use other than school purposes?

2. If the answer to question 1 is "yes," and if the term of the lease is more than three years, must authority to enter into the lease by the school district be granted by the voters of the district at a school election?

**Opinion**

When any building of a school district becomes such that the same is "no longer needed for the purposes or use of the municipality, and that by leasing the same a better income would be derived and the burden of taxation lightened," such building may be legally leased. **Anderson v. City of Montevideo**, 137 Minn. 179.

Minnesota Statutes 1945, Section 125.06, provides:

> "Subdivision 1. The school board shall have the general charge of the business of the district, the school houses, and of the interests of the schools thereof.
>
> "Subd. 2. When authorized by the voters at a regular meeting or election or at a special meeting or election called for that purpose, it may acquire necessary sites for school houses, or enlargements or additions to existing school house sites, by lease, purchase, or condemnation under the right of eminent domain; erect, lease, or purchase necessary school houses, or additions thereto; erect or purchase garages for district-owned school buses; **and sell or exchange school houses or sites and execute deeds of conveyance thereof** * * * ."

It will be noted that in the above quoted subdivision 2 the authority by the voters is necessary in acquiring sites for schoolhouses or enlargements of or additions to school sites whether acquisition thereof is by "lease," "purchase," or "eminent domain." The requirement of such authority to lease is not specifically mentioned in the clause "and sell or exchange school houses or sites and execute deeds of conveyance thereof."

If it had been intended that an election should be required to authorize the lease of school sites or schoolhouses, it would appear that the word "lease" would also have been used in the latter connection. The omission thereof, in my opinion, limits the meaning of the words "sell or exchange and execute deeds of conveyance thereof" as used in subdivision 2 of the

above cited section to deeds conveying or exchanging the fee title to the school premises. Such clause does not refer to the leasing thereof.

Under section 125.06, I believe it is immaterial whether the lease is for a period of more than three years. Regardless of its duration, it is still a lease and not a sale or exchange of school property.

There appears to be no statutory provision directly authorizing the leasing of school sites or schoolhouses to a private corporation for business purposes.

However, under the decision of our Supreme Court in the above cited case of **Anderson v. City of Montevideo,** when a public building is unused and not needed and by leasing the same an income can be derived and the burden of taxation lightened, there is an implied authority for so doing in such circumstances.

The proposed agreement, of course, must be reasonable as to the terms thereof, including the time for which the premises are leased. The reasonableness of the lease must be determined by the school board in the exercise of its own judgment after considering the surrounding facts and circumstances. In the board's sound discretion, without being first authorized to do so by an election of the voters of the school district, it may lease the property in question for such length of time as it determines the property will not be needed for school purposes and upon such terms as it reasonably deems to be for the best interests of the school district.

**Any former opinions inconsistent herewith are hereby superseded.**

J. A. A. BURNQUIST,
Attorney General.

Commissioner of Education.

September 25, 1946. 622-A-6

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TEACHERS

## 34

**Contract—Opening date for school not certain but to be fixed by the board.**

**Facts**

Teachers' contracts for the school year 1946-1947 in the school district No. 15 of Red Lake County employ teachers to teach for nine months, beginning "on or about September 3, 1946." The words "on or about" indicate that the date of the beginning of the school year was not certain, but that that is the approximate date and the school board being the business manager for the district has the power to state when the school year

does begin. When the contracts were made, it was supposed that the date mentioned might be the date for opening.

**Questions**

Should the teachers present themselves for work on the date specified for opening school (September 3)?

Would the district be liable for their salaries for the period September 3 to September 13 notwithstanding the fact that the school board has voted to postpone the opening of school for two weeks?

**Opinion**

I presume that the postponement for two weeks was brought about because of the prevalence in the state of polio and because of the desire to prevent its spread if postponement would accomplish that end. There is no question in my mind that the board had the right to postpone the time of opening of school, especially in view of the fact that no positive date is stated in the contracts when school will open.

It appears to me that the contracts will be executed for the school year beginning September 16, if that is the time that the board has decided to open. If the teachers were informed in advance of September 3 that school will open on September 16, I see no ground for any claim for salary in the interim under the contracts.

The teachers would not be justified in presenting themselves for work on September 3 if they were notified before that time that school was not going to open until two weeks later. Consequently, I see no reason why they should present themselves or make any claim for services for that interim. The contracts do not say that school will open on September 3.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.

September 3, 1946. 172-C-2

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## 35

**Retirement fund—Annuitants and annuities: Deductions for periods teacher was on military leave**—MS1941, §§ 135.04, 192.262.

**Question**

"(a) May the Board, above referred to (Board of Trustees of Teachers Retirement Fund), determine under Minnesota Statutes 1941, Chapter 135.04, upon what salary the regular 5 percent Retirement de-

duction may be made in the case of members of the Fund who served in the Military forces, who have now resumed teaching in schools covered by the Law, and who may elect to make such payments into the Fund?"

**Opinion**

Under Minnesota Statutes 1941, Section 135.04, the Teachers Retirement Board is given power to "adopt, alter, and enforce reasonable rules and regulations not inconsistent with the laws of the state for the administration and management of the fund" and "for the payment and collection of payments from members."

Minnesota Statutes 1941, Section 192.262, provides:

"Any public officer or employee receiving leave of absence under sections 192.26 to 192.264 and having rights in any state, municipal, or other public pension, retirement, or relief system shall retain all such rights accrued up to the time of taking such leave, and shall have all rights subsequently accruing under such system as if he had been actually employed during the time of such leave; provided, that so far as any increase in the amount of money benefits accruing with respect to the time of such leave is dependent upon the payment of any contributions or assessments, the right to such increase shall be conditioned upon the payment of such contributions or assessments within such reasonable time after the termination of such leave and upon such terms as the authorities in charge of such system may prescribe."

In view of these two sections and in view of the fact that the statute does not specify the basis for deductions in the case of members of the fund who have served in the military forces, the answer to your question is in the affirmative.

**Question**

"(b) If so, which salary basis for this deduction should be fixed: the school salary which such members were receiving at the time they entered Military service, **or**, the salary plus yearly increments which these members would have received had they not gone into such service, **or**, the salary which they now receive, having resumed their teaching in schools covered by the Law?"

**Opinion**

My answer to this question is that the basis to be fixed is in the discretion of the board, which is, under Section 192.262, to prescribe the terms of the payment of contributions or assessments. I might also suggest that the first measure which you propose would seem to be the most definite. To attempt to determine what the teacher might have earned during the time he was on military leave would be more or less of a guess, and there would seem to be no particular justification for using the salary which he receives upon resumption of teaching. Since the making of payments by

the returned veteran will be entirely voluntary, it would seem that any reasonable basis would be proper so long as the practice is uniform.

WM. C. GREEN,
Assistant Attorney General.

Teachers Retirement Fund.

January 18, 1946. 175-A

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## 36

**Soldiers' Preference—Law does not apply to position of teacher**—MS1945, §§ 130.18, 197.45, 197.46.

**Facts**

"Mr. M. a properly certificated and qualified teacher was employed by Independent School District No. 12, Ely, Minnesota, and entered upon his duties pursuant to his contract on September 9, 1937, as a teacher of General Science. He had the usual form of contract known as the 'continuing contract' and taught as 'assigned by the Superintendent.' In August 1943, Mr. M. secured a commission in the U. S. Naval Reserve. Therefore, he did not teach in the Ely schools until after his discharge from the service on July 11, 1946. He began teaching in his former position on September 2, 1946, and is now so employed.

"During the school year 1943-44, a Miss S. taught the subjects formerly taught by Mr. M.

"Mr. L., a properly certificated and qualified teacher, who had been employed as a teacher in the schools of H., Minnesota, and had entered the military service from that School District, was employed in September, 1945, to teach in the Ely Schools. When employed he was still in the military service and did not report until September 24, 1945. He was assigned the work formerly taught by Mr. M. He was given the usual 'continuing contract' which contained a clause to the effect that either party could terminate the contract before April 1st. Anticipating Mr. M's return for the coming school year the Board terminated Mr. L.'s contract before April 1, 1946.

"Since that time no position has developed, in the opinion of the Superintendent which Mr. L. could satisfactorily fill. There are not sufficient classes available in subjects in which Mr. L. is qualified and certificated to constitute a normal load. Therefore, the Board has thus far refused to reinstate Mr. L. as a teacher and enter into a contract with him though Mr. L. has appeared before the board and has so requested."

We shall rearrange the order of the questions submitted by you.

**Questions**

"3. * * * does Mr. L.'s employment come under the so-called Soldier's Preference Act and must he be retained under such Act?"

**Opinion**

Your third question is answered in the negative.

Minnesota Statutes 1945, Sections 197.45 and 197.46, are known as the Veterans' Preference Law. In Section 197.46 it is specifically provided:

"Nothing in sections 197.45 and 197.46 shall be construed to apply to the position of * * * teacher * * * ."

**Question**

"1. Did the Board have the right to cancel Mr. L.'s contract (the one entered into on September 3, 1945, and modified and reissued on November 12, 1945, which increased his salary) before April 1, 1946?"

**Opinion**

Your first question is answered in the affirmative.

The contract submitted by you contains the following provision:

"This contract shall remain in full force and effect, except as modified by mutual consent, until terminated by a majority vote of the full membership of said Board or by the written resignation of the teacher before April 1st. Such termination shall take effect at the close of the school year in which the contract is terminated in the manner aforesaid. Provided further, that this contract may be terminated at any time by mutual consent of the contracting parties."

This provision of the contract is not affected by the amendment to the contract which you submitted, which deals solely with the compensation to be paid to Mr. L. It is in conformity with Minn. St. 1945, Section 130.18, and is binding upon both parties to the contract.

**Question**

"2. Must the Board reinstate Mr. L. and enter into a contract with him?"

**Opinion**

Assuming that the cancellation of the contract was effected in compliance with the terms thereof, your second question is answered in the negative.

We have hereinabove examined the authority to cancel the contract under its provisions and determined that the Soldiers' Preference Law does

not apply to the position of teacher. It follows that Mr. L. has no right of reinstatement, nor is the board required to enter into a contract with him.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Commissioner of Education.

October 3, 1946. 85-F

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# ELECTIONS

BALLOTS

## 37

**Color—India tint—Where India tint paper cannot be procured, the ballots shall be printed on paper of a similar color—Failure to use India tint paper would not disfranchise the voters.**

### Question

"We have been advised by certain county auditors that their printers are unable to furnish India tint paper for printing the 1946 county and district ballot as prescribed by Section 205.65, Minnesota Statutes 1941.

"Under the circumstances, may a color imparting or producing a hue similar to that of India tint be used?"

### Opinion

The statute provides that there shall be one ballot on India tint paper upon which shall be printed the names of all candidates for office and all questions and propositions except those required to be placed on other ballots. Minnesota Statutes 1945, Section 205.65. The county auditors are now confronted with the situation where it is impossible for them to comply with this requirement for India tint paper. They should make every effort to comply with the statutory requirements. If unable to do so, the ballot should be printed on paper as nearly similar in color to the India tint color as may be available.

It would be out of the question to hold that the voters in any county were disfranchised simply because it was impossible to secure a supply of India tint paper.

I quote the following from the article on Elections in 29 C. J. S. p. 248:

"As a rule, failure of the officers charged with the duty of preparing the ballots to follow statutory provisions as to the dimensions

thereof, the quality and color of the paper to be used, the character of type and the color of ink to be used in printing them, will not disfranchise the voters who make use of the ballots supplied to them by the election officers."

It is my opinion that the election will not be invalid if when it is impossible to secure a supply of India tint paper, the county and district ballots are printed on paper of a color as nearly similar to India tint as it is possible to secure.

RALPH A. STONE,
Assistant Attorney General.

Secretary of State.

August 21, 1946. 28-A-2

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## 38

**Counting—Villages—Vote on question of liquor license—Blank ballot should not be included in determining the majority of the votes cast upon the question**—MS1941, § 340.21, Mason's 1940 Supp., § 3200-36.

### Facts

In the annual election held on December 4, 1945, in the Village of Kenyon there were 392 votes or ballots cast in favor of license and 389 against it and, in addition, there were deposited eight blank ballots in the separate ballot box provided for the casting of ballots on that question.

### Question

Whether the blank ballots so deposited should be included among the ballots cast on the question of license, as it is apparent that, if the blank ballots are included, the 392 votes in favor of license would not be sufficient to authorize the council to grant it.

### Opinion

Minnesota Statutes 1941, Section 340.21 (Mason's 1940 Supplement, Section 3200-36) reads as follows:

> "If a majority of **all the ballots cast upon such question** at such election shall be 'for license' the village council of the village may grant license for the sale of intoxicating liquors for the ensuing license year, but if such majority shall be 'against license' then no such license shall be granted and such vote shall remain in force until reversed at a subsequent annual election at which the question of license is again in like manner submitted."

As early as 1876, in the case of **Dayton v. City of St. Paul,** 22 Minn. 400, the Supreme Court of Minnesota stated:

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

In the case of **Smith v. Board of County Commissioners,** 64 Minn. 16, the court expressed approval of the rule so stated. Notwithstanding such approval, the court in that case held that, in voting upon the question of the removal of a county seat, the percentage necessary was 55% of the aggregate number of the votes cast at the special election and included therein 68 unintelligible votes. A strict construction of the language of the statute designating the majority by which the removal should be carried was applied by the court for the reasons stated in its opinion.

However, the general rule above quoted was adhered to in the case of **Hopkins v. City of Duluth,** 81 Minn. 189. It was there held that fraudulent ballots, ballots with unintelligible marks expressing no effective vote upon any choice, and ballots upon which no markings had been made by the voters should be excluded from the aggregate number upon which the requisite four-sevenths vote is to be estimated in determining the ratification of a proposed charter. Of the 26 ballots excluded by the trial court, 15 had markings upon them but expressed no effective choice, six ballots were totally blank, and the others were alleged to be fraudulent. The court held that it was proper to exclude the 26 ballots in the determination of the total vote cast.

In the case of **Lodoen v. City Council of City of Warren,** 118 Minn. 372, the court decided that, in the matter of issuing a liquor license in that city, the vote required under a special law applying to the City of Warren was a majority of the votes cast at the annual election and not a majority of those voting on the question. Seventeen ballots of the 321 cast at the election were blank only on the question of license or no license. If the statute had required, as the one here under consideration, that the majority of the ballots **cast on the question** was to determine the issue, the inclusion or exclusion of the 17 blank ballots would have been material. As all that the court held in the **Lodoen v. Warren** case was that the provisions of the special law there involved required a majority of all voting at the election in order to authorize license, it is clear that the vote there passed upon was not sufficient for that purpose, although the majority of those voting on the question were in favor of the granting of license.

In the case of **Powers v. Village of Chisholm,** 146 Minn. 308, there was considered a statute which required for the issuing of bonds five-eighths **of those voting on the question.** In that case it was disclosed that:

> "Separate ballots and separate ballot boxes were provided for the vote on village officers and the vote on the bond proposition. Each

voter was handed a ballot of each kind, went into the voting booth, returned the two ballots to the election officers, and they were deposited in the appropriate ballot boxes. There were 1,235 ballots, of which 765 were in favor of issuance of bonds, 454 against, and 16 were blank. If the five-eighths is computed on the total of 1,235 the proposition did not carry. If the 16 blank ballots are rejected and the five-eighths is computed on 1,219 ballots, it did carry."

The trial court rejected the blank ballots and held that the proposition to issue bonds carried. In so rejecting the blank ballots, the Supreme Court sustained the lower court, stating that the statute "intended that the result should be determined by those voting upon the question of the issuance of bonds unaffected by those casting blank ballots, that is, not voting at all upon the question" and that "those who voted for officers, but deposited blank bond ballots, were not within the statute 'voting on the question'."

In most of the statutes designating the votes to be required the word "votes" is used and not "ballots," as in the statute under consideration. The only case found by the writer at the time of writing this opinion which passes upon the effect of the use of the word "ballots" instead of "votes" in a statute is that of **Cashman v. Entwistle,** 100 N. E. 58, 213 Mass. 153. In that case the statute provided for a repeal of a charter by "a majority of the ballots" cast at an election. The court there said:

> " 'Ballots' and 'votes', though in some connections of different meaning are shown by the dictionaries as well as by common observation to be used occasionally as synonyms. * * * 'Ballots' and 'votes' appear to be used here as having the same signification, * * * .
>
> "Those who come to an election and cast a blank ballot in principle are no more efficacious in expressing their convictions than those who absent themselves altogether. Both classes must be presumed to be willing to abide by the decision made by the majority of those voting, unless there is an express provision of law to the contrary."

In the vote on the question of repealing the charter involved in the Massachusetts case, where the phrase "majority of ballots cast" was construed, there were 676 blank ballots. The court excluded them in determining the majority of the votes cast in that election.

In **Runge vs. Anderson,** 76 N. W. 482, 100 Wis. 523, the Supreme Court of Wisconsin says:

> "The official ballot, so called, is not complete when furnished to the elector as he enters the booth to prepare his ballot. It is a mere form for a ballot. When marked and prepared by the voter so as to show his choice at the election, then, **and not till then,** does it become his constitutional ballot; * * * ."

In view of the authorities above cited, it would appear that, by the passage of the statute under consideration, requiring a majority of all the ballots cast upon the license question at a village election, it was intended

that the word "ballots" should have the same meaning as the word "votes" and that the depositing of a blank ballot would not constitute casting a ballot or vote upon such question.

Therefore, unless the courts should find unusual reasons, as in the case of **Smith v. Board of County Commissioners**, above cited, for deciding that the blank ballots should not be excluded, it is my opinion that they will hold that the blank ballots deposited at your election in the ballot box provided for the balloting on license or no license, but expressing no choice on the question submitted, should not be included in determining the majority of the votes cast upon that question.

J. A. A. BURNQUIST,
Attorney General.

Kenyon Village Attorney.

December 18, 1945. 28-A-3

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## 39

**Nominations by petition—Vacancy—Death of Judge of Seventh District in August whose term expires in 1951—Nominations by petition may be made and filed on or before October 15, 1946—Method of preparation of ballot discussed—Candidates to succeed the deceased judge run in a separate class—Form of ballot.**

### Facts

One of the judges of the District Court of the Seventh Judicial District, Judge Anton Thompson, died during the week commencing August 11. His term would have expired on the first Monday in January, 1951. Hence there is a vacancy on the district bench which should be filled at the November 1946 general election. Several attorneys desire to file by petition for this office and desire to have their names appear on the official ballot.

The Seventh Judicial District comprises ten counties and regularly has four judges. The term of only one of the present judges expires on the first Monday in January 1947, to-wit: the term of Judge Cameron. Candidates for the judicial term expiring in January, 1947, will have their names on the ballot and will be voted upon at the general election. Their names have been certified to the several county auditors by the secretary of state.

Your county auditor feels that he should proceed with the printing of the ballots for the November election because of the provisions of the soldiers' voting law (Laws 1945, Chapter 190), which requires that ballots shall be in the hands of the printers not later than August 19, and in the hands of the county auditors not later than September 4.

**Question**

What procedure should be adopted for the filling of the vacancy caused by the death of Judge Thompson?

**Opinion**

The death of the district judge caused a vacancy on the district bench of the Seventh Judicial District to which the provision of Minnesota Constitution, Article VI, Sec. 10, is applicable. This provision reads thus:

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

Any law of the state which would prevent the election of a successor to Judge Thompson at the November 1946 general election would be contrary to this provision of the Constitution, and therefore void. A successor to the deceased judge will therefore be elected at the November general election.

See **Flakne v. Erickson,** 213 Minn. 146, 6 N. W. (2d) 40.

Pertinent statutes applicable to the situation are Minnesota Statutes 1945, Sections 202.23, 202.25, 202.26, 202.27 and 202.28.

Sec. 202.23 reads in part as follows:

> " * * * If there is no proper committee to fill such vacancy, as above provided, then in that event the person receiving the next highest number of votes for such office at such primary election shall be the candidate for such office and if there is no other candidate for such office and a vacancy exists by reason of this fact the vacancy may be filled by the proper officer, placing upon the ballot the name or names of such candidates as are nominated by petition in the manner provided in sections 202.19 to 202.22."

Sec. 202.25 reads as follows:

> "When the nomination of a candidate to be voted for in any district larger than a single county is made by voters' certificate, the original thereof shall be filed with the auditor of the county where the candidate resides and such auditor shall certify as many copies thereof, if presented to him, as there are other counties in the district, one of which certified copies shall be filed within the proper time with the auditor of each such county, and shall be authority for such auditor to place the name upon the India tint ballots."

Also Sec. 202.26 reading as follows:

> "No nomination for any office shall be made either by petition or

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

I also quote:

202.27 "Certificates of nomination shall be filed as follows: 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; with the city clerk or other proper officer, to be placed on the red ballots, on or before the third Saturday preceding the day of election. In each case the officer with whom such certificate is filed shall give or send to the person filing the same an acknowledgment thereof upon the same day it is received, and shall file and preserve such certificates, subject to public inspection. No filing of any certificate shall be effectual unless at the time thereof the prescribed fee shall be paid or tendered to such officer."

202.28 "If the ballots have been printed, the officer whose duty it may be to have such ballots prepared and printed, shall, if such ballots be still in his hands, attach to the ballots, over the name of the candidate who causes the vacancy, adhesive stickers containing the name only of the candidate selected under section 202.23. Should such ballots have been distributed before such vacancy occurs then and in that event the officer shall cause to be printed and distributed to the judges to whom the ballots have been distributed a sufficient number of adhesive stickers to correct the ballots, as provided herein, and the judges shall correct the ballots as herein provided."

As to the number of signers of the nominating petition, see Minnesota Statutes 1945, Sec. 202.19.

Laws 1945, Chapter 190, is entitled:

"An act relating to elections and to facilitate voting by Minnesota Electors serving in the armed forces of the United States at the primary and general elections of 1946."

Sec. 3 thereof provides:

"Except as modified by this act, the provisions of Minnesota Statutes, 1941, and acts amendatory thereof, and other statutes relating to elections shall remain in full force and effect."

Laws 1945, Chapter 190, Sec. 14, names the dates for the performance of acts in preparation for and the holding of the primary and general elections. It provides that August 1 is the last day for filing nominations by petition; that vacancies in nomination must be filled not later than August 8; that ballots must be in the hands of the printers not later than August 19; and that ballots must be in the hands of the county auditors not later than September 4.

This office has heretofore held that the 1945 act did not repeal the provisions of the general election law which allow the filling of a party nomination vacancy at any time before the general election. (Opinion August 19, 1946, No. 41 this report.)

As heretofore stated, the legislature could not pass a valid law which would prevent the filling of the vacancy caused by the death of Judge Thompson at the 1946 general election, as that would be contrary to the constitution.

Further, the 1945 Act applies only to vacancies in nominations which have been made. There had been no nomination to fill the vacancy caused by the Judge's death. The 1945 law by its very terms is not applicable thereto. Hence the provisions of the general election law above quoted apply to the filling of the vacancy caused by the death of Judge Thompson. Nominations for that office may now be made by petition as prescribed by the laws above quoted.

The auditors will not know how many nominations will be made by petition to fill this vacancy or who the nominees will be until the third Tuesday preceding the general election, i.e. October 15, 1946. Certificates of nomination to fill this vacancy of candidates whose names will appear on the India tint ballot, must be filed on or before the third Tuesday preceding the day of election. Minnesota Statutes 1945, Section 202.27.

Where a certificate of nomination to fill the Judge Thompson vacancy has been properly filed in accordance with the statutes on or before the third Tuesday preceding the November 5 election, such name should, if possible, be placed on the general election ballot. But members of the armed forces should not be deprived of the opportunity to vote because of the delay in the printing of the ballots. Yet there is no way in which the general election ballots can now be printed and show thereon the names of those who will be candidates to succeed Judge Thompson in time to reach distant members of the armed forces.

I suggest two courses of procedure which are open to the county auditors:

1. All the ballots can now be printed. These ballots will contain the names of the candidates for district judge to fill the vacancy which regularly occurs on the first Monday in January 1947, and which names have been certified to the county auditors by the secretary of state. If so printed now, these ballots will not contain the names of the nominees who are candidates to succeed Judge Thompson, but should contain a blank which would permit the voter to write in the name of his choice for a candidate to succeed Judge Thompson. The auditors could then mail to members of the armed forces these ballots when proper requests have been filed by or on behalf of such members, and if the person for whom ballots are requested is stationed at such a distant point that his ballot could not otherwise be marked and mailed in time to be counted at the general election, holding back ballots for other members of the armed forces who are located at such

points that their ballots could be properly marked and mailed after October 15, 1946. Then after October 15, 1946, the auditors could attach to the general election ballots adhesive stickers containing the names of the candidates nominated by petition to succeed Judge Thompson. These ballots with the stickers attached would then be supplied to the several judges of election and to such members of the armed forces as are stationed at such points that they could mark and mail their ballots in time to be counted at the general election.

2. This second course is available. The auditors could print now a few ballots sufficient to comply with the requests of those members of the armed forces who are stationed so far away that their ballots would not otherwise reach the judges of election in time to be counted. These ballots, of course, would not contain the names of the nominees for the judgeship to succeed Judge Thompson, but should contain a box which would permit the voter to write in the name of his choice of a candidate to succeed Judge Thompson. They would be comparatively few in number and not enough to affect the election on the Judge Thompson vacancy. The auditors could leave the form set up, and then after October 15 have the complete ballot printed with the names thereon of the candidates nominated by petition for this particular vacancy. These ballots could then be supplied to the several judges of election and to those members of the armed forces who are stationed at such points that their ballots could then be marked and mailed in time to be counted.

While your request for an opinion does not cover the following, in order to fully advise the county auditors as to the proper preparation of the ballots, I further advise you as follows:

The names of the candidates for judicial office which have been certified by the auditors to the secretary of state are those who are candidates for the term of Judge Cameron which regularly expires in January, 1947. Candidates to fill the vacancy caused by the death of Judge Thompson run in a class by themselves. They do not run in the same class as those who may have filed for the judgeship, the term of which expires in January 1947 (Judge Cameron's seat). They are in a separate class. Therefore a box on the ballot should provide for the election of a judge for the term of Judge Cameron expiring in January 1947.

As to Judge Thompson's vacancy, the ballots printed after October 15, 1946 (or the adhesive stickers if the auditors use that method) should present an opportunity separately to vote for a successor to Judge Thompson. I suggest the following form to be printed on the ballot if the ballots are printed after October 15, or on the adhesive sticker if that method is used, to-wit:

"Judge of the District Court
For 6 year term
To succeed Judge Thompson, Deceased
Vote for One

☐ A B Nominated by Petition

☐ C D Nominated by Petition

☐ E F Nominated by Petition"

RALPH A. STONE,
Assistant Attorney General.

Clay County Attorney.
August 26, 1946. 28-B-2

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## 40

**Nomination by petition—Vacancy—Death of candidate for state senator—Removing name from ballot**—MS1945, §§ 202.19, 202.21, 202.25, 202.26, 202.27, 202.28.

**Opinion**

Prior to 1939, Mason's Minnesota Statutes 1927, Section 329, contained the following:

> " * * * provided that no person shall be nominated by petition pursuant to this section for any office now or hereafter declared to be a nonpartisan office except in case of vacancy * * * ."

Laws 1939, Chapter 345, Pt. 3, c. 3, § 1 (Minn. Stat. 1945, § 202.19), changed the wording of the above quoted provision by adding thereto the words: "or death or withdrawal of a nominated candidate." As so changed, the provision now reads:

> " * * * provided that no persons shall be nominated by petition pursuant to this section for any office now or hereafter declared to be a non-partisan office, except in case of vacancy or **death or withdrawal of a nominated candidate.** * * * " (Boldface supplied)

Prior to the enactment of Laws 1939, the provision in question was construed by this office to permit no filing by petition for a nonpartisan office unless there was no nominee, but the 1939 act clearly provides that in case of "death or withdrawal of a nominated candidate" there may be filings by petition signed by the number of voters therein required although the office involved is a nonpartisan office. Such change in the statute has made any opinion of this office written prior thereto and inconsistent therewith inapplicable at this time.

Laws 1939, Chapter 345, Pt. 3, c. 3, § 7 (Minn. Stat. 1945, § 202.25), provides as follows:

> "When the nomination of a candidate to be voted for in any district larger than a single county is made by voters' certificate, the orig-

inal thereof shall be filed with the auditor of the county where the candidate resides and such auditor shall certify as many copies thereof, if presented to him, as there are other counties in the district, one of which certified copies shall be filed within the proper time with the auditor of each such county, and shall be authority for such auditor to place the name upon the India tint ballots."

Section 8 (Minn. Stat. 1945, § 202.26), which follows the above cited § 7, provides that:

"No nomination for any office shall be made either by petition or otherwise within 30 days before the time of holding a general election, except nominations to fill a vacancy in a nomination previously made * * * ."

As the matter under consideration involves a vacancy in a nomination previously made, it is my opinion that, under the above cited laws and Minn. Stat. 1945, § 202.27, the filing of the original certificate of nomination may be made with the county auditor where the candidate resides on or before the 3rd Tuesday preceding the day of the election. Under the decision in the case of **Gallagher v. Erickson,** 213 Minn. 151, it would appear advisable also to file on or before the 3rd Tuesday preceding the day of election certified copies of the original petition with the county auditors of the other two counties which constitute a part of the 12th Senatorial District.

We have heretofore held that the date August 8 designated in Laws 1945, Chapter 190, as the last day for filling vacancies, modifies the 30-day provision in Section 8 supra, now appearing in Minn. Stat. 1945, § 202.26, but does not repeal the two exceptions therein provided, one of which excepts nominations to fill a vacancy in a nomination previously made. Therefore, it is herein held that one or more additional candidates may be nominated for the office of state senator in your district by petition and placed on the India tint ballot by complying with the statutory requirements for such a nomination.

There appears to be no statutory provision requiring proof of the death of a nominee. If the auditor has sufficient evidence of such death to convince him of the fact, that knowledge would appear to justify him in removing the name of the deceased nominee upon the filing of the petition or petitions authorized by above cited Section 202.19. If no certificate of nomination is filed, Minnesota statutes do not specifically authorize the auditor to remove the name of the deceased.

As to the placing of nominees by petition on the ballots if already printed, the procedure to be followed is that provided in Minn. Stat. 1945, § 202.28. If there is only one additional nominee, his name should be printed on an adhesive sticker and placed over the name of the deceased nominee. If more than one are nominated by petitions and there is not sufficient room for the stickers where the names of the primary nominees now appear, the practical way of handling the situation would be to eliminate by blank

adhesive stickers the present nominees appearing on the ballot and print on a separate adhesive sticker the name of the surviving candidate heretofore nominated and the names of those who are nominated by petition, omitting the name of the deceased candidate, and attach the sticker at the bottom of the ballot.

Because only two candidates filed for the office of senator in the 12th Senatorial District under Minn. Stat. 1945, § 202.02, their names were not placed on the primary ballot, and they became the nominees for that office without being voted upon in the primary election. As no candidates for the office of senator were voted upon in your district at the last primary election, any voters of that district may at this time sign one petition for a nomination for senator therein. Minn. Stat. 1945, § 202.21, disqualifies only those voters who shall have voted at a primary for any nomination to an office for which nominees were voted upon at such primary.

J. A. A. BURNQUIST,
Attorney General.

Lincoln County Attorney.

October 8, 1946. 28-B-1

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CONGRESSIONAL OFFICE

## 41

**Vacancy—Death of nominee—Filling vacancy by filing a certificate of nomination by the proper committee of the political party** — MS1941, §§ 202.23, 202.26 and 202.28; L 1945, C 190.

**Opinion**

All section references in this opinion are to Minnesota Statutes 1941, unless otherwise noted.

Section 202.23 provides:

"If a vacancy occurs after nominations have been made it may be filled **at any time before the general election** by filing with the proper officer a nomination certificate in form and substance as hereinbefore provided, executed by the chairman and secretary of the proper committees of the political party whose voters make the original nomination * * * "

Section 202.28 reads as follows:

"If the ballots have been printed, the officer whose duty it may be to have such ballots prepared and printed, shall, if such ballots be still in his hands, attach to the ballots, over the name of the candidate who

causes the vacancy, adhesive stickers containing the name only of the candidate selected under section 202.23. Should such ballots have been distributed before such vacancy occurs then and in that event the officer shall cause to be printed and distributed to the judges to whom the ballots have been distributed a sufficient number of adhesive stickers to correct the ballots, as provided herein, and the judges shall correct the ballots as herein provided."

Section 202.26 provides:

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

Laws 1945, Chapter 190, is entitled "An act relating to elections and to facilitate voting by Minnesota Electors serving in the armed forces of the United States at the primary and general elections of 1946." The chapter applies only to the primary and general elections held this year. Section 3 thereof provides:

"Except as modified by this act, the provisions of Minnesota Statutes, 1941, and acts amendatory thereof, and other statutes relating to elections shall remain in full force and effect."

The question here involved is whether a party committee, under above cited Section 202.23, has the right to file a certificate of nomination, notwithstanding the provision in Laws 1945, Chapter 190, Section 14, which reads as follows:

"**The dates** for the performance of acts in preparation for and the holding of the primary and general elections are changed as follows:
" * * *

"Not later than August 8—Vacancies in nominations must be filled.
" * * * "

The above cited Section 14 was enacted for the purpose of getting the ballots to those in the armed forces on time. It advanced the usual dates which are prescribed in our other election laws. The language used in the section indicates that the only changes intended by its enactment are those that advance the dates theretofore designated by Minnesota Statutes for the performance of election acts and that the repeal of the provisions of our election laws which except certain nominations from such date limitation was not the object of the clause under consideration.

Under Section 202.26 heretofore cited, which was not expressly repealed by the 1945 act, no nominations for any office could be made by petition or otherwise within thirty days before the time of holding a general election except as therein stated. One of the definite exceptions provided by that section is the right to fill a vacancy in a nomination previously made at any time prior to a general election.

In so far as nominations to fill vacancies are concerned, unless a repeal of such exception provision in Section 202.26 shall be implied, the only effect of the change of date required to be made in Section 202.26 by Section 14 of the 1945 act is to advance the thirty day requirement to August 8. As above suggested, Section 14 of the 1945 act was limited by the language therein contained to a change of dates. Neither the provision in Section 202.26 which excepts from the thirty day time limit the filling of a vacancy in a nomination previously made nor Section 202.23 authorizing a nomination to fill such a vacancy at any time before the general election was expressly repealed.

The 1945 act itself provides that except where a modification is therein made provisions of Minnesota Statutes 1941 and acts amendatory thereof and other statutes relating to elections shall be in full force and effect. If by enacting Laws 1945, Chapter 190, Section 14, there was a legislative intent to repeal other statutory provisions which allow the filling of a party nomination vacancy at any time before the general election, that intent should have been clearly expressed. In the absence of specific language definitely abrogating such other statutory provisions, the requirement in the 1945 act relative to a change in dates should not be construed to modify our election laws to such an extent as to constitute a repeal of the exception provisions above referred to by which a vacancy in a party nomination previously made might be filled at any time before the general election.

The vacancy here considered occurred after August 8, the date designated by Section 14 of the 1945 act as the last day for filling vacancies in nominations. If the legislature had intended by so prescribing that date to deny a party committee the right to file thereafter a nomination certificate to fill a vacancy occurring after the date so designated, the provision in question should, I believe, have been differently worded. The language used in its enactment does not explicitly disclose a legislative intent to repeal the exception provision in Section 202.26, which permits the filling of a vacancy by the filing of a nomination certificate by a party committee notwithstanding the thirty day limitation, now changed to August 8, or to repeal the provision in Section 202.23, which authorizes the filling of such a party vacancy at any time before the general election.

It should not be presumed that the legislature intended to repeal a provision of an existing act so as to deprive a political party of the right to fill a vacancy occasioned by the death of its nominee unless such repeal is expressed in unmistakable terms. Repeals by implications are not favored. "If by any reasonable construction two statutes can stand together they must so stand." **State v. Archibald,** 43 Minn. 328.

For the reasons hereinabove stated, it is my opinion that you should allow the filing of a certificate of nomination if executed pursuant to Section 202.23 for the purpose of filling the vacancy in the Democratic Farm

Labor nomination for Congress in the Third Congressional District caused by the death of Congressman William J. Gallagher.

J. A. A. BURNQUIST,
Attorney General.

Secretary of State.

August 19, 1946. 28-B-1

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## 42

**Vacancy—Writ of Election—To fill the vacancy for the unexpired term—** MS1945, §§ 205.06, 205.07, 645.26; L 1929, C 297, §§ 1 and 2; L 1939, C 345, Part 6, C 2, §§ 2 and 3; U. S. Const. Art. 1, § 2.

### Question

As to the necessity of the issuing of a writ of election by the Governor to fill the unexpired portion of the term for which Congressman Gallagher was elected in 1944 in the Third Congressional District of Minnesota."

### Opinion

The sections hereinafter cited, unless otherwise noted, are those contained in Minnesota Statutes 1945.

Section 205.06 provides:

" * * * If there will be no session of the congress * * * or other occasion for the exercise of the functions of the office, as the case may be, **before the expiration of the term in which the vacancy exists** * * * , it shall not be necessary to fill the vacancy."

Section 205.07 reads in part as follows:

"In any case where a vacancy in such office has occurred and the governor is informed thereof a sufficient time before the next general election to permit the giving of notice and the nomination of candidates therefor as hereinafter provided, and where there will be no session of the congress or the legislature or other occasion for the exercise of the functions of the office, as the case may be, before the time fixed by law for the final canvass of the general election returns for offices of the same kind as that to be filled hereunder the governor shall issue his writ directing that the vacancy be filled at such general election and that nominations be made therefor as hereinafter provided. * * * "

The two above quoted statutory provisions were enacted at the same time as part of Laws 1929, Chapter 297, Sections 1 and 2, and re-enacted as part of the election code appearing in Laws 1939, Chapter 345, Part 6, Chapter 2, Sections 2 and 3. The two sections appear to be somewhat

inconsistent, but in such circumstances a statutory rule of construction, Section 645.26, provides that "the two shall be construed, if possible, so that effect may be given to both."

Therefore to give effect to the portion of Section 205.07 above quoted, it should, I believe, be construed to require the issuance of a writ by the governor to fill **at the general election** a vacancy in such an office as that of state senator when the term in which the vacancy occurs extends into the next session of the legislature and there is no legislative session or other occasion which requires nomination and election on a date different from that of the general election. To give effect to Section 205.06, Section 205.07 should not be construed to require the issuance of a writ by the governor to fill a vacancy in the office of a member of the national house of representatives or the state legislature when Congress or the legislature is not in session and will not be in session before the expiration of the term in which there is a vacancy and no other occasion exists for filling the same.

It is clear that by the enactment of Section 205.06 the legislature intended to enable the governor to save the expenses of a special primary or election when the situation is such as to make a special primary and election unnecessary. It is apparent that it would be a useless expenditure of public funds to hold an election to fill the vacancy in the office of a member of the house of representatives of either the state or nation when there is no session thereof, and, as in the case under consideration, when the person elected could hold office for not more than about two months after election because of the expiration of the term involved and during that time would be required to perform no services.

It is true that the constitution of the United States provides in Article I, Section 2 thereof that "When vacancies happen in the representation from any state the executive authority thereof shall issue writs of election to fill such vacancies." This provision should not, I believe, be construed to require the issuance of a writ when an election will serve no useful purpose or when under the state law the issuance thereof under certain conditions is not made necessary.

Therefore, although under both state law and the federal constitution, a state executive is empowered to issue a writ of election to fill a vacancy in the state's representation in the lower house of Congress, he need not always do so. In certain cases, as when a vacancy occurs when Congress or the legislature is in session, the duty imposed upon the governor to issue a writ is mandatory, but under the facts in connection with the vacancy here considered, it is my opinion that although the governor may issue a writ of election, he is under no statutory obligation to do so, unless the president shall call a special session of Congress prior to January 3, 1947.

However, if notwithstanding Section 205.06 under which the governor may in his discretion refuse under the conditions here existing to issue a writ to fill the vacancy in question, he should nevertheless find it advisable that the same be filled at the next general election, such writ should direct that a special primary election for the party nomination of candidates for

the unexpired portion of Congressman Gallagher's term be held on a designated date not later than the 7th day before the date of the general election, and that candidates for such nomination file their affidavits not later than the 7th day before the date designated by the writ for the special primary election.

J. A. A. BURNQUIST,
Attorney General.

Governor.

September 5, 1946. 213-A

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CORRUPT PRACTICES

## 43

**Committee—Volunteer—Status of—Limitations on disbursements by—Duty to file reports**—MS1945, § 211.01 (7) and 211.20.

**Opinion**

LEGAL STATUS OF VOLUNTEER COMMITTEES

The law recognizes three kinds of campaign committees:

(1) The personal campaign committee. This is a committee appointed by a candidate for any election. Minnesota Statutes 1945, Section 211.01 (5).

(2) The party committee—which means any committee appointed or elected to represent any political party in this state. Minnesota Statutes 1945, Section 211.01 (6).

(3) The political committee. This includes "every two or more persons who shall cooperate in the raising, collecting, or disbursing of money used, or to be used for or against the election to public office of any person or any class or number of persons," etc. Minnesota Statutes 1945, Section 211.01 (7).

It is under this section that so-called volunteer committees are organized. The term "volunteer committee" is but another name for a political committee under this definition.

LIMITATION UPON EXPENDITURES BY VOLUNTEER COMMITTEE

The law places no definite limitation upon the amount of money which such a committee may raise, collect or expend. This statement is, however, subject to the qualification that such a committee may not be organized as a mere subterfuge in an attempt to evade the corrupt practices act.

## DUTY TO FILE REPORTS BY VOLUNTEER COMMITTEE

Such a committee is required to file a statement of the total amount of receipts and disbursements, and for what purpose such disbursements were made, within 30 days after any primary or election. Minnesota Statutes 1945, Section 211.20 applies. The paragraph applicable reads:

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

## SUPREME COURT AUTHORITY

The authority for the foregoing opinion is found not only in the statutes referred to but in the decision of our Supreme Court in the case of Mariette v. Murray, 185 Minn. 620, 242 N. W. 331, from which I quote:

> "When it comes to a political committee, the law is not so definite. Such a committee may not publish advertisements in the newspapers except in the manner prescribed in § 539. It may not issue or circulate campaign literature except in the form provided in § 544. It may not do any of those things which persons or associations generally are forbidden to do in a campaign. In other words, its activities must be confined to lawful purposes and be carried out in a lawful manner. The law places no definite limitation upon the amount of money which such a committee may raise, collect, or expend. It cannot receive contributions from corporations. § 563. It is not limited as to the amount of contributions it may receive from individuals or firms. § 545 (2). It is required to file statements of the total amount of receipts and disbursements and for what purposes such disbursements were made within 30 days after any primary or election. G. S. 1923, § 556, subd. 3 (e), Mason, 1931, Supp. id. The law does not provide how such a committee shall be organized. * * *
>
> "Presumably all expenditures made by a political committee, organized to work for the election of a particular candidate, are for the benefit of such candidate. In that sense the expenditures are made on his behalf. We do not think that because the candidate has knowledge of the activities of the committee and approves same, as here shown, but gives no directions and has no knowledge of any particular disbursement, he becomes chargeable with the disbursements made by the committee. It would be otherwise if the candidate had knowledge of and consented to or approved expenditures of the committee for unlawful purposes."

In the case from which the above quotations are taken, the court held that the evidence did not support a finding that the committee was in fact a personal campaign committee rather than a volunteer committee. A reading of the case will disclose that there must be quite conclusive evidence

to support a finding that a volunteer committee is organized as a subterfuge to avoid the corrupt practices act.

RALPH A. STONE,
Assistant Attorney General.

Renville County Attorney.

August 30, 1946. 627-C-7

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## 44

**Villages—Conveying voters to the polls at a village election is violation of the corrupt practices act—MS1941, § 211.14.**

**Question 1**

Does the corrupt practices act apply to village elections?

**Opinion**

This question is answered in the affirmative. It was held in Aura v. Brandt, 211 Minn. 281, that the corrupt practices act applies to village elections.

**Question 2**

Is the conveyance of voters to the polls as forbidden by the above statutes a corrupt practice?

**Opinion**

This question is also answered in the affirmative.

In 1912 the legislature passed a law entitled "An act relating to corrupt practices at primaries and elections and candidates to be voted for therein and providing for the violation thereof." Laws 1912, Chapter 3.

This law sets out various practices that are forbidden; and in Section 13 provides:

> "No person or committee or organization shall convey or furnish any vehicle for conveying or bear any portion of any expense of conveying any voters to or from the polls. But this provision shall not apply to persons of the same household nor shall it prohibit two or more voters from providing joint transportation for themselves by mutual agreement at their own expense." Laws 1912, Chapter 3, Section 13.

This language now appears in the section of the law cited above in the caption of this letter. The prohibition against conveying voters to the polls was part of the original corrupt practices act. A wilful violation of that

provision would in my opinion be a violation of the corrupt practices act. However, I call your attention to the case of Sweno v. Gutches, 191 Minn. 24, 252 N. W. 839, holding that for a candidate to pick up two or three of his neighbors as an act of courtesy was a trivial and unimportant violation of the act.

RALPH A. STONE,
Assistant Attorney General.

Mower County Attorney.
December 8, 1945. 627-L

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JUDGES AND CLERK

## 45

**Candidate—Irregularities—Although candidate for office is prohibited from acting as judge or clerk of election, fact that one of judges was a candidate does not invalidate the village election.**

**Facts**

At the annual village election in the Village of Moose Lake the judge of election was one of the contestants and the vote resulted in a tie, whereby this candidate was tied with the incumbent. This judge of election did not file for the office but solicited votes for several days before election, and his votes were all "write-in" votes and he acted as judge of election knowing he was a contestant.

**Question**

Whether he was a proper judge of election and whether this would affect his own vote only or all of the votes cast in the election for other contestants for other offices.

**Opinion**

It has been held several times by this office that, while Mason's Statutes 1927, Section 360, prohibits a candidate for office from acting as a judge or clerk of election, still the rule of law is well settled that the acts of election officers **de facto** are valid as to the public. These opinions are based on **Quinn v. Markoe**, 37 Minn. 439.

The answer to your question is the same. While perhaps, under the circumstances, the party referred to was not a proper judge of election, nevertheless, the fact that he acted as such would not invalidate his election or that of any other officers.

WM. C. GREEN,
Assistant Attorney General.

Moose Lake Village Attorney.
December 27, 1945. 472-J

POLLS

## 46

**Hours open—L 1943, C 562 extends time for opening polls, but does not extend time for convening town meeting.**

### Facts

"Section 212.05, Minnesota Statutes of 1941, provides that the voters present any time between 9:00 and 10:00 a.m. on the day of the annual town meeting shall be called to order. Section 212.10 provides that the polls shall be opened between 9:00 a.m. and 10:00 a.m. and close at 5:00 p.m. Chapter 562, Laws of 1943, amended the section last referred to so as to provide that the polls shall be opened any time between 9:00 a.m. and 1:00 p.m. and shall close at 5:00 p.m."

### Question

"Whether it would now be possible to open the town meetings at 1:00 and have the town meeting in session at the same time as the polls are opened, or whether they must still convene the meeting between 9:00 and 10:00 a.m. It would seem to me as though the 1943 amendment did nothing to change the time for convening the annual meeting. The matter has caused considerable discussion in this county and I would appreciate your views on the matter."

### Opinion

It is my opinion that Laws 1943, Chapter 562, does not modify Minnesota Statutes 1941, Section 212.05, which provides that the town meeting shall be convened between 9:00 a.m. and 10:00 a.m. It is therefore my opinion that the town meeting may not be opened at 1:00 p.m.

KENT C. VAN DEN BERG,
Assistant Attorney General.

Chippewa County Attorney.

April 8, 1946. 434-B-18

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## 47

**Place—Second floor of building or building outside of precinct**—MS1941, § 205.25.

### Questions

"1. Is there any legal objection to holding an election at a polling place, otherwise suitable and located, on the second floor of a building which requires voters to climb one flight of stairs?

"2. In an emergency could a polling place be designated in a building located outside of the precinct in which the votes are to be cast?"

**Opinion**

My answer to your first question is that we find no statute prohibiting the designation of the second floor of a building as a place for holding an election. It is my opinion that such designation is not illegal.

Your second question, I believe, is answered in Minnesota Statutes 1941, Section 205.25, which provides as follows:

"The council of every municipality shall, by ordinance or resolution, and any town may, by vote, designate the place of holding the election in each district; otherwise the election shall be held as near as may be at the place where the preceding election was held, subject to change before the opening of the polls as provided by law. In villages and in cities of the fourth class, now or hereafter having two or more districts, the council of such municipality may, by ordinance or resolution, provide for the holding of all elections in such village or city in some building centrally located therein and the voters of the village or city may vote at such place so designated, irrespective of whether the voting place is actually located in their district or not. At such place so designated there shall be provided separate statutory voting facilities for each district, and the voting shall otherwise be conducted in the same manner as though the voting places were located in the respective districts."

J. A. A. BURNQUIST,
Attorney General.

Luverne City Attorney.

March 28, 1945. 64-S

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REGISTRATION

## 48

**Commissioner registration—No authority to keep office open for registration on legal holiday**—L 1945, C 337; MS1945 §§ 201.05, 201.06.

**Question**

"Whether or not the city clerk (commissioner of registration) would be justified * * * to keep the office open on October 12th (a legal holiday) under the exception clause in Chapter 337, Laws of Minnesota 1945, namely, 'except in cases of necessity'."

**Opinion**

Minnesota Statutes 1945, § 201.05, provides in part that:

"The office of the commissioner (city clerk) shall remain open until 9:00 p. m. for each of the eight days, not including Sundays and legal holidays, immediately preceding the last registration day. * * * "

Minnesota Statutes 1945, § 201.06, provides in part that:

"Any person, not already registered, who possesses the constitutional qualifications of a voter, or who will possess such qualifications on the day of the next ensuing election, may make application for registration * * * on any day other than a Sunday, a legal holiday, the day of any election, and the 20 days preceding any election day * * * ."

Under the foregoing provisions there appears to be no authority to keep an office open for registration on a legal holiday, and no authority is granted to a voter to apply for registration on a legal holiday. The clause to which you refer, viz., "except in cases of necessity," although contained in Laws 1945, Chapter 337, is not included in the above cited sections. No exception to the exclusion of a legal holiday in the matter of registration of voters appears in the chapter pertaining thereto.

The fact that the city clerk's office was not open for registration until 9:00 p. m. on Saturday, October 5, 1946, will not, in my opinion, affect the validity of the general election to be held on November 5, 1946.

J. A. A. BURNQUIST,
Attorney General.

Minneapolis City Attorney.

October 9, 1946. 183-R

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**VOTERS**

## 49

**Absent—Ballots: Filing application day before election—Challengers—Village elections. Right of voters not official challengers to remain inside the voting place** — MS1941, §§ 203.02, 206.08, 206.09, 206.10, 206.11, 212.08, 212.38.

**Question**

1. Whether, under Minn. St. 1941, § 203.02, a disabled person may make application for an absent voter's ballot the day before the day of holding the election.

**Opinion**

So far as material, § 203.02 reads:

"At any time not more than 30 days or less than one day before

> the day of holding any election, any person may make application in writing * * * for ballots and envelopes * * * ."

Such a statute should be construed liberally to give every qualified voter an opportunity to vote. Further, this office has construed such a requirement to be directory and not mandatory and held that, if ballots were sent to a voter who failed to file his application within the statutory time and were cast, the ballots should be received and counted (A. G. Rep. 1924, # 156). However, I am of the opinion that, under the weight of authority, an application filed on the day before election is filed at least one day before that election.

In **Brady v. Moulton,** 61 Minn. 185, 63 N. W. 489, the court had under consideration a statute providing that the village council should give "not less than ten days' notice" of an election on the proposition of issuing bonds by publishing the same in some newspaper. The notice was first published May 16th, and the election was called for May 26th. It was claimed that this did not constitute ten days' notice because in the computation of time both the day of the first publication and the day of election should be excluded. Mr. Justice Mitchell, writing the opinion for the court, said:

> "This is not the proper rule of computation. The day of the first publication is to be excluded, and the day on which the election was held is to be included."

In the earlier case of **State v. Weld,** 39 Minn. 426, in construing the statute requiring a notice of trial to be served "at least eight days before the term," our supreme court, speaking through Mr. Justice Mitchell held that a notice of trial served on October 10th for a term of court beginning October 18th was served in time, under the statute providing that the time within which an act is to be done shall be computed by excluding the first day and including the last (L. 1941, c. 492, § 15). To the same effect see: **Luedke v. Todd,** 109 Colo. 326, 124 P. 2d 932, 934; **State v. Hunter,** 134 Ark. 443, 204 S. W. 308, 309; **In re Espinosa's Estate and Guardianship,** 179 Calif. 189, 175 P. 896.

### Question

2. You inquire as to the right of any party interested in an election such as this to ask for the appointment of a challenger and state, in this connection, that no petition for such appointment was filed not less than three days prior to the election.

### Opinion

The only statute which would be applicable to such an election as this would be Minn. St. 1941, § 206.08, and the terms of this statute cannot be considered in view of the fact that no petition was filed in time. Sections 206.06 and 206.07 refer to challengers to be appointed at elections to fill offices.

**Question**

3. You next inquire as to what statute governs the matter of challenges in such an election as is to be held in your village.

**Opinion**

In my opinion, the only applicable statute is Minn. St. 1941, § 206.10. Section 212.38 makes the laws for town meetings applicable to village elections; § 212.08 provides that, if a voter is challenged, the judges shall proceed thereupon as in the case of challenges at a general election; and § 206.10 provides that:

> "Each judge shall, and any authorized challenger or other voter may, challenge any person whom he knows or suspects not to be a qualified voter."

The procedure to be followed is then set out in §§ 206.10 and 206.11.

**Question**

4. You ask for a construction of Minn. St. 1941, § 206.09, in its application to voters who may desire to challenge persons whom they know or suspect not to be qualified voters.

**Opinion**

This section, so far as applicable, reads:

> "No person shall be allowed to remain inside the voting place except members of the board, clerks, peace officers, challengers and voters who are about to vote, unless it be a voter who is called upon to assist another voter who cannot read English or is physically disabled, in marking his ballot as herein provided. * * * "

You state that the voting in your village will be conducted in a large room in the village hall, in which will be set large tables, behind which the election officials will sit and the voting booths be located. A person about to vote will pass through a space between the end of these tables and the wall, receive his ballot, vote, and make his exit through the same opening. Your specific question is whether voters desiring to challenge persons about to vote may be permitted to remain in the portion of the room in front of the tables.

Section 206.09 in its present form first appeared in L. 1939, c. 345, pt. 6, c. 8, § 9. A previous statute, Mason St. 1927, § 417, provided that:

> "No person shall be allowed to go or remain inside the railing at the voting place except members of the board, clerks, peace officers, and one member of each of the political parties represented on the ballot, challengers appearing for non-partisan candidates, and voters who are about to vote," etc.

Under this statute it was held that there was no objection to voters being in the voting place provided that none except the persons mentioned in the statute remained inside the railing. It must be presumed that the change of language was deliberate and that, under the present statute, only those persons specifically named in § 206.09 may remain inside the voting place, which we would construe to be the place named in the notice of election. Since there is no provision for official challengers, voters desiring to act as unofficial challengers will be required to remain outside the voting place except when necessary to enter it to interpose a challenge. This privilege, of course, must be allowed in order to give full effect to § 206.10.

While this may cause some inconvenience, it was within the power of anyone who could secure a written petition of at least 25 legal voters to have had challengers appointed by filing such a petition not less than three days prior to the election.

WM. C. GREEN,
Assistant Attorney General.

Plainview Village Attorney.

February 20, 1946. 639-A
182

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## 50

**Absent—County-wide election—Establishment of municipal liquor stores—May vote by mail**—L 1945, C 345; MS1945, § 203.01.

### Facts

"The County of Dodge will on September 9th hold an election under Chapter 305, Laws of 1945, to determine the following question: 'Shall the sale of intoxicating liquor be permitted within the County of Dodge through the establishment of municipal liquor stores?'"

### Question

Whether an absent voter may vote in this election under Minnesota Statutes 1945, Section 203.01, Mason's Supplement 1940, Section 601-4(1), Laws 1939, Chapter 345, part 4, c. 1, s. 1.

### Opinion

The applicable provisions of the statutes which must be consulted to answer this question are as follows: Minnesota Statutes 1945, Section 203.01, Mason's Supplement 1940, Section 601-4(1), Laws 1945, Chapter 345, part 4, c. 1, s. 1, reading in part as follows:

"Any person entitled to vote at any general election, any primary election, any city election, or any village or town election in villages

or towns operating under the 'Australian Ballot System,' who is absent on the day such election is held from the district in which he is entitled to vote, or who by reason of illness or physical disability is unable to go to the polling place of such district, may vote therein by having his ballot delivered by mail to the election board of such district on the day of such election, by complying with the provisions of this chapter. * * * "

Minnesota Statutes 1945, Section 200.03, Mason's Supplement 1940, Section 601-1(1)b, reading as follows:

"The words 'general election,' as used in chapters 200 to 212, mean and include the election provided to be held in the state on the first Tuesday after the first Monday of November in every even-numbered year."

Minnesota Statutes 1945, Sections 340.25-340.40, relating to county-wide elections such as the one to be held in your county, and in particular Section 340.31 thereof (Mason's Supplement 1940, Section 3200-46), which reads in part as follows:

"In all elections hereunder, except as to matters otherwise provided for, all provisions of law governing general elections for county officers in this state, including penal provisions and provisions relating to compensation of officials, and to payment of expenses incurred in preparing for and conducting elections, shall apply and govern, as far as applicable; provided, that the compensation of the members of the county canvassing board shall be the same as the compensation of the members of the county canvassing board provided for by the election laws. The ballots shall be given to electors, marked, cast, counted, canvassed, returned, and preserved, and returns made and delivered to the auditor, all substantially in accordance with the law governing general elections for county officers. * * * "

If the question were governed by Minnesota Statutes 1945, Section 203.01 of the general election laws, it would follow that a voter has no right to cast an absentee ballot at such an election. However, the above quoted section of the liquor laws, Minnesota Statutes 1941, Section 340.31, makes all provisions of the election laws which govern the election of county officials applicable to a county election such as you are holding in your county. The general election laws permit absentee voting at a general election where county officials are elected. Therefore such voting is permitted in the wet and dry county election held under Minnesota Statutes 1945, Section 340.25, et seq. Thereby the same laws are made applicable as apply to the election of county officers.

Said Section 340.31 further provides that the ballots at a county wet and dry election shall be cast in accordance with the law governing general elections. This is further ground for applying the absentee voters act to a county wet and dry election.

Before prohibition this state had a county option law found in Laws 1915, Chapter 23. This law contained a provision substantially the same as said Section 340.31 supra. This office held that under said prior county option law it was permissible to cast absentee ballots at a county option election. See opinion of August 16, 1919, printed as opinion 502 in the 1920 Report of the Attorney General.

If the election laws alone were considered, it would be necessary to hold that absentee voting is not permitted at a county liquor election. But considering the provisions of the liquor law (said Section 340.31), which make the general election laws apply to such an election, I am of the opinion that a voter who is absent from his district on the day of the county-wide election on municipal liquor stores may vote by mail by following the procedure prescribed by Minnesota Statutes 1945, Section 203.01, et seq., Mason's Supplement 1940, Section 601-4(1) et seq.

RALPH A. STONE,
Assistant Attorney General.

Dodge County Attorney.

August 13, 1946. 639-C

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## 51

**Qualifications—Residents of territory annexed to city less than 30 days before election are not qualified to vote in the ensuing city election.**

**Facts**

"Pursuant to Sections 1845 to 1849 inclusive, Mason's Minnesota Statutes 1927, Section 413.12 Minnesota Statutes 1941, a new territory in which approximately 140 persons reside including approximately 60 voters was annexed to the city of East Grand Forks. The city of East Grand Forks is a city of the fourth class, organized and existing under and by virtue of the Laws of Minnesota for 1895. The annexation was completed on October 23, 1945. On that date certified copies of the complete annexation document were filed with the Secretary of State and the County Attorney of Polk County. All of the annexed territory is adjacent to the Second Precinct of the Fourth Ward of the city of East Grand Forks.

"No proceedings have been taken by the city council of the city of East Grand Forks to place the annexed territory in an old or new election district in the city.

"On November 6, 1945, the municipal election will be duly held in the city of East Grand Forks."

**Questions**

"Are the legal voters in the annexed territory entitled to vote in the municipal election?

"If they are entitled to vote would they vote in the Second Precinct of the Fourth Ward?"

**Opinion**

The State Constitution, Article VII, Section 1, provides:

"Every person of the age of twenty-one (21) years or upwards belonging to either of the following classes who has resided in this State six (6) months next preceding any election shall be entitled to vote at such election in the election district of which he shall at the time have been for thirty (30) days a resident, for all officers that now are, or hereafter may be, elective by the people."

Assuming without deciding that the annexed territory became a part of the second precinct of the fourth ward, the voters residing in the annexed territory would not be entitled to vote therein for the reason that they will not have been residents of that election precinct for 30 days preceding the election on November 6. Prior to October 23, 1945, these voters resided in the town and not in the city. They cannot vote in the city precinct until they have resided therein for 30 days.

See State v. Huggins, 107 Okla. 80, 230 Pac. 716.

RALPH A. STONE,
Assistant Attorney General.

East Grand Forks City Attorney.

November 1, 1945. 64-N

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# INSURANCE

**LIFE**

## 52

**Group policies—Group life insurance distinguished from industrial insurance—Authority to write life insurance at special rates for groups of less than 50 persons—Authority of commissioner of insurance to establish rules relating to writing of group life insurance**—MS1941, § 60.03 (Mason's 1927 § 53-30); § 61.06 (§ 3378); § 72.13 (§ 3766); § 72.15 (§ 3768, as amended by L 1941, C 505); L 1943, C 615; L 1945, C 452; L 1945, C 602, amending MS1941, § 61.38 (Mason's § 3410).

**Question**

"1. Do the provisions of Section 3768, Mason's Minnesota Statutes, 1927, as amended by Chapter 505, Laws of 1941, govern the issuance of so-called Group Life Insurance policies of this state?"

**Opinion**

Minnesota Statutes 1941, Section 72.13 (Mason's Minnesota Statutes 1927, Section 3766), insofar as material here, provides:

> "No insurance company or association, however constituted or entitled, doing business in this state, * * * shall make or permit any advantage or distinction in favor of any insured individual, firm, corporation, or association with respect to the amount of premium named in, or to be paid on, any policy of insurance * * * ."

This section was originally Section 1 of Chapter 427, Laws 1909.

Minnesota Statutes 1941, Section 72.15 (Mason's Minnesota Statutes 1927, Section 3768, as amended by Laws 1941, Chapter 505), which was originally Section 3 of the 1909 act, insofar as material here, provides:

> " * * * any life insurance company doing business in this state may issue industrial policies of life or endowment insurance, with or without annuities, with special rates of premiums less than the usual rates of premiums for these policies, to members of labor organizations, credit unions, lodges, beneficial societies, or similar organizations, or employees of one employer, who, through their secretary or employer, may take out insurance in an aggregate of not less than 50 members and pay their premiums through the secretary or employer."

In an opinion of this office dated February 21, 1944, the history and a brief definition of industrial insurance policies were given. Reference in that opinion was made to the discussion of the character and history of industrial insurance to be found in **McAlpine v. Fidelity & Casualty Co.**, 134 Minn. 192, 196, 158 N. W. 967, and **Dight v. Palladium Life Ins. Co.**, 201 Minn. 247, 251, 276 N. W. 3, and it was stated:

> "In brief, industrial insurance policies are universally defined as meaning small policies issued in consideration of small weekly or monthly payments, sometimes five cents a week or some multiple thereof or other small amount, in contradistinction to ordinary insurance where premiums are payable annually, semi-annually, or quarterly."

In addition to 21 **Words and Phrases,** Permanent Edition, pp. 227 **et seq.,** cited in that opinion, see 44 **Corpus Juris Secundum,** p. 480, § 20, and cases cited.

As will be pointed out later in this opinion, at the time of the enactment of Laws 1909, Chapter 427, group insurance as it is now understood was practically unknown, while industrial insurance was known and had

been written for some time. I adhere to the view expressed in my former opinion, that, while industrial policies may be group policies, industrial insurance is merely a species of life insurance with a well defined, narrow meaning, and it is, therefore, my opinion that Minnesota Statutes 72.15 (Mason's 3768) applies only to industrial insurance as above defined.

**Question**

"2. If not, are there any statutory requirements governing the issuance of so-called Group Life Insurance policies in this state?"

***Opinion***

An answer to this question requires a rather broad discussion of the subject of group insurance.

Group insurance is considered one kind of life insurance. In 44 C. J. S. at p. 486, the kinds of life insurance are designated as follows: general, ordinary, or old-line insurance; limited-payment or limited-premium insurance; endowment insurance; term insurance; advance insurance; tontine or deferred-dividend insurance; **group life insurance**; assessment insurance; paid-up insurance, and extended insurance.

This state has no statute specifically governing the issuance of group life insurance policies except as hereinafter noted. The legislature has recognized that such insurance is a kind of life insurance by Laws 1943, Chapter 615, authorizing group insurance for officers and employees of the state and its political subdivisions, and by Laws 1945, Chapter 602, which amended Minnesota Statutes 1941, Section 61.38 (Mason's Minnesota Statutes 1927, Section 3410), which was the section principally discussed in the opinion of February 21, 1944, and which relates to exceptions from the statutory requirements as to standard provisions of life insurance policies. By the amendment of Subdivision 1 of Section 61.38, the distinction between industrial and "group term" policies was recognized through the addition of the latter term in the amendment. Although only a portion of Subdivision 2 of the amendatory statute is italicized, as a matter of fact the entire subdivision is an amendment. This does prescribe certain limitations on the issuance of group life insurance policies which are mandatory as to any such policies issued subsequent to the approval of that act, April 23, 1945.

Otherwise, we have no such statutes as those of New York, Michigan, and other states which have defined a "group" and limited the issuance of group policies.

In the first instance, because of the fact that group life insurance is a kind of life insurance the writing of which is authorized by our statutes and because the legislature has recognized that kind of insurance, I am of the opinion that such insurance may be written in this state, subject to the provisions of our statutes governing life insurance generally and the particular types which may be involved and subject to proper regulation by

the commissioner of insurance, provided no statutory prohibitions are violated.

It is difficult, in the absence of a statute, to find a proper definition of group life insurance. Indeed, as stated by the Supreme Court of Wisconsin in **Garnsky v. Metropolitan Life Insurance Co.**, 287 N. W. 731, 124 A. L. R. 1489 (1939):

> "This is a field in which for several reasons precedents are not particularly helpful. The field is new and the trend of the authorities is difficult to ascertain at this stage of its development. Furthermore, the policies are so different in terms and the situations involved vary so greatly that precedents must be applied with great caution."

Group insurance first began to assume significant proportions in 1912 when a policy was issued to a large mail order house for $6,000,000 worth of insurance. A standard definition was formulated by the national convention of insurance commissioners, which limited group insurance to life insurance on groups of 50 or more employees for the benefit of persons other than the employer, with the proviso that policies under which the employees are to pay part of the premium must cover at least 75% of the employees of the group. While this definition was made the kernel of some 16 or 18 statutes, as stated in 36 **Columbia Law Review**, 93, it has not been followed exactly, and as to the number of persons required for the group:

> "Nor does any magic inhere in the number 50. Some statutes accordingly have lowered it to 25 (citing Indiana, Michigan, Texas, and Washington statutes)."

Other states do not attempt to define group insurance nor to enumerate permissible groups, and some have statutes regulating minor phases, thereby acknowledging its legality. Perhaps the simplest definition is that contained in 44 **C. J. S.** at p 479:

> "Group insurance is the coverage of a number of individuals by means of a single or blanket insurance policy."

Even this definition may not be wholly accurate because there has arisen another form of insurance of a number of individuals known as "wholesale insurance," which has been defined and distinguished from group insurance as defined in a number of statutes in **Prudential Insurance Co. of America v. Jenkins**, 290 Ky. 802, 162 S. W. 2d 791, 793, as follows:

> "The type of insurance here involved was known as 'wholesale insurance' issued to groups composed of not less than ten nor more than forty-nine employees of a single company. Individual policies were issued to each employee, and applications were required, both from the employer and each member of the group. The principal difference between it and what is known as 'group insurance' is that the latter type requires fifty or more employees who are not required to make individual applications, and receive certificates referring to the 'master policy' which is issued to the employer."

In testing the legality of the two types of insurance, if they are to be distinguished, I can see no difference between what are technically called "group insurance" and "wholesale insurance." It seems to me that, in the absence of a statute specifying the number of insureds required to constitute a group, the only question is as to whether the writing of life insurance for members of either group at lesser premium rates than would be charged in the case of individual policies constitutes the violation of any antidiscrimination statute.

Minnesota Statutes 1941, Section 72.13 (Mason's Minnesota Statutes 1927, Section 3766), prohibiting the making or permitting of any advantage or distinction in favor of any insured with respect to the amount of the premium named in or to be paid on any policy of insurance, which refers to all kinds of insurance, has already been quoted. Minnesota Statutes 1941, Section 61.06 (Mason's Minnesota Statutes 1927, Section 3378), which relates only to life insurance companies, provides, insofar as applicable:

> "No life insurance company doing business in this state shall make or permit any distinction or discrimination in favor of individuals between insurants of the same class and equal expectation of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes * * * ."

It has always been recognized that different rates would be charged for different types of insurance, such as term, ordinary life, endowment, etc. The question is squarely presented whether there is any proper basis for a difference in rates to be charged a single individual purchasing one of these types of insurance and the rates to be charged members of a group, whether those members be insured under what is commonly known as a group life insurance policy with a master policy, and certificates to the individual insureds, or whether the insurance be "wholesale insurance" with individual policies issued to the insureds but with a limitation as to the minimum number of members of the group, provisions for termination of the benefits of lower premiums upon severance from the group, etc. The test would appear to be whether members of a group may be considered as in a distinctive class of insurants.

The question as to what is meant by the word "class" is discussed in **Julian v. Guarantee Life Insurance Co.**, 159 Ala. 533, 49 So. 234, 236, in which the court said:

> "The key word to construction of this provision of the statute is the word 'class.' As therein employed it has no reference to the individual characteristics of the policy holder. It refers to that number of persons who hold similar policy contracts. If it were construed to mean those of like individual characteristics, for instance, of age, family history, or state of health at the time of insurance, the result would necessarily be that an insurance company could not vary its policies, but

would be bound, under that interpretation of our status, to conform the policy contract to the individual characteristics of the applicants for insurance. Such a regulation would impair the right of contract, without justification under the police or other power of the state to control the exercise of the right of contract. Furthermore, the phrase 'of the same class' qualifies the term 'policy holder,' and hence 'class' clearly means the holders of like policy contracts. To read the provision otherwise is to distort its obvious meaning."

In **Greer v. Aetna Life Insurance Co.**, 225 Ala. 121, 142 So. 393, the court had under consideration a practice of the defendant insurance company with reference to the insurance of loans to policy holders. In connection with the making of mortgage loans the company issued to its loan department a master policy and then issued to borrowers certificates of insurance for which the borrowers, without reference to age, would be charged $1.25 per month per thousand dollars of insurance, the calculation being so made that the insurance was reduced each month in the same amount that the loan was reduced, so that at the expiration of a fifteen-year period, provided all monthly payments were made, the mortgagor's indebtedness and insurance would both be extinguished. If the borrower died before the end of the fifteen-year period, his insurance, being equal to the remaining amount due on the mortgage indebtedness, would pay the indebtedness in full. The claim was made by the insurance commissioner that the flat rate of $1.25 per thousand per individual worked a discrimination against those of younger ages and in favor of the older and, therefore, violated the antidiscrimination statutes of the state, which were practically identical with ours. The court stated that the sole question was whether or not the flat rate for all those in the borrower's class worked a discrimination condemned by the law and answered that question in the negative. While the basis of classification was different in that case, the court followed the definition of the word "class" as set out in the **Julian** case.

Our legislature has recognized the right to charge special premiums to members of groups for industrial insurance. In states where group insurance is defined and regulated by statute such lesser premiums are permitted. The basis of permitting the charging of lower rates to members of groups of employees of one employer and the members of various societies and associations is too well recognized to require discussion. In my opinion, the definition of the word "class" in the **Julian** case is correct. If, for instance, it should appear to the commissioner of insurance that the charging of a lower premium rate to as few as ten members of a group, whether the insurance be written as group insurance or wholesale insurance, was justified in the light of insurance experience and if all members of that group and of any similar groups which might apply for insurance were given the same treatment, I do not believe the antidiscrimination statutes would be violated, because, assuming a proper distinction being made for age, the holders of all like policy contracts would be receiving the same treatment. This does not mean that an agent would be permitted to go

out and assemble ten or 25, or even 50, people, call them a group, and then proceed to write insurance on the life of each individual at a reduced rate. To constitute a proper group the ordinary characteristics of groups on whom group insurance or wholesale insurance is ordinarily written must exist. This leads to a discussion of your third question.

**Question**

"3. In the absence of statutory provisions governing the issuance of this type of life insurance, can the Commissioner of Insurance regulate its issuance by administrative ruling?"

**Opinion**

The answer to this question is in the affirmative. Under Minnesota Statutes 1941, Section 60.03 (Mason's Minnesota Statutes 1927, Section 53-30), which carried forward the powers granted the commissioner of insurance by Mason's Minnesota Statutes 1927, Section 3288, he has the power to enforce all the laws of this state relating to insurance, and it is made his duty to enforce all the provisions of the laws of this state relating to insurance. By Laws 1945, Chapter 452:

> "For the purpose of carrying out the duties and powers imposed upon and granted to administrative agencies, each agency may promulgate reasonable rules and regulations and may amend, modify, or annul the same, and may prescribe methods and procedure in connection therewith."

After the provisions of Chapter 452 have been fully complied with rules and regulations of the administrative agencies have the force and effect of law.

In my opinion, you may properly make rules and regulations designed to limit the issuance of group life insurance policies or wholesale life insurance policies, if you choose to distinguish them, in order to insure a compliance with the spirit of the antidiscrimination laws and insure a sound basis for the writing of such insurance.

While you do not ask the question, I am of the opinion that, although in the case of wholesale insurance separate policies are issued, this type of insurance is a species of group insurance and that as to any policies written subsequent to April 23, 1945, the requirements of Laws 1945, Chapter 602, Subdivision 2, insofar as applicable, should be complied with, and, in my opinion, a regulation to this effect by you would be proper.

WM. C. GREEN,
Assistant Attorney General.

Commissioner of Insurance.

January 17, 1946. 253-B-4

MUTUALS

## 53

**Gross Premium Tax—Liability of town and farmers' mutual insurance companies for**—L 1943, C 73 (Mason's Supp. 1940, § 3347); L 1943, C 75 (Mason's Supp. 1940, §§ 3723 and 24; Mason's Stat. 1927, §3727); MS1927, § 3737; L 1933, C 177, § 29.

### Question

Whether or not town and farmers' mutual insurance companies are liable for the two per cent tax on gross direct fire premiums received by them for insurance upon property located in cities, villages, boroughs, towns, or townships served by fire departments of other municipalities under contract.

### Opinion

Laws 1943, Chapter 73, which amended Mason's Supplement 1940, Section 3347, provides:

> "Every domestic and foreign company, except town and farmers' mutual insurance companies and domestic mutual insurance companies other than life, shall pay to the state treasurer on or before April 30th annually a sum equal to two per cent of the gross premiums less return premiums on all direct business received by it in this state, or by its agents for it, in cash or otherwise, during the preceding calendar year. * * * 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, less return premiums on all direct business received by it, or by its agents for it, in cash or otherwise, during the preceding calendar year upon business written in municipalities in this state maintaining organized fire departments; provided the existence of such department has been certified to in accordance with Mason's Minnesota Statutes 1927, Section 3737, * * * ."

Laws 1943, Chapter 75, which amended Mason's Supplement 1940, Sections 3723 and 3724, and Mason's Minnesota Statutes 1927, Section 3727, provides for the filing by the clerk of every city, village, borough, town, or township having an organized fire department, or a partly paid or volunteer department, of a certificate stating that fact and giving details as to the fire equipment and requires that he include in such certificate the name of each city, village, borough, town, or township served by such fire department under contract. This portion of the statute is Section 3723, as amended.

That portion of the statute which is 3724, as amended, has by an unfortunately inept placing of the amending language, been rendered somewhat unintelligible. However, the general purport of the section and the

clear import of the section before the amendment was that the commissioner of insurance should include in the blank form furnished to each fire insurance company for its annual statement a list of all the cities, villages, boroughs, towns, and townships served by the fire departments of other municipalities under contract and that each company should report the amount of premiums for insurance upon property located within the corporate limits of the municipalities so served. The italicized language of the amendment was apparently intended to provide for the furnishing by the commissioner to the companies of a further list showing the names of the municipalities furnishing fire protection to other municipalities, indicating the municipality to which the premium tax should be allocated. The section then continues by providing for the certification by the commissioner to the state auditor of the names of municipalities having organized fire departments, the amount of premiums upon property located within the corporate limits thereof, and also the gross premiums upon property located within the corporate limits of municipalities being served under service contracts. On the basis of this certificate, the state auditor, under the provisions of Mason's Statutes, 1927, Section 3725, proceeds to make his distribution of the premium tax.

Since Mason's Supplement 1940, Section 3347, and the amendatory statute, Laws 1943, Chapter 73, made town and farmers' mutual insurance companies liable only for the tax on insurance written in municipalities maintaining organized fire departments, the first question is as to what is meant by the words "maintaining organized fire departments," and this leads to the question as to whether or not the statutes amended by Chapter 75 and that chapter have any bearing upon a determination of the question as to what are municipalities maintaining organized fire departments. In my opinion, they do not. The two acts deal with two different matters. One relates to liability for the tax and the other to the distribution of the tax. If anything, Chapter 75 confirms the opinion that municipalities being served under contract are not "municipalities in this state maintaining organized fire departments."

Attention has already been called to the provisions of Mason's Statutes 1927, Section 3723. This came from Revised Laws 1905, Section 1650.

Section 3737 required the clerk of any city of the first class to annually file a similar report.

Mason's Supplement 1940 shows Section 3737 as having been repealed by Laws 1933, Chapter 177, Section 29. I assume this is because Section 8 of that act simply requires the clerk of every city of the first class having a firemen's relief association to make and file with the commissioner his certificate stating the existence of such firemen's relief association. Section 29 is simply a general repeal clause repealing inconsistent acts. Section 3723 has been continued on and was last amended by Laws 1943, Chapter 75.

It will be noted, however, that even in the 1943 amendment of Section 3347 reference is made to a certificate in accordance with Section 3737. In determining what is meant by the expression "maintaining organized fire

departments" and particularly whether it refers to so-called contract municipalities, we go back to Section 3737 and find that that applies to a city "having an organized fire department." If we go to Section 3723, even as amended by Chapter 75, Laws 1943, we find that refers to municipalities "having an organized fire department, or a partly paid or volunteer department."

From a consideration of all the statutes, I am led to the conclusion that, when the statute speaks of municipalities maintaining organized fire departments, it means municipalities having organized fire departments as distinguished from municipalities served by such fire departments under contract. Such a construction also accords with the ordinary meaning of the word "maintaining," which signifies a keeping up, a support, an operation, etc. While in a sense the contract municipalities may be said to be assisting in keeping up these fire departments, they are not doing so in a legal sense because they are merely receiving services from the municipality which has the department.

I am, therefore, of the opinion that under present statutes town and farmers' mutual insurance companies are liable for premium tax only on business written in municipalities in this state having organized fire departments, as distinguished from those municipalities which receive service under contract.

The same opinion would apply to domestic mutual insurance companies in view of the language of Laws 1943, Chapter 73.

WM. C. GREEN,
Assistant Attorney General.

Commissioner of Insurance.

July 12, 1945. 254-D

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# LABOR

## EMPLOYMENT AND SECURITY

## 54

**Contributions—Covered employers**—§ 268.04, Subd. 12 (6) (s) (1) and (2), MS1941. **Services performed both outside and inside of towns of 10,000 population are employment if that part of service performed inside is regular part of the business.**

### Question

Does Section 268.04 Sd. 12 (6) (s) (1) and (2) M. S. 1941, exclude from the term "employment" services performed by truck drivers who regu-

larly haul livestock from stock pens not on a farm but located in a rural area, to market in cities of more than 10,000 population for an employer who is engaged in the buying, selling and shipping of livestock in a rural area outside of the corporate limits of any city, village or town of 10,000 population or more employing less than eight individuals including such livestock truck drivers, the services of such truck drivers in driving to market within a city of 10,000 or more population being the only services performed for and in behalf of the employer within the corporate limits of such a city, village or town?

**Opinion**

The situation which you describe is one where an employer is engaged in the business of buying, selling and shipping livestock. The base of his operations is in a "rural area," that is, outside of towns, cities or villages of 10,000 or more population. He employs truck drivers for the purpose of gathering livestock which the employer purchases and which he ships to market. These truck drivers "regularly" haul the livestock of this employer from the stock pens to markets located in cities of more than 10,000 population. It would appear, therefore, that the "regular" hauling of the livestock into such markets is an integral part of the employer's business and that such hauling into such city is a regular occurrence as contrasted with intermittent or occasional or casual occurrences.

In applying the section of the law involved to this situation we find that the services performed by the truck drivers for this employer are performed "both outside and within such corporate limits" of a city, village or borough of 10,000 population or more. Such services which are performed inside of the corporate limits include the driving of the truck to the proper unloading docks and perhaps aiding in the unloading of the livestock. It may also include the flushing of the trucks, etc.

We also find that the hauling of the livestock into the corporate limits of such a city is, under the generally accepted meaning of the word, "incidental" to the employer's business of buying, selling and shipping livestock. It is also apparent that the "regular" hauling of the livestock to market does not consist of "isolated transactions" nor are the transactions of hauling the livestock to market temporary or transitory transactions when related to the whole operation of the employer who is thus engaged in buying, selling and shipping livestock.

It is our opinion, therefore, that under such circumstances the services thus rendered by these truck drivers are "employment" within the Minnesota Employment and Security Law. Such services might very well not be covered by the Employment and Security Law if the haulers for such an employer regularly perform services outside of a town of 10,000 population but only occasionally or intermittently haul to a market that is within a city of 10,000 or more population.

K. D. STALLAND,
Assistant Attorney General.

Minnesota Division of Employment and Security.
April 12, 1945. 885-D-1

# 55

**Contributions—War risk—Noncharging of benefits to experience rating account—§ 268.06, Subd. 16, MS1941, as amended by L 1943, C 650, L 1945, C 376.**

**Facts**

Section 268.06, Subd. 16, as amended, reads as follows:

"The total current payrolls and total benefits paid to unemployed workers of any employer who is required to pay war risk contributions shall be included as factors in determining such employer's normal contribution rate for the calendar year 1943 and thereafter in the same manner as other employers' contribution rates are determined; except that benefits paid subsequent to June 30, 1944, to unemployed workers of any employer who is required to pay and has paid war risk contributions as provided for herein, shall not be included as a factor in determining such employers' future contribution rate until such benefits so paid shall equal the total amount of war risk contributions paid by such employer into the unemployment compensation fund, or until wage credits accrued to such employer's workers during the period for which war risk contributions were required **of such employer** are no longer available as a basis for payment of benefits, whichever event occurs first. **Provided, however, that for the purposes of determining contribution rates under subdivisions 4 to 10 of this section, only such benefits as exceed the aggregate amount of such employer's war risk contributions shall be included as a factor in determining such employer's contribution rate."**

**Question**

As to the effect of the insertion of the words "of such employer" and the addition of the proviso above underlined.

**Opinion**

Prior to the insertion of the words "of such employer" by the last Legislature, the words "during the period for which war risk contributions were required" were interpreted by the Division of Employment and Security as being the entire period during which the war risk law was effective. To illustrate: A war risk employer who had paid war risk contributions for the first and second quarters of the year 1943 (the year when such contributions were first required), and after that was no longer required to pay war risk contributions, would never have benefits, which were charged by reason of claims based upon wage credits earned during the effective period of the act, used as a factor in his experience rating until such benefits exceeded the amount of his war risk contributions. It is obvious that there must have been some definite purpose which prompted the insertion of the words "of such employer" and it would seem that both the literal and obvious meaning is that an employer, such as the one mentioned above, would

only be entitled to be free from the charging of benefits to his experience rating account until benefits drawn were no longer based on a "base period" which includes a period for which war risk contributions were required of him.

As to the effect of the proviso on the foregoing interpretation, it should be borne in mind that provisos are often used out of abundant caution merely to explain the general words of the enactment and to guard against a possible construction that is not intended. It appears that during discussions of the effect of Section 268.06, subd. 16, before the above underlined proviso was added, a question was raised as to whether or not in determining experience rating, benefits charged to an employer's war risk contributions should be again used as a factor in the matter of computing such employer's experience rate. Although it was thought that the law was clear in this respect, the proviso was, nevertheless, added as further assurance that benefits once charged against employer's war risk contributions should not again be charged against his normal experience rating account. The result is that only those benefits which are based upon wages earned during a base period of the claimant, which includes a portion or all of the period during which the individual employer was required to pay war risk contributions, can be charged against the employer's war risk account. Such charges are to be limited to the amount of war risk contributions paid, the excess being charged to his regular experience rating account.

In the main body of the section, of course, the time during which benefits drawn may be charged against war risk contributions made is limited to that period **when wage credits are available as a basis for payment of benefits** (assuming that the contributions made have not been exceeded by the benefits drawn before that time) and this time expires in all cases not later than the last day of the eighteen-month period following the termination of the war or June 30, 1947, whichever is earlier. The proviso cannot enlarge upon that limitation.

K. D. STALLAND,
Assistant Attorney General.

Division of Employment and Security.

August 3, 1945. 885-D-1

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FAIR LABOR STANDARDS ACT

## 56

**Municipalities—Where county rents machinery from contractors but hires employees, employees not under Fair Labor Standards Act if employment by county in good faith**—U.S.C.A. Tit. 29, §§ 201-219, "Fair Labor Standards Act of 1938."

**Facts**

"Several contractors have been doing work in the maintenance and construction of roads in Brown County. The Federal Department insists that the employees of these contractors come within the provisions of the Fair Labor Standards Act. The County of Brown contemplates hiring men doing work on the county roads direct and to rent the machinery from the contractors."

**Question**

Whether such employees would come under the Fair Labor Standards Act (U.S.C.A., Title 29, §§ 201-219).

**Opinion**

It was held in the case of **Walling, Administrator, v. Craig et al.** (D.C., D. Minn.), 53 F. Supp. 479, that public roads and highways traversed by vehicles transporting goods and persons moving from one state to another or to and from foreign countries from and into the United States are "instrumentalities of interstate commerce." In its findings the court found that, while generally each section of public road or highway repaired, maintained, or reconstructed by the defendants and their employees lies wholly within a single state, each of said sections was a part of a network of roads and highways regularly traversed by vehicles operated by common and contract carriers and private persons for the transportation of persons and property from one state to another and to and from foreign countries from and into the United States of America.

Under this decision and the numerous decisions of the federal courts compiled in U.S.C.A., Title 29, under § 203, both in the original volume and in the supplement, I am satisfied that it would be held by the federal courts that employees of a contractor doing work on any kind of a public road in this state would be held to come under the Fair Labor Standards Act.

Section 203, however, in its definitions provides, among other things:

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee **but shall not include** the United States or any State or **political subdivision of a State,** or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. (Emphasis supplied.)

"(e) 'Employee' includes any individual employed by an employer."

I am of the opinion, therefore, that, if the county in good faith employs men to do work on the county roads, those men would not be considered employees under the act. Whether the county owned the machinery outright or rented it from contractors, it seems to me, is immaterial. Of

course, the act could not be avoided by any subterfuge through an arrangement with the contractor under which he retained any control of the men or had anything whatsoever to do with their employment. In other words, if the county should take over the entire crew of a contractor from whom it was renting machinery under any arrangement by which the county ostensibly paid the men, but then adjusted the matter of a profit on their work in connection with the rental of the machinery, the exemption would not apply.

WM. C. GREEN,
Assistant Attorney General.

Brown County Attorney.
January 3, 1946. 270

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# LIQUOR

## INTOXICATING

## 57

**Club—Licenses—Eligibility—There should be no unreasonable delay in securing new quarters after clubhouse is destroyed by fire.**

### Facts

"A golf club located in this state whereof approximately ten acres of the grounds are located within the limits of a city of the fourth class and where the original club house was located in the township adjoining the city limits until said club house sometime ago was destroyed by fire.

"After the fire, the club purchased a building in the city which building is approximately one mile from that part of the golf course that is located within the city limits."

### Question

"In view of the recent change of location of the club house from that of the township to the city, the question arises whether the city council is authorized to issue a club license as provided by Laws 1939, Chapter 154."

### Opinion

I will state again the tests with which a club must comply in order to be eligible for a club license.

1. The club must be a corporation organized under the laws of Minnesota for civic, fraternal, social, or business purposes or for intellectual improvement or for the promotion of sports.

2. It must have more than 50 members.

3. For more than two years it must have owned, hired, or leased a building or space in a building of such extent and character as is suitable and adequate for the reasonable and comfortable accommodation of its members.

4. The affairs of the club must be conducted by a board of directors, executive committee, or other similar body chosen by the members at a meeting held for that purpose.

5. None of the members, officers, agents or employees can be paid directly or indirectly any compensation by way of profit from the disposition or sale of beverages, except that a reasonable salary or wage may be fixed annually by the club.

6. A club must have been in existence for more than 20 years.

7. It must be a bona fide club with restricted membership, and not a scheme or device for supplying liquor to members generally with little or no trouble about securing membership.

The fact that the clubhouse was destroyed by fire would not affect its eligibility for a club license (if otherwise qualified) if at once after the fire the club secured its new clubhouse. If there was unreasonable delay in securing new quarters, then the club could not comply with paragraph 3, supra.

RALPH A. STONE,
Assistant Attorney General.

Liquor Control Commissioner.

December 3, 1945. 218-G-15

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## 58

**Club—License — Eligibility — Local organization must have existed for 20 years and must be incorporated. Club having intoxicating liquor club license may also handle 3.2 beer—Whether club quarters comply with requirement is a question of fact.**

**Question 1**

"Does the 20 year life requirement apply to the particular applicant, or can such credit be carried over from its parent organization? For example, a V.F.W. local post is organized in 1944; in 1946 it ap-

plies for a club liquor license, claiming that it is eligible from this one consideration inasmuch as the parent national organization has been in existence for more than 20 years."

**Answer**

The local organization must have been in existence for 20 years.

**Question 2**

"Similarly with reference to the incorporation provision. Does this apply strictly to the club that is applying for the license; or can the fact that, although the local club is unincorporated, but the national or parent club is incorporated, be sufficient under the statute?"

**Answer**

The incorporation provision applies to the local club. The fact that the parent organization is incorporated is not sufficient.

**Question 3**

"If the club is granted an on-sale intoxicating liquor license, can it also properly receive an on-sale 3.2 beer license? Or an off-sale 3.2 beer license?"

**Answer**

As to an on-sale beer license, the answer is yes. But as to an off-sale beer license, it occurs to me that the sale of bottled beer off-sale for profit would probably not be within the express or implied powers of an incorporated club which has the statutory qualifications.

**Question 4**

"What is the interpretation of the statutory requirement regarding club quarters? If a group has been meeting once a week or once a month in a village hall, is that sufficient to qualify? Suppose that the applicant now leases a building for itself, but that such building has been leased by them for only a few months, or is not yet occupied by them?"

**Answer**

To secure an intoxicating liquor club license, it is required that for more than two years the club must have owned, hired or leased a building or space in a building of such extent and character as is suitable and adequate for the reasonable and comfortable accommodation of its members. Whether the club complies with this requirement is a question of fact.

RALPH A. STONE,
Assistant Attorney General.

Coleraine Village Attorney.
April 11, 1946. 218-G-15

## 59

**Clubs—Private—For place of dancing—Private and not public dancing may be permitted in room where intoxicating liquor is sold.**

**Facts**

"The City of International Falls has issued 'on sale' liquor licenses to two 'clubs' which have held dances in which only members and their guests have participated and which are not open to the general public. The dancing has been restricted to a floor other than that on which beverages are sold."

**Question**

" * * * whether it would be a violation of state law for these clubs to have both dancing and liquor sales on the same floor or premises?"

**Opinion**

You do not give me sufficient information about the nature of the dances to enable me to give a categorical answer to your question.

If the place in question is not open to the public, and if the place is not a public dancing place, and if the dances as conducted are not public dances, all as defined in Minnesota Statutes 1941, Section 617.42, Mason's Statutes 1927, Section 10161, but on the contrary, the place is a private place and the dances are private dances being conducted in a private club to which the public has no access, then it would seem to me that dancing might lawfully be permitted in the place and on the same floor where intoxicating liquor is sold.

This is a matter for regulation by the city council. If that body does not want such dances in private clubs of the character here involved, they could pass an ordinance on the subject.

Of course, minors could not be allowed to attend dances conducted in a room where intoxicating liquor is sold. Minnesota Statutes 1941, Section 617.60, Mason's Statutes 1927, Section 10140.

RALPH A. STONE,
Assistant Attorney General.

International Falls City Attorney.

November 6, 1945. 218-G-15

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## 60

**Election—Ballots—County auditor must submit to the voters the question presented in the petition and not any other question—L 1945, C 305.**

**Facts**

A petition has been presented to the auditor of Grant County praying that a special election be held in the county to determine whether the sale of intoxicating liquors shall be prohibited therein.

**Question**

May the auditor in preparing the ballot of the question to be submitted to the voters have it read: Shall the sale of intoxicating liquors be permitted within the county through the establishment of municipal liquor stores?

**Opinion**

Under Laws 1945, Chapter 305, the voters of counties in which there are no cities of the first class are permitted to vote upon either one of the following questions: (1) Whether the sale of intoxicating liquors shall be prohibited therein, or (2) in any county wherein such sale is prohibited, whether the sale of intoxicating liquors shall be permitted within the county through the establishment of municipal liquor stores.

The county auditor can only submit to the voters the question presented to him in the petition. He has no choice in the matter. Since the question presented to him is: Shall the sale of intoxicating liquor be prohibited—that is the question which he must submit to the voters. He cannot of his own volition submit the question as to municipal liquor stores.

IRVING M. FRISCH,
Special Assistant Attorney General.

Grant County Attorney.

March 20, 1946. 218-C-2

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## 61

**Election—County option—Vote to repeal in dry counties**—MS1941, §§ 340.25 and 340.26, et seq. as amended by L 1945, C 305.

**Facts**

A petition has been directed to the county auditor pursuant to Minnesota Statutes 1941, Section 340.40, praying for an election in Pennington County to determine whether the sale of intoxicating liquor shall be permitted therein; Pennington County is a dry county; the petition was presented pursuant to Laws 1945, Chapter 305, for the submission of the question which you have designated (1) and not upon the question which you have designated (2), both of which are set forth and specified in said last mentioned act.

**Question**

"1. What construction shall be placed upon the insertion into the amendment of Section 340.25 of (1) and (2)?"

**Opinion**

Before the amendment, Laws 1945, Chapter 305, to Minnesota Statutes 1941, Section 340.25 and 340.26, the said last mentioned sections constituted Extra Session Laws 1934, Chapter 46, Sections 20 and 21 respectively. No amendment was made to the original act until the amendment by Chapter 305, supra. These laws are applicable to dry counties such as Pennington County. Under the original act, Extra Session Laws 1934, Chapter 46, Sections 20 and 21, the only matter to be submitted thereunder was the question as to whether such county should remain a dry county or whether it should become a wet county. No provision was therein contained upon the second proposition relating to the establishment of municipal liquor stores within such county. Consequently, prior to the 1945 amendment the only question, as stated, was whether the county should remain a dry county. The legislature, by the amendment, Chapter 305, supra, added to the original laws the following:

"or (2), in any county wherein such sale is prohibited, whether the sale of intoxicating liquors shall be permitted within the county through the establishment of municipal liquor stores."

This last mentioned act contains in addition to the foregoing quotation the other proposition which may be voted upon, namely:

"(1) whether the sale of intoxicating liquors shall be prohibited therein."

We believe that either of the propositions (1) or (2) may be voted upon when the proper petition therefor has been presented as provided for in the act mentioned. If (1) is presented and the vote is favorable toward changing the county from a dry to a wet county, then no further election would be necessary in order that municipal liquor stores might be established within such county, except as hereinafter qualified. The general law relative to the establishment of municipal liquor stores would thereupon become applicable, leaving the matter of establishing municipal liquor stores within the discretion of the governing body of each municipality, provided, however, that if any municipality within such county had previously voted dry upon the question of the sale of intoxicating liquor within such municipality and such vote remained unchanged, then it would be necessary to vote upon that question again within such municipality before the governing body would be authorized to establish municipal liquor stores, and, of course, the vote thereon would have to be favorable upon that question.

Turning now to the second proposition, (2) in Chapter 305, it seems clear that the legislature intended to permit a dry county to vote only upon the question of the establishment of municipal liquor stores within

such county. In the event that this proposition was voted upon and the establishment of municipal liquor stores authorized by such vote, then such county would remain a dry county except for the establishment of municipal liquor stores. No other method for dispensing intoxicating liquor would be authorized. Furthermore, if proposition (2) were favorably voted upon in a county election, then before municipal liquor stores might be established it would be necessary for the governing body of each municipality to so determine, and provided further that if in any such municipality the electors had voted dry thereat at the last election upon the sale of intoxicating liquor, then it would be necessary for the electors to vote again and favorably for the sale of intoxicating liquor therein before the governing body would be authorized to establish a municipal liquor store within such municipality.

To summarize, if proposition (1) were submitted to the electors of the county, and the electors voted to make such county a wet county, then and thereupon the general laws of this state applicable to intoxicating liquor and municipal liquor stores would apply. If only proposition (2) were submitted to the electors of the county and favorably voted upon by the electors, then and thereupon such county would remain a dry county except for the sale of intoxicating liquor by municipal liquor stores, subject, however, to the limitations as previously indicated herein.

**Question**

"2. Does this raise two questions so that both must be submitted at a special election in dry counties?"

**Opinion**

We believe that Chapter 305, supra, contains two separate questions designated as (1) and (2). These questions may be separately submitted when proper petitions therefor have been presented and filed and need not both be submitted at the same special election. However, there is a time limitation in the act mentioned to which we will direct your attention in our answer to your fourth question.

**Question**

"3. Do the petitioners have a right to submit the question of whether the sale of intoxicating liquor shall be prohibited at one election and subsequently submit the question of whether the sale of intoxicating liquor shall be permitted within the county through the establishment of municipal liquor stores?"

**Opinion**

We believe that our answer to your first and second questions answers your third question, subject to the limitations as to time which will be covered in our answer to the next question.

**Question**

"4. If the question is divisible so that the petitioners have a right to elect is there any statutory time limit between which such elections may be held?"

**Opinion**

The original act, Extra Session Laws 1934, Chapter 46, Section 21, contained in part this provision:

"and provided further that no election in any such county under the provisions of this Act shall be ordered or held within three (3) years subsequent to a previous election hereunder in such county, unless such previous election shall have been set aside or adjudged invalid."

This same language appears in Minnesota Statutes 1941, Section 340.26 except with reference therein to Sections **40.07** to **40.40**. The bold face sections are erroneously designated and should have been designated as sections **340.07** to **340.40**. Sections 40.07 to 40.40 relate to soil conservation and not intoxicating liquors. The same error was carried forward in the amendment, Chapter 305, but the three year limitation is contained in said Chapter 305.

We believe that the three year limitation contained in this statute is a limitation upon both propositions (1) and (2) set forth in the 1945 amendment to Sections 340.25 and 340.26. Consequently, when a petition requesting a vote upon either proposition has been presented and an election held thereon, we do not believe that either of these propositions can be again presented by petition for an election until after the expiration of three years.

Further and specifically answering your question, it is our opinion that the questions (1) and (2) are divisible so that an election may be held on either proposition upon the presentation of a proper petition therefor, subject, however, to the time limitation as hereinbefore set forth.

"5. If the question is not divisible is the petition in its present form where it does not include proposition No. 2 in the required form so as to make it mandatory upon the Auditor to call a special election?"

What has been previously stated in our answer to your former questions answers this question.

By way of further comment, we point out that when a proper petition has been presented to the auditor for an election upon either of said propositions (1) or (2), it is mandatory upon the auditor to call a special election for the purpose of voting upon the question proposed in such petition.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Pennington County Attorney.
June 24, 1946. 218-C-2

# 62

**Election—Special—Dry county—Statutory provisions necessary to secure —MS1945, §§ 340.25 et seq.**

**Question**

As to the correct legal procedure to bring about a special election to permit the sale of intoxicating liquor in dry counties pursuant to Minn. Stat. 1945, §§ 340.25 et seq.

**Opinion**

Section 340.25 provides that, when there shall be presented to the auditor of any county a petition signed by any number of qualified voters thereof equal to or exceeding 25% of the total number of votes cast therein for governor at the last preceding general election, praying that a special election be held upon either of the propositions stated in such section, the county auditor shall forthwith file such petition in his office. Thereafter he shall make an order submitting to the voters of the county for their consideration the question to be voted upon as recited in such petition. The duties of the auditor after the petition has been filed are set forth in §§ 340.26 et seq. When the petition has reached the hands of the auditor from then on it becomes the duty of the auditor to see to it that the necessary notices are given as provided for in the liquor act in order that an election may be held upon the question contained in the petition. We assume that when the proper petition has reached the auditor, if there are any questions regarding procedure thereafter, the auditor will ask the counsel and advice of the county attorney, and he, in turn, may submit proper inquiries to this office.

The form of petition is set forth in § 340.40. The form of this petition was prepared so as to set forth therein the first proposition, designated as (1), in § 340.25, supra. If it is desired to petition for an election on the second proposition, referred to in said section as, "(2), * * * whether the sale of intoxicating liquors shall be permitted within the county through the establishment of municipal liquor stores," then it would be necessary to delete from the form of petition in § 340.40 the words "prohibited therein" and insert in lieu thereof the words "permitted within the county through the establishment of municipal liquor stores." In view of the fact that § 340.25 requires that the petition shall contain a written statement or printed oath to the effect that the petitioner is a legal voter of the county and knows the contents and purposes of the petition and signed the same of his own free will and that each petitioner shall at the time of signing be so sworn, it would be desirable that the person who obtains signatures upon any petition be a notary public or person authorized to administer oaths, so that each person when signing the petition could be sworn as provided for in the act.

This office has rendered numerous opinions construing various phases of the liquor act, and for your information there are enclosed herewith copy

of opinion dated September 18, 1945, and copy of opinion dated June 24, 1946.

The provisions of the liquor act relative to the duties of the county auditor and the manner and method of holding the special election on any petition presented are set forth quite clearly in the act, and there should be no difficulty in following the provisions of the act in regard thereto.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Canby City Attorney.

August 3, 1946. 218-C-2

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## 63

**Election—Voters—Submission of question to authorize sale of liquor—Qualification of voter not registered to be determined by MS1945, § 340.31 and not under § 201.01.**

**Question**

Whether the right of a person to vote in a special election authorized by Minnesota Statutes 1945, Section 340.26 is to be determined by Section 340.31 or 201.01.

**Opinion**

You are advised that the right of a person to so vote is to be determined under the provisions of Section 340.31 and not under Section 201.01. The latter section relates to elections generally and the other section, 340.31, relates to the qualifications of voters upon any question to be submitted to the voters at a special election as provided for in Section 340.26.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Albert Lea City Attorney.

August 8, 1946. 218-C-2

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## 64

**Stores—Bartender—Villages—Council has power in good faith to make a reasonable contract hiring a bartender for its municipal liquor store for a period of three years.**

**Facts**

"The village is opening an on-sale liquor store. They have hired a bartender but he now wants a three year contract. We have three

councilmen who serve for three years. However, one is voted for each year. We have the mayor and clerk whose terms are two years."

**Question**

May the village enter into a contract of hire with a bartender which is to continue for a period of three years?

**Opinion**

The authorities are not harmonious upon this question.

In an opinion dated May 15, 1940 (63b-2), it was held that the council of the city of Northfield had authority to enter into a contract of employment with a firm of architects which would extend beyond the life of the council. A copy of this opinion is enclosed to you herewith.

You cite the case of Egan v. City of St. Paul, 57 Minn. 1, in which it was held that the joint committee having charge of the city hall and court house in the city of St. Paul had no power to appoint a janitor for a period of time extending beyond the year for which the appointive members of the committee were themselves appointed.

The question again arose as to the power of the same joint committee in the case of State ex rel. v. McCardy, 62 Minn. 509. In this case it was held that a contract by the same committee for the lighting of the city hall and court house for a period of three years was valid.

I call your attention to the following quotation from the case of Ambrozich v. City of Eveleth, 200 Minn. 473, 479:

> "The fact that the lease was to remain in force after the old council went out of office is no objection to it. If the council had exercised its powers to purchase this property or to acquire it by condemnation, the city would have become the owner in fee; but the council exercised the lesser power of acquiring a lease. Leases of property by municipal corporations are not invalid because the lease extends beyond the term of office of the officers negotiating the lease. 1 Dillon, Municipal Corporations (5 ed.) p. 459, § 243. This court has upheld contracts extending beyond terms of officers making them and of longer duration than the instant lease. In State ex rel. St. Paul Gaslight Co. v. McCardy, 62 Minn. 509, 64 N. W. 1133, a contract for lighting a courthouse and city hall for three years was upheld; Reed v. City of Anoka, 85 Minn. 294, 88 N. W. 981 (contract for city water and hydrants for period of 31 years); Northern States Power Co. v. City of Granite Falls, 186 Minn. 209, 242 N. W. 714 (contract for purchase of electricity for period of 15 years). Similar contracts have generally been upheld. Moses v. Risdon, 46 Iowa, 251 (lease for 20 years); American Press v. City of St. Louis, 314 Mo. 288, 284 S. W. 482 (lease for two years with option to renew for six years); McBean v. City of Fresno, 112 Cal. 159, 44 P. 358, 31 L.R.A. 794, 53 A.S.R. 191 (contract for disposal of sewage for

five years); Garrison v. City of Chicago, 7 Bissell, 480 (contract for supply of gas to city for ten years); see Spaulding v. City of Lowell, 23 Pick. (Mass.) 71; Schanck v. Mayor, 69 N. Y. 444; Gale v. Village of Kalamazoo, 23 Mich. 344, 9 Am. R. 80; 3 Dillon, Municipal Corporations (5 ed.) p. 2151, § 1307."

I also quote to you from McQuillin Municipal Corporations, Rev. Vol. 3, § 1356, p. 1286:

"As to contracts of employment, the decisions are not entirely harmonious. In some cases holding that particular contracts of employment must not be extended beyond the life of the board, the decision is based on the ground that the nature and character of the employment was such as to require the board to exercise supervisory control over the employee, and hence the contract was in the exercise of a governmental function. So it has been held that a contract for the employment of a keeper of a county poorhouse for a period of three years was not within the power of a board of supervisors, whose members are elected for one year only. And the employment by a board of commissioners of a physician to an office not having a term fixed by law has been held not binding on the succeeding board. While contracts, if made in good faith, extending beyond the terms of the officers making them are ordinarily valid, where the nature of an office or employment is such as to require a municipal board or officer to exercise a supervisory control over the appointee or employee, together with the power of removal, such employment or contract of employment by the board, it has been held, is in the exercise of a governmental function, and contracts relating thereto must not be extended beyond the life of the board. Accordingly, a contract of a council employing one to sprinkle streets for a year after a new council was elected and just before it assumed office was held void and contrary to public policy, and the new council might avoid the contract at its pleasure. However, in Indiana, it has been held that county commissioners may employ a superintendent of an insane asylum for a period of five years, although extending beyond the term of the board; but in an earlier case it was held that they could not employ a legal adviser for a time extending beyond a date when all the members of the board as constituted would retire, unless re-elected.

"On the other hand, a board of county commissioners has been held to have power to enter into a contract with an employee for his services for one year, although made on the last day of the year, and two of the five members of the board were elected at the preceding November election and would enter into office soon after the first of the next year. So it has been held that architects may be employed to prepare plans and specifications and to supervise the work, until its completion, although the building may not be completed until after the tenure of office of the official board. And the employment of a physician by county commissioners for a period extending a little beyond their term has been held not invalid. Of course, a board of aldermen cannot make a con-

tract for the employment of legal services for an unlimited time and irrevocable by their successors."

This author apparently seeks to differentiate between contracts made by the municipality in a proprietary capacity extending beyond the life of the council and contracts made by the municipality in its governmental capacity. In this connection, it may be said that it has been held by this office that a municipality operates a municipal liquor store in both a governmental and proprietary capacity.

The doctrine of the Egan case was at least impliedly overruled by the case of Manley v. Scott, 108 Minn. 142. In that case it was held that a board of county commissioners (a continuing body) could hire a morgue keeper for a period extending beyond the term of those composing the board at the time the contract of employment was made. Therein the court placed emphasis upon the fact that the board was a continuing body, "and the election of new commissioners has no other legal effect than to partially change the personnel of the body."

The court further said:

> "The morgue keeper is an employee, and not a public officer. His selection and employment for a definite and reasonable term in no manner interferes with the proper discharge of the duties of the board of county commissioners, nor does it deprive the board of full power and proper control over the things and matters submitted to its care by the statutes. It is conceded that the person employed by the board on December 31, 1908, was and is a suitable person to perform the duties required to be performed by him. Having the power at that time to employ a morgue keeper, there is no implied limitation upon that power which restricts the possible term of employment to the time when any member or members of the board shall go out of office. The contract made in this instance was fair and reasonable, and no question of fraud or collusion is even suggested. Such being the facts, we can conceive of no principle of public policy which is violated by the contract in question. The contract being thus valid, the board, after the new members qualified, had no power to revoke or rescind it without cause being shown."

In view of the foregoing, it is my opinion that if a contract hiring a bartender for three years is not unreasonable, if it is not arbitrary, if it is free from caprice or wilfullness and if otherwise fair, it would be upheld even though the membership of the council might change during the three year period. The village council is a continuing body, as is the board of county commissioners. Of course during the three year term the bartender would be subject to discharge for cause as any other employee.

RALPH A. STONE,
Assistant Attorney General.

Pine City Village Attorney.

May 7, 1945. 218-R

## 65

**Stores—Establishment—After dry county votes wet in county-wide election, the sale of intoxicating liquor becomes lawful in municipalities which did not vote dry at the last local option election therein.**

### Facts

Clearwater County was a dry county because it voted against the repeal of prohibition. However, on September 30, 1946, in a county-wide election the county voted wet. The village of Bagley (which voted overwhelmingly dry in the county-wide election) voted wet at the last local option election in said village in 1911 or 1912.

### Question

Whether the village of Bagley may now issue licenses or establish a municipal liquor store?

### Opinion

The answer to this question is in the affirmative. After the county-wide election on September 30, the sale of intoxicating liquor in municipalities in the county in the manner provided by law became legal, except in a municipality which at the last local option election therein voted dry. Minnesota Statutes 1945, Section 340.72.

In my opinion, the fact that the "Indian lid" was in operation in Clearwater County some years ago has nothing to do with the question. The village of Bagley may now either issue licenses or establish a municipal liquor store. Whether a municipal liquor store should be established rests in the discretion of the council. No election is necessary on that question. If a municipal store is established, no licenses should be issued.

If the interested citizens of Bagley wish their village to be dry, they can have an election on that question in December by following Minnesota Statutes 1945, Sections 340.20, 340.21. If at such election, the majority is "against license," then and thereafter no licenses can be granted or municipal store operated until such vote is reversed at a subsequent election.

RALPH A. STONE,
Assistant Attorney General.

Clearwater County Attorney.
October 4, 1946. 218-G-13

## 66

**Stores—Financing of.**

**Facts**

The Village of Delhi, at an election in December, voted to establish a municipal liquor store; no levy has been provided to lay in a stock of goods to supply the store; they have no money available in any general or special funds, and the levy made for next year will not be sufficient to do more than pay the general operating expenses of the village for the ensuing year.

**Question**

As to how it may be possible to raise the sum of $1500 to $2000 to lay in a stock of goods with which to operate a municipal liquor store.

**Opinion**

It is my opinion that the village would have the power to enter into a contract with a supplier of liquor whereby the vendor would furnish the liquor and look only to the receipts of the liquor store for payment of the contract of purchase. See Williams v. Village of Kenyon, 187 Minn. 161, 224 N. W. 558; Davies v. Village of Madelia, 205 Minn. 526, 534, 287 N. W. 1; Hendricks v. City of Minneapolis, 207 Minn. 151, 290 N. W. 428, and Struble v. Nelson, 217 Minn. 610, 15 N. W. (2) 101.

It has been held that under such a contract no debt of the municipality is created or incurred which might affect the constitutional or statutory debt limit fixed. Williams v. Village of Kenyon, supra.

KENT C. VAN DEN BERG,
Assistant Attorney General.

Redwood County Attorney.

February 2, 1946. 218-R

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## 67

**Tax — Village has no authority to levy a gross sales tax on intoxicating liquors sold in the village.**

**Question**

Has the village council authority to levy a gross sales tax on all intoxicating liquors sold in the village?

**Opinion**

The answer to this question is in the negative. A village possesses only

such power to tax as is conferred upon it by the statutes, and the statutes do not grant power to a village to levy a gross sales tax.

RALPH A. STONE,
Assistant Attorney General.

Goodhue Village Attorney.

April 23, 1946. 519-Q

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NON-INTOXICATING MALT

## 68

**Clubs—License—Baseball Association is a bona fide club eligible for license —Grandstand at baseball field covered by county board license is not a room within the meaning of Laws 1945, Chapter 589.**

**Facts**

"The Albert Lea Baseball Association, Inc., is organized solely for the purpose of managing a local baseball team. It leases the ball park owned by the City of Albert Lea on a part-time basis. The city corporate limits cross the field. The grandstand and approximately one-half of the area lie outside such corporate limits. Admission is charged the public for attendance at games.

"The Association is making application to the Board of County Commissioners for an on-sale malt liquor license under the provisions of the non-intoxicating malt liquor laws, as amended by Chapters 589 and 595, Laws of Minnesota, 1945. The application has been approved by the town board.

"It is understood non-intoxicating malt liquor will be sold in the grandstand and other facilities provided for spectators, by employees who pass among the attendants and will be consumed on the premises."

**Question 1**

"Is the Baseball Association a 'bona fide club,' within the definition of Subdivision (2) of Section (1) of Chapter 595, Laws of 1945, which provides among other things:

" 'A bona fide club * * * is an organization for the promotion of sports, where the serving of such non-intoxicating malt liquor is incidental and not a major purpose of the club';

thereby qualifying itself for such on-sale license?"

**Opinion**

In my opinion the incorporated baseball association comes squarely

within the definition of a bona fide club as used in the non-intoxicating malt liquor law, assuming that the purpose of the organization is the promotion of baseball games.

**Question 2**

"The last paragraph of Chapter 589 provides:

" 'Persons holding license issued by the County Board shall not permit any minor to loiter or remain in the room where non-intoxicating malt liquor is being sold or served unless accompanied by his parent or legal guardian.

"*If* such license is issued, does this preclude attendance by minors, unaccompanied by parent or guardian, at ball games where non-intoxicating liquor is sold? In other words, is the presence in the grandstand and other facilities for spectators, of minors, permitting them to 'loiter or remain in the room where non-intoxicating malt liquor is being sold or served'?"

**Opinion**

Laws 1945, Chapter 589, was enacted to regulate and control taverns in rural areas. The word "room," as used in this law, refers to the room in any such rural tavern where 3.2 beer is sold. A grandstand is not a room within the meaning of this law.

RALPH A. STONE,
Assistant Attorney General.

Freeborn County Attorney.

August 13, 1945. 218-G-15

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## 69

**Licenses—Applicant—County board—Absent recommendation by the sheriff, absent statement by him that to the best of his knowledge applicant has not violated the liquor law within preceding five years, and absent statement by the sheriff that in his opinion applicant will comply with the law, license should not be issued.**

**Facts**

"A has submitted an application for an ON SALE license to sell malt liquors in the unorganized territory of this County. There is no record of any violation of the liquor laws during the five years last past. The County Attorney has submitted a favorable recommendation in writing, the Sheriff has been requested to submit his recommendation but has stated orally to the Board he is unfavorable to the applicant."

**Questions**

"Can the County Board grant A such license if the report of the Sheriff or County Attorney is unfavorable and oppose the granting of a license even though there is no conviction of any nature against A? Can they (County Board) act on the application if either the Sheriff or County Attorney after request refuse to submit a written report or recommendation?"

**Opinion**

The statute applicable to the situation is Minnesota Statutes 1945, Section 340.01, Laws 1945, Chapter 589. This statute governs the issuance of non-intoxicating malt liquor licenses by county boards. One paragraph of this statute reads as follows:

> "No license shall be issued or renewed by the county board after application has been made therefor until said county board shall have secured the written recommendation of the sheriff and of the county attorney. Said recommendation shall be accompanied by a statement attesting that to the best of their knowledge the applicant has not, within a period of five years prior to the date of such application, violated any law relating to the sale of non-intoxicating malt liquor or of intoxicating liquor and that in their judgment the applicant will comply with the laws and regulations relating to the conduct of said business in the event said license is issued or renewed. Before issuing or renewing any license, the county board shall consider the recommendation of the sheriff and the county attorney, the character and reputation of the applicant, the nature of the business to be conducted and the type of premises and propriety of the location of said business."

Under this law the county board cannot issue a 3.2 beer license unless and until the board has secured a recommendation by the sheriff. The word "recommend" must be given its usual and ordinary meaning.

Funk and Wagnall's new standard dictionary defines the word "recommend" as follows:

> "To commend to the attention, favor, or use of another; offer with favorable representations; praise as desirable, advantageous, trustworthy or advisable; speak in behalf of."

Adopting this definition, the word "recommendation" should be and is construed as requiring a favorable commendation from the sheriff. To so hold is a reasonable construction of the law. The sheriff of the county is charged with the enforcement of the law therein, and is particularly charged with the enforcement of the liquor laws. Lack of law enforcement is blamed upon him. His is the duty and responsibility. To adopt a construction which would permit the doing of something which might prevent or hinder him in the performance of his duty should not be adopted.

There is another requirement in this statute which must be complied with before the board can issue a license. Said law requires that the recom-

mendation of the sheriff must be accompanied by his statement that in his judgment the applicant for a license "will comply with the laws and regulations relating to the conduct of said business in the event said license is issued or renewed." In this case the sheriff refuses to make any such accompanying statement. In the absence of such a statement it is my opinion that the county board is prohibited from issuing a license.

The statute also requires that the sheriff's recommendation shall be accompanied by his statement that to the best of his knowledge the applicant has not within a period of five years prior to the date of the application violated any law relating to the sale of non-intoxicating liquor. Such a statement from the sheriff is lacking. Your statement is that there is no record of any violation of the liquor laws by the applicant during the preceding five years. This is not conclusive proof that the applicant has not violated the law. The sheriff may be of the honest opinion that the applicant has violated the law during the preceding five years. Many persons violate the law who are not prosecuted or convicted. It may be that the sheriff cannot honestly state that to the best of his knowledge the applicant has not within a period of five years violated any such law. Until the sheriff makes such a statement to accompany his recommendation as required by the statute, the county board should not issue the license applied for.

It would not be conducive to law enforcement that the county board could issue a license to a person as to whom the sheriff is unwilling to give a statement that to the best of his knowledge such person has not violated the law. It was not the intention of the legislature to permit the issuance of a license to a place which the sheriff is unwilling to recommend or certify to as aforesaid.

This opinion assumes that the sheriff is acting honestly and in good faith and in the exercise of what he honestly believes to be his duty.

RALPH A. STONE,
Assistant Attorney General.

Cook County Attorney.

August 16, 1946. 217-B-2

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## 70

**Sale—Dance halls—Minors—Rural taverns—Minors should not be permitted to remain at a dance where 3.2 beer is sold.**

**Facts**

Under consideration is an application by the proprietor of a dance pavilion for an on-sale non-intoxicating malt liquor license, and approval by the County Attorney is required by Laws 1945, Chapter 589, before such license can be issued.

The dance pavilion consists of one large building, all on one floor. There are booths around the sides of the dance floor and in one end of the building near the front entrance is the bar. At one time the proprietor served lunches on the night when a public dance was held. The main business is the operation of a public dance. Dances have been held twice a week during the war. Formerly dances were held nearly every night.

**Question**

Assuming that application is approved and an on-sale non-intoxicating malt liquor license is issued for this place, would the proprietor be required to exclude minors and prevent them from attending dances unless accompanied by parent or guardian?

**Opinion**

Laws 1945, Chapter 589, provides that persons holding licenses issued by a county board shall not permit any minors to "loiter or remain in the room where non-intoxicating malt liquors are being served or sold unless accompanied by their parents or legal guardians."

The statute provides that a minor shall not be permitted to remain in the place where beer is sold. It covers just such a case as that described by you. A minor should not be allowed to attend and remain at such a public dance in a room where 3.2 beer is sold if unaccompanied by parent or guardian.

It is not like a case of a minor going into a restaurant to buy a meal and leaving when his meal is finished.

This applicant can take his choice. If 3.2 beer is to be served upon the premises, the proprietor must exclude minors from the dance hall. If he permits minors in the dance hall, he should close up the bar and cease to sell 3.2 beer during all the time that minors are permitted to remain in the establishment.

As to what constitutes "remain" or "loiter" is a question of fact to be determined by the facts in each particular case. However, in the case mentioned by you, I think the facts require the answer heretofore given.

Each proprietor should adopt a safe and sane course if he wishes to secure a renewal of his license. He must so conduct his place as to meet with the approval of yourself and the county sheriff. He should be guided in his conduct by the advice given him by the county attorney.

RALPH A. STONE,
Assistant Attorney General.

Mower County Attorney.

June 9, 1945. 217-F-3

# 71

**Sale—Dance halls—Minors—Sale of beer in room adjoining room where minors dance—Permitting beer to be drunk in room where minors dance—Question of fact whether place of entertainment is injurious to morals of minors—L 1945, C 589.**

### Example 1

"This fellow has two buildings which are joined together, there being a doorway between the two buildings. The front building is used for a resort store and there is beer sold in the place. The back building is a dance hall. Minors, of course, attend these dances."

### Question 1

Can beer be sold in the front building even though it connects by a doorway to a dance hall where minors will be dancing?

### Opinion

Laws 1945, Chapter 589, makes it unlawful for the licensee to permit any minor to loiter or remain in the **room** where non-intoxicating malt liquor is being sold or served. Whether the premises where a dance is being conducted are within the **room** where the beer is being sold, would be in most cases a question of fact. The application of the law mentioned does not extend beyond the room where the beer is being sold, but the word "room" should be given such a construction as to effectuate the purposes of the law which were to prevent the minor from getting beer or being present where it is served or sold. Whether the dance hall room is a part of the room where the beer is being sold depends to a large extent upon the character and size of the opening between the two rooms. That opening might be so large that the two rooms are practically one. So the character of the opening between the two rooms must be taken into consideration in determining whether a minor in the place where dancing is being done is in the room where the beer is being sold.

### Question 2

If so, can the patrons buy the beer in the room which is used for the store and beer parlor and take the bottles of beer into the dance hall?

### Opinion

On sale non-intoxicating malt liquor licenses permit a licensee to sell such liquor on the licensed premises for consumption on the licensed premises only.

This question calls also for the consideration of another law. See Minnesota Statutes 1941, Section 617.60, Mason's Statutes 1927, Section 10140, reading:

"Whoever permits any person under the age of 21 years to be or remain in any dancehouse, concert saloon, place where intoxicating liquors are sold or given away, or any place of entertainment injurious to the morals, owned, kept or managed by him, in whole or in part, or shall permit any person under the age of 21 years to play any game of skill or chance in any such place, shall be guilty of a misdemeanor and be punished by a fine of not less than $25.00."

Whether the fact that the proprietor allows his patrons to sit around the dance hall drinking their beer makes that hall a place injurious to the morals of minors is also a question of fact. It would seem that such a state of facts would support a finding that the premises constituted a place of entertainment injurious to the morals of minors, and that the proprietor could accordingly be found guilty of a violation of Minnesota Statutes 1941, Section 617.60 above quoted. You are, of course, called upon to approve the issuance of licenses for these places in rural territory. As to such places you are in a much better position than this office to determine whether they are places injurious to the morals of minors.

**Question 3**

Will minors be permitted to go into the room where beer is sold and buy soft drinks if they don't loiter around there after purchasing the soft drinks?

**Opinion**

I am enclosing copy of an opinion of June 9, 1945, file 217f-3. This opinion partially answers your questions.

However, the same question arises as raised above. It would be an open question of fact whether the dance hall could be considered and found to be a place injurious to the morals of minors were such practices permitted.

**Example 2**

"Another dance hall has a counter in the end of the dance hall where beer in former years has been sold. Now minors will be dancing in the same room and the question is, whether it would be illegal to sell beer in that room while dances are held and attended by minors. If so, this operator said he could move the beer counter into another room which again is connected with the dance hall by a doorway."

**Question 4**

Whether it would be illegal to sell beer in the same room where the dance is carried on with minors in attendance.

**Opinion**

I think it would be clearly illegal to permit minors to remain and to

dance in the same room where 3.2 beer is being sold on sale. What is said above as to connecting rooms also applies to this answer.

**Question 5**

Would it be illegal to sell beer in such adjoining room?

**Opinion**

The answer to this question is included in what is said above. An operator under such circumstances would clearly encounter the risk of permitting minors to remain in a place of entertainment injurious to the morals of minors.

**Example 3**

"Another fellow has a dance hall but sells beer in a separate little building which is apart from the dance hall. If he sells beer in this separate little building it seems to comply with Chapter 589."

**Question 6**

Would his patrons be permitted to take the beer out of the building where purchased and into the dance hall for consumption?

**Opinion**

The answer to this question is covered in the foregoing answers, and it would seem to me that it might be considered quite as injurious to the morals of minors to have the place in the room where 3.2 beer was being drunk as in the room where it was sold. A jury might so find. A licensee who permits minors in a place of business where such a practice occurs does so at his own risk.

RALPH A. STONE,
Assistant Attorney General.

Otter Tail County Attorney.

June 25, 1945. 217-F-3

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# MILITARY

## VETERANS

## 72

**Licenses—Hawkers and peddlers—Transient merchants—Payment of fee for license not required — Business of transient merchant excepted — MS1945, § 197.59.**

**Facts**

"A serviceman acquired a large supply of surplus war goods consisting of clothing used by the Armed Forces, and now wishes to dispose of it in various villages in this county. He proposes to lease a space in a vacant building or in a building partially occupied to dispose of the property."

**Question**

"Would the fact that he had leased space in the village coupled with the fact that he is a veteran selling war surplus exempt him from the license requirements of the ordinance as well as from the county license?"

**Opinion**

You do not advise as to the license requirements of any village ordinance. Absence of this information precludes us from giving you a decisive answer to your question.

Veterans are entitled to a hawker's and peddler's license without payment of the license fee upon compliance with Minnesota Statutes 1945, Section 197.59.

Upon the facts submitted, we believe that the business proposed to be carried on is that of a transient merchant rather than a hawker or a peddler. A peddler is one who travels from house to house with an assortment of goods for retail. See definition of "peddler" in **City of St. Paul v. Briggs**, 85 Minn. 290, 292. A hawker is one who cries goods and wares for sale on the street and from place to place.

The term "transient merchant" is defined in Minnesota Statutes 1945, Section 329.01. Sections 329.10 to 329.17 relate to the licensing of the business of a transient merchant. Hawkers and peddlers are excepted. Section 329.14. Veterans must comply with the provisions of this law and pay the license fee and obtain a license as therein provided before they may engage in the business of a transient merchant.

Even though a village ordinance required the payment of a license fee to obtain a hawker's or peddler's license, veterans would be entitled to such license without payment of the license fee. Section 197.59 supra. However, you will note that the last mentioned section does not except veterans from the provisions and requirements of the transient merchant law, Section 329.11, *nor* from the provisions of any ordinance regulating the business of a transient merchant. Veterans must pay the required license fee to transact the business of a transient merchant either under the state law or as required by a village ordinance as the circumstances of each case might require.

Note: See Laws 1947, Ch. 170.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Caledonia Village Attorneys.

August 21, 1946. 290-J-10

# 73

**Public employment—Military leave and reinstatement—The time provided by the state and federal laws for making application to be reinstated in public employment after termination of military service is the same.**

### Facts

Section 8, Subdivision (B), paragraphs (A), (B) and (C) of the Selective Training and Service Act of 1940, as amended December 8, 1944, Chapter 548, Section 1, 58 Stat. 798 (50 U.S.C.A., Section 308, U. S. Code Congressional Service 1944, No. 8, p. 797), relates to persons inducted into the land and naval forces for training and service. The pertinent portions thereof read in part:

> "(B) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who * * * makes application for reemployment within ninety days after he is relieved from such training and service, or from hospitalization continuing after discharge for a period of not more than one year—
>
> "(C) If such position was in the employ of any state or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status and pay."

You call attention to Section 118 of the Civil Service Rules of the City of Duluth (Ordinance No. 6619, passed March 1, 1943) and to Laws 1941, Chapter 120, Section 2 (Minnesota Statutes 1941, Section 192.261, Subdivision 2), both of which provide in part that any employee on military leave of absence shall be reinstated upon certain conditions, including the condition that he makes written application for reinstatement to the appointing authority within 45 days after termination of such service.

### Question

> " * * * whether paragraph (C) or Subdivision (B) of the above quoted portion of the Act (Selective Training and Service Act of 1940, as amended December 8, 1944) has the effect of abrogating the Civil Service Rules of the City of Duluth and State of Minnesota, insofar as it specifies the time within which application for reinstatement must be made to the appointing authority."

### Opinion

It is unnecessary to pass upon your question because at the recent session of the legislature Minnesota Statutes 1941, Section 192.261, Subdivision 2, was amended by Laws 1945, Chapter 489, to read as follows:

> "Except as otherwise hereinafter provided, upon the completion of such service such officer or employee shall be reinstated in public posi-

tion, which he held at the time of entry into such service, or a public position of like seniority, status, and pay if such is available at the same salary which he would have received if he had not taken such leave, upon the following conditions: (1) that the term thereof, if limited, has not expired; (2) that he is not physically or mentally disabled from performing the duties of such position; (3) that he makes written application for reinstatement to the appointing authority within 90 days after termination of such service, or 90 days after discharge from hospitalization or medical treatment which immediately follows the termination of, and results from, such service; provided such application shall be made within one year and 90 days after termination of such service notwithstanding such hospitalization or medical treatment; (4) that he submits an honorable discharge or other form of release by proper authority indicating that his military or naval service was satisfactory. Upon such reinstatement the officer or employee shall have the same rights with respect to accrued and future seniority status, efficiency rating, vacation, sick leave, and other benefits as if he had been actually employed during the time of such leave. No officer or employee so reinstated shall be removed or discharged within one year thereafter except for cause, after notice and hearing; but this shall not operate to extend a term of service limited by law."

You will observe that the time provided by the state and federal laws for making application to be reinstated in public employment after the termination of military service or after discharge from hospitalization following the termination of such service is now the same. It will be noted that Laws 1945, Chapter 489, refers not only to termination of military service and hospitalization, but also to medical treatment. This statute abrogates the provisions of the Civil Service Rules of Duluth which are inconsistent with it.

PAUL JAROSCAK,
Special Assistant Attorney General.

Duluth City Attorney.

April 26, 1945. 120

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## 74

**Records—Birth and Death—Laws 1945, Chapter 19 is not irreconcilable with Laws 1945, Chapter 512, Section 18, and will remain in effect after January 1, 1946.**

**Facts**

Laws 1945, Chapter 19, now in effect provides for free copies of birth and death records to veterans and others enumerated therein for certain purposes. Laws 1945, Chapter 512, Section 18, which takes effect January

1, 1946, also provides for the issuance of free copies of birth and death certificates for certain purposes.

**Questions**

"(1) On and after January 1, 1946, will Chapter 512, Laws of 1945, Section 18, take precedence over Chapter 19, Laws of 1945?

"(2) In your opinion, what evidence for the issuance of a free copy would be necessary?"

**Opinion**

Laws 1945, Chapter 512, designated therein as the Uniform Vital Statistics Act does not expressly repeal Chapter 19. This law is not enumerated among those repealed by Section 37. The rule of law as stated in Minnesota Statutes 1941, Section 645.39 is that "a later law shall not be construed to repeal an earlier law unless the two are irreconcilable." An examination of the provisions of Chapter 19 shows that it extends not only to birth and death records but to marriage and divorce records as well. Marriage and divorce records are not vital statistics as defined in Chapter 512, Section 1, Subdivision 2.

Chapter 512, Section 18, in no way conflicts with Chapter 19. This section is much broader than Chapter 19 as to the persons and organizations who may receive free copies of birth and death records. Under this section everyone is entitled to receive such free copies providing that they are "needed in connection with service in the armed forces or the Merchant Marine of the United States or in the presentation of claims to the United States Veterans Administration or the official veterans administration of any state or territory of the United States." Subdivision 2 of this section is the same as Chapter 19, Section 2. Chapter 19 and Chapter 512, Section 18, will, therefore, both be in effect after January 1, 1946, for their respective purposes.

IRVING M. FRISCH,
Special Assistant Attorney General.

Department of Health.

August 17, 1945. 310

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## 75

**Records — Separation papers — Releasing a veteran from active duty and placing him on an inactive status may be recorded in the office of the Register of Deeds under Minnesota Statutes 1941, Section 386.20.**

**Facts**

Army and Navy officers, unless retired, are released from active duty and placed on an inactive status. Some enlisted personnel are also released from active duty for various reasons.

**Question**

Should not the Register of Deeds accept these separation papers in lieu of discharges for recording?

**Opinion**

Yes, he should receive them for recording. In an opinion issued to you under date August 14, 1944, this office held that "for the purpose of securing benefits provided by the State of Minnesota for honorably discharged veterans, the certificate of service (War Department Form 280) is in effect an honorable discharge." It appears from the statement of facts in that opinion that the certificate of service considered therein was "a Certificate of Service from the army, which shows that he (the veteran) honorably served in active Federal service and was transferred to the Enlisted Reserve Corps." In other words, he was released from active duty, subject to recall thereto in the future. The essential facts in that matter with respect to the character of the separation papers were similar to those in the instant matter.

By authorizing veterans to record their certificates of discharge in the office of the Register of Deeds of any county, the legislature extended a benefit to them. Minnesota Statutes 1941, Section 386.20. We hold that a veteran may avail himself of this benefit by recording in any such office his separation papers which release him from active duty and place him on an inactive status.

PAUL JAROSCAK,
Special Assistant Attorney General.

Commissioner of Veterans' Affairs.

March 16, 1945. 310-S

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# MUNICIPALITIES

## BIDS AND CONTRACTS

## 76

**Advertising—School districts—Right of school district to contract for cleaning of heating system by patented process without advertisement for bids.**

**Facts**

"A firm which specializes in the cleaning of heating systems, by a patented process, has made a proposition to the board to clean the school system at a cost of approximately $900. The firm offering to do this work contends that it is not necessary for the board to secure competitive bids because their method of doing this work is covered by

exclusive patent and therefore it is not possible to secure bids which would be competitive."

**Question**

Whether or not there is any provision in the law whereby the school board can obtain materials or services covered by exclusive patent when the amount involved exceeds the legal limit of $500.00.

**Opinion**

The question you ask is not free from doubt. However, it was held by this office in an opinion given to the Commissioner of Education September 30, 1932 (1932 Reports, No. 130), that "where an article is covered by a patent or copyright and that article may be purchased only from one person or concern, it may be contracted for without advertising for bids, notwithstanding the above mentioned statute requiring advertisement for bids for contracts in excess of $500.00." The question asked there was with reference to the purchase of textbooks and library books copyrighted and published by only one publishing house, with an exclusive right of sale. The foregoing language contained in that opinion should be applied in the situation you suggest. The opinion continues:

> "However, before a school district may decide to purchase a particular patented or copyrighted article it must appear that there is no other similar article or device which would accomplish substantially the same results and meet the same needs."

Undoubtedly there are many methods of cleaning heating systems, and ordinarily, if the cost of cleaning a heating system would exceed $500.00, it would be necessary to advertise for bids. However, if the patented process referred to in your request is something entirely new and is so superior to the ordinary methods of cleaning that the members of the board in good faith determine that the interests of the district will be best served by the use of that system, I am of the opinion that they would be justified in arranging for its use without advertising for bids. If, however, persons using other methods should be able to demonstrate that their methods were as effective and economical as the patented process, the letting of a contract for doing this work without advertisement for bids might result in litigation which might be determined adversely to the school board.

I suggest a careful reading of the opinion of September 30, 1942, which covers the whole subject very thoroughly.

WM. C. GREEN,
Assistant Attorney General.

Commissioner of Education.

March 27, 1946. 707-A-12

# 77

**Day labor—School board owning building material may advertise for bids for labor and construction equipment and supervision to complete work, board to furnish additional material required. Board may furnish list of materials on hand to bidders and ask for bids for additional labor and material required to complete addition.**

### Facts

"The classroom building was a W.P.A. project. However, plans had been drawn for a complete structure which had included a gymnasium-auditorium. At the time the project was undertaken by W.P.A., it was not certain that all of the work could be completed and, therefore, only the classroom unit was undertaken. The School Board, however, purchased approximately eighty or ninety per cent of the materials required to complete the gymnasium-auditorium. This material, according to information of the School Board, is now stored at the site and includes steel, steel trusses, steel decking, roofing, plumbing, heating and electrical requirements including conduit, pipe and fixtures. We also understand that the rough and finished hardware is available.

"There is some indication that one of the most practical ways of completing this structure might be the re-engaging of the former construction superintendent, who is thoroughly acquainted with the materials on hand as well as all the details constructed and to be constructed, and proceeding on the day labor basis for the completion of the gymnasium-auditorium addition."

### Question

1. Does the school board have the legal authority to proceed on a day labor basis?

### Opinion

See Attorney General's opinion No. 186, 1914, report and opinion dated June 23, 1925, file 707-D-4.

### Questions

2. Could the board use the following procedure: Advertise for bids for labor and construction equipment and supervision to complete the work wherein the board would furnish the additional material required?

3. Could the board furnish a list of the inventory of materials on hand which would be available to all bidders, and then ask for bids for the additional material and labor required to complete the addition?

### Opinion

In answer to your first question, the opinions referred to are still in

effect, and it is still the opinion of this office that a school board has the power to do such work as you describe by day labor.

In answer to your second question, inasmuch as the school board has certain of the material on hand, there is no reason why it cannot advertise for bids for labor and construction equipment and supervision to complete the work, the board to furnish the additional material required. This is upon the assumption that the words "additional material required" refer to the material now on hand.

Under this construction of your second question, I see no difference between that and the third question, and the answer to the third question would be in the affirmative.

WM. C. GREEN,
Assistant Attorney General.

Commissioner of Education.

March 26, 1946. 707-D-4

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## 78

**Equipment—Power of county board to rent equipment to grade tax-forfeited land under L. 1945, C. 93 may be exercised without advertising for bids under M. S. 1945, § 375.21, Subd. 2.**

### Facts

"Minnesota Statutes 1945, Section 375.21, Subdivision 2, prohibits counties having a population of more than 225,000 from contracting for the purchase of goods and materials or supplies of any kind for the county the estimated cost of which will exceed $500.00, without giving the published notice provided for therein."

### Question

In counties of that class, may equipment for grading be rented for the purpose of grading tax-forfeited lands, without giving the notice as required by the statute cited, when the total rental charge is known in advance to exceed $500?

### Opinion

The rental of equipment is not "the purchase of goods, materials or supplies." The authority to do the grading is found in Laws 1945, Chapter 93. A strict construction of Section 375.21, Subdivision 2, does not limit the power of the county board in the rental of equipment for grading under its authority granted in Laws 1945, Chapter 93. Since it does not clearly appear

that the legislature intended such limitation, it is my opinion that it does not apply.

CHARLES E. HOUSTON,
Assistant Attorney General.

Public Examiner.

October 16, 1946. 707-A-7

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## 79

**Escalator clause—Public utilities—Light and power—Purchase—Plans and specifications—Right of a municipality engaged in supplying of electric power, heat, and water to enter into a contract carrying price and material adjustment clauses**—Charter, City of Rochester, C XV, §§ 257-287.

You have asked the opinion of this office with reference to a proposed new power plant construction, the cost of which will be in excess of $1,000,000. Your particular question goes to the matter of the right of the Utility Board of the City of Rochester to accept bids containing so-called "Escalator Clauses." You have enclosed with your request a communication from the Superintendent of your City Electric Department to you, which sets up quite completely and concisely the situation which confronts you. This letter reads as follows:

"At a meeting of the Public Utility Board on December 12th a motion was made regarding an opinion on the following matter. So that you will have an understanding of why we are asking for this opinion I will briefly outline the problem confronting us.

"In January of 1946 we intend to advertise for bids on our new Power Plant construction. The cost of this project will be in excess of $1,000,000. In all probability the regulations of the Office of Price Administration will still be in effect at the time we take bids. To prevent discrimination between the bidders, and to be able to analyze our bids on the same basis, we feel that there should be incorporated in our specifications a clause covering the procedure which will be followed for price adjustment of any contract which we will award.

"Under present conditions manufacturers and general contractors are refusing to bid on municipal work where the contract is in excess of $25,000 or the delivery time is in the excess of six months. In instances where they do submit bids they have been inserting their own price adjustment clauses or Escalator Clauses. These clauses vary in their terms depending upon the type of equipment supplied, and also, between the different manufacturers of the same equipment. Other municipalities in this state and other states have found it difficult to properly compare bids with these variations existing, and the question of the legality of awarding contracts on this basis has been questioned.

* * *

"Exhibit A, which is attached to this letter, is a typical Escalator Clause which is being used by several of the major manufacturers on

all of their contracts with private concerns, and has been attached to proposals submitted to municipalities.

"Exhibit B, which is also inclosed, is a copy of a report which I submitted to the Public Utility Board. You will note from this report that we are now in a critical situation insofar as present plant capacity is concerned. The new Power Plant construction will not be ready for service for approximately two years. By that time it is forecasted that our load will be much greater. As we are an isolated plant and have no transmission line connections with outside utilities, we must rely on our own equipment to supply the City of Rochester, therefore, before the new Plant is constructed we will have serious overloads even on our reserve equipment. This is pointed out as a reason why we must take bids as soon as possible and not wait for the removal of O.P.A. rules or modifications.

"We would appreciate your opinion on the question as to whether a municipal public utility, engaged in the supplying of electric power, heat, and water, can legally enter into a contract which carries price and material adjustment clauses."

Exhibit "A" attached to the superintendent's letter is as follows:

"MATERIAL AND SHOP LABOR PRICE ADJUSTMENT CLAUSES

"(1) The price quoted, $....., is based on the company's material costs and wage rates as of October 1, 1941, in accordance with Revised Maximum price Regulation No. 136, issued by the Office of Price Administration.

"(2) Because of increases in the Company's material costs and wage rates since October 1, 1941, the price as of the date of this proposal would be $....., were it not for the necessity for compliance with Revised Maximum Price Regulation No. 136.

"(3) The price quoted in Par. 1 is to be increased to the amount stated in Par. 2 and, in addition, it is to be adjusted for changes in material costs and in average hourly shop wage rates from those presently being paid by the Company, provided that—

"(a) Existing OPA Price Regulations have been amended to permit the Company to invoke escalation and then to the extent permitted by OPA, or

"(b) OPA Regulations controlling the Company's prices have been abandoned and no other Governmental Agency is permitted by law to control the Company's prices.

"(4) Adjustment in price beyond that stated in Par. 2 for changes in material costs and shop wage rates from those presently being paid by the Company follows:

"(a) MATERIAL PRICE ADJUSTMENT: The price included in Par. 2 for equipment to be manufactured by the Company is based upon the following material costs:

Plate, Structural and Bars: Average base price per 100 lb. f.o.b. steel mill as of the date of this proposal.

Steel Tubes: As per published tube price schedules f.o.b. tube mill as of the date of this proposal.

Alloy Steel Tubing: Price as of the date of this proposal.
The price shall be adjusted $..... for each 5 cents per 100 lb. increase or decrease in the average price of plate structural and bars and $..... for each 5 cents per 100 lb. increase or decrease in the price of tubes; if the increase or decrease per 100 lb. is different from 5 cents per 100 lb., adjustment is to be made in the proportion that the increase or decrease bears to 5 cents per 100 lb. The Company will order the necessary materials not later than 30 days after receipt of approval of setting drawings. The contract price is to be increased or decreased, dependent upon the prices actually paid by the Company.

"(b) WAGE ADJUSTMENT: The price included in Par. 2 for equipment to be manufactured by the Company is based upon its ..... .....average hourly straight-time shop wage rate. In the event that the average hourly straight-time shop wage rate for the months in which the equipment is in the process of manufacture is higher or lower than the ..... average hourly straight-time shop wage rate, the price shall be increased or decreased by $..... for a difference of 1 cent between the average hourly straight-time shop wage rate paid by the Company and the ..... average hourly straight-time shop wage rate. If the difference in average hourly straight-time shop wage rate is more or less than 1 cent, adjustment in price shall be made in the proportion that the difference bears to 1 cent. For the purpose of adjustment of the contract price, the average hourly straight-time shop wage rate shall be the sum of the amounts obtained by multiplying the average hourly straight-time shop wage rate, for each month that the equipment is in the process of manufacture, by the actual shop labor hours expended upon the contract in each such month, divided by the total shop labor hours expended on the contract. The average hourly straight-time shop wage rate for any month shall be determined by dividing the total wages, exclusive of overtime and bonus-time, paid to all hourly employees at the Company's Barberton, Ohio Works for such month, by the total number of hours actually worked for which such employees were paid such wages as shown by the Company's pay-roll records.

"(c) The amounts included in Par. 2 for equipment and/or services not manufactured or performed by the Company, including,

.....

.....

.....

are based upon prices current at the time of making the proposal. In the event that the suppliers of such equipment and/or services increase or decrease prices to the Company, because of increases or decreases in their material costs or wage rates at the time of fulfilling their orders, the contract price shall be adjusted by the actual increase or decrease which the Company must pay to such suppliers. The Company will provide the Purchaser with copies of all available price adjustment provisions of such suppliers upon request.

"(5) Payments of all such price adjustments shall be due upon receipt of the invoice or credit, as the case may be.

"(6) Any change in the price stated in Par. 1 by reason of any of the escalation clauses in Pars. 3 and 4 will be billed to the Purchaser not later than 90 days after final shipment."

Exhibit "B" attached to his letter is a general report to the Public Utility Board, stating in more detail the situation summarized in the superintendent's letter, in which the superintendent states the emergency which confronts the City of Rochester and his belief that you cannot have a successful letting without Escalator Clauses being submitted in the proposals.

Your request poses a very difficult question and one upon which I have been unable to find any authority whatsoever. In giving this opinion its general effect must be considered because, while representatives of the City of Rochester are controlled by the charter of that city, the provisions of that charter are very similar to statutory provisions governing the state and a number of its municipalities and to charters of other home rule cities. The portions of Chapter XV of the Charter of the City of Rochester here material read as follows:

"Section 275. All contracts for commodities or service to be furnished or performed for the City, or any department thereof involving an expenditure of more than Five Hundred Dollars ($500) shall be made as in this chapter provided, and not otherwise. The words 'commodities' and 'service' as used in this chapter, shall be construed to include all work, labor, materials, supplies or other property and all lighting and other service, and all local or public improvements. The word 'contract' as used in this chapter, shall be construed to include every agreement, in writing or otherwise, executed or executory, by which any commodities, work, or service are to be furnished to or done for the City, and every transaction whereby an expenditure is made or incurred on the part of the City or any department or any officer thereof.

* * *

"Section 277. Before advertising for bids, the Common Council or Board, shall cause to be prepared by the proper department or officer

of the City, and filed with the Clerk, detailed plans and specifications for the proposed contract for commodities and service and if the Common Council, or Board, shall desire to consider different methods or different commodities, it shall cause to be prepared separate estimates for each method or each variety, of commodity which it desires to consider.

"Section 278. After filing the same, the Common Council shall direct the City Clerk, or, if the matter is in the hands of a Board, such Board shall direct its clerk or secretary to advertise for bids for doing or furnishing said commodities or service in accordance with such contract, plans or specifications, and, if there be specifications for different methods or different commodities, or both, he shall advertise for bids for doing or furnishing said commodities or service in each of said respective ways. Such advertisement shall be published in the official paper, once at least one week before the letting of the contract and in such other manner as the Common Council, or such Board, may direct.

"All advertisements for bids shall clearly state that such bids are to be received and opened at a public meeting of the Common Council in the Council Chambers, or of such Board at its usual meeting place, upon a certain day and hour.

* * *

"Section 280. At the time and place mentioned in the advertisement for bids, the Common Council shall meet in public session and publicly receive, open and read all bids that may be presented. * * *

"Section 281. The Common Council or Board shall act upon such bids and determine which one shall be accepted. All contracts shall be awarded to the lowest reliable and responsible bidder complying with the foregoing requirements, provided, that the Common Council, or Board, may reject any bids which it may deem unreasonable or unreliable, and the Common Council, or Board, in determining the reliability of a bid, shall consider the question of the responsibility of the bidder and his ability to perform his contract, without any references to the responsibility of the sureties upon his bond, and any person who shall have defaulted in any contract awarded by the City, except as to time, or who within ten years prior to said bidding shall have refused to enter into a contract after the same shall have been awarded to him, shall not be considered a reliable and responsible bidder.

"The Common Council or Board may reject any or all bids and abandon the proposed contract, or it may require the Clerk or Secretary to re-advertise for new bids in the manner hereinbefore provided and the Common Council or board may again reject all bids. After receiving a bid, or bids, or after having advertised and not having received any bid, the Common Council, or Board may either abandon the proposed contract or cause the proper department of the City to procure the necessary commodities, implements, machinery, labor and service and carry out the proposed improvement, work or other purpose. * * *

"Section 283. Before any contract whatever for the doing of any work or labor, or furnishing any skill, or material, or commodity to the city for the erection, construction, repair or alteration of any bridge, public building or any other public structure, work or improvement or in the making of any public improvement whatever or for performing any labor or furnishing material or commodities, shall be valid for any purpose, the contractor therefor shall enter into a bond with the city, for the use and benefit of the city and of all other persons who may perform any work or labor or furnish any skill or material in the execution of such contract, conditioned to pay as they become due all just claims for all work and labor performed and all skill and material furnished in the execution of such contract, and also to save the city harmless from any cost or expense, that may accrue on account of the doing of the work specified in such contract, and also to complete such contract according to its terms, and to comply with all the requirements of law, which bond shall be in an amount to be fixed by the Common Council or Board not less than the contract price agreed to be paid for the performance of such contract. * * *

"Section 284. In case of emergency, and when the delays occasioned by the strict compliance with this charter relative to the furnishing of commodities, or performance of work or services, will cause great damage to the public interest, or endanger public safety, the head of any department, with the written approval of the Mayor, may make necessary repairs by day labor and procure materials therefor in the open market.

* * *

"Section 287. Any contract made in violation of the provision of this chapter shall be absolutely void, and any money paid on account of such contract by the city, or any department or officer thereof, may be recovered by the city, without restitution of the property or the benefits received or obtained by the city thereunder."

In a consideration of the problem we must keep in mind certain fundamentals:

(1) There must be real competitive bidding; that is, each bidder must be given the opportunity to bid on the same basis.

(2) The bids must be in such form that the council can determine who is the lowest bidder, reliability and responsibility being assumed.

(3) The contract price to be bid must be sufficiently definite to furnish a measure of the minimum bond to be entered into by the contractor.

(4) The contract price must be sufficiently definite so that it may be determined whether any indebtedness to be incurred is within the debt limit of the municipality.

(5) In the case of the state and of a number of municipalities in the state, where it is required that expenditures be limited to appropriations,

the contract price must be sufficiently definite to allow a determination as to whether such a requirement has been complied with.

(6) In case of the state and certain municipalities, where it is required that no payments be made and no obligation incurred against any fund, allotment, or appropriation unless the proper officer has certified that there is a sufficient unencumbered balance in such fund, allotment, or appropriation to meet the same, the contract price must be sufficiently definite to permit such an encumbrance; at least there must be a maximum figure definitely agreed to to permit a maximum encumbrance.

In my opinion, it would be out of the question simply to advertise for bids with ordinary specifications and permit each bidder to insert his own Escalator Clauses. I do not believe this would permit free and open competition, and, further, I do not see how a proper determination could be made as to what is the lowest bid unless it should happen that the Escalator Clauses in each bid were uniform.

I am, therefore, of the opinion that, if it is to be held that Escalator Clauses of the general character set forth in Exhibit "A" of the superintendent's letter heretofore quoted are to be included in bids, the city should incorporate in its specifications the type of price adjustment it will accept. There will probably be no particular difficulty in specifying the material price adjustment referred to in (4) (a) of Exhibit "A." I question the method of wage adjustment set out in (4) (b) because such a clause makes that adjustment depend upon the situation existing in the plant of the individual bidder. It might be possible to specify a wage adjustment predicated upon some index which could be applied to all bidders.

With reference to the adjustment provided for in (4) (c), we are again met with the problem as to how a uniform specification might be framed because these suppliers of different bidders might make different increases or decreases in their prices. Again the question arises as to whether or not a uniform specification could be framed which would apply equally to all bidders.

Assuming that specifications could be framed of such character that all bidders would be bidding on an equal basis and a comparison of the prices bid in clauses (1) and (2) of Exhibit "A" would be the only thing necessary to determine who was the lowest bidder (equal reliability and responsibility being assumed), I am of the opinion that there would be no objection to bids containing such uniform Escalator Clauses from the standpoint of allowing free and open competition.

We must then consider the matters of bond, debt limit, appropriations, and encumbrance. I do not see how the requirements of statutes and charters with reference to these matters can be met unless a maximum price is stated in each bid. If such a maximum price were not stated, it would be impossible to determine under Section 283 of your charter the minimum amount of the contractor's bond. In case of any municipality, it would not be possible to determine whether it might not be necessary to exceed the

statutory debt limit in order to meet the final cost of a project. If a specific appropriation were made for the purpose of constructing a utility, it would not be possible to determine whether or not the final cost would be within the limits of the appropriation. In the case of the state and of municipalities, where an encumbrance of funds is required, it would not be possible to make such an encumbrance without knowing the maximum amount which would be payable under the contract. I am, therefore, of the opinion that, if bids with Escalator Clauses are to be permitted, they must not only be based upon specifications setting out standard bases of adjustment, but that a maximum cost must be stated in each bid.

As to the practical proposition that it might be impossible to secure bids under the conditions stated, the answer would appear to be found in the second paragraph of Section 281 of the charter, permitting the procurement of the necessary commodities, implements, machinery, labor, and service by the city when it appears that the work cannot be let by contract.

WM. C. GREEN,
Assistant Attorney General.

Rochester City Attorney.

January 15, 1946. 707-B-7

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## 80

**Excavation work—One contract may not be added to another without advertising for bids—Village may advertise contract for all excavation work to be done in the village in one year.**

**Facts**

"The Village of Hopkins has a municipal water system and a sanitary sewage disposal system.

"Every year there are presented to the Council numerous petitions by village residents of the village praying for the extension of the sanitary sewer and water in the various streets in the village. Sometimes these petitions ask for an extension of one or more blocks long and then at other times these extensions are for not more than 40 or 50 feet. Likewise, these petitions are not presented at the same time. Some appear at the council in the early part of the year and others are presented at other times during the same year.

"I realize that the statutes provide that in case of improvements of that nature there must be a notice by the Council asking for bids for the material and work involved in such instances, all according to certain plans and specifications, and the Council intends to have bids pursuant to advertisement in all instances. However, it has occurred frequently that there has been a call for bids on some project and the bids

received and one of them accepted, and the work either commenced or perhaps even finished upon some project when another project of a similar nature appears. When the Village thereupon again advertises for bids for the second such project, the first contractor may have pulled out his machines and men, thereby making such second project much costlier, not to speak of the delay in its completion."

**Question 1**

"Is it possible for the Village to add some such project, as above described, to a contract already in existence with some contractor who is working pursuant to an accepted bid on a different project in the Village?"

**Opinion**

The answer to this question is in the negative. The adding of one contract to another in this manner would not be justifiable as to the making of a new contract, and bids should be called for.

**Question 2**

"Would it be possible for the village to advertise for bids in the beginning of the year for excavation work to be performed for the village in connection with all water and sewer projects as they may arise in the village during the ensuing year and thereupon after the acceptance of the lowest responsible bid, to assign to such successful bidder all such excavation work as it may arise during the year, the cost to be determined by such successful bid?"

**Opinion**

I think this question should be answered in the affirmative, if the council deems it to be for the best interest of the village to have all the excavation work in one year done by the same contractor. Specification should be filed for the excavation and bids should be called for on the basis of such specifications.

Then when the city comes to advertise for the construction of sewers or water pipes, the specifications for such work should specify that the excavation will be performed by another contractor.

RALPH A. STONE,
Assistant Attorney General.

Hopkins Village Attorney.

October 8, 1945. 707-A-15

# 81

**Lowest responsible bidder—Does not necessarily mean lowest bidder whose pecuniary ability to perform contract is deemed best. Commission may reject lowest bid if, in exercise of honest discretion, another seems better for object to be accomplished. Before variation from specifications will be deemed to destroy competitive character of bid for public contract variation must be a substantial and material one beneficial to the successful bidder.**

**Facts**

"The City of Virginia is a city of the third class operating under a home rule charter. The charter provides (Section 146) that the control, management and operation of all water, heat, power and light plants shall be committed to a board to be known as the 'Water and Light Commission.' The charter also provides (Section 153) that all supplies for such plants or work required to be done or performed to repair and extend any of said plants, shall be made or procured by said Commission, 'but in case the purchases required to be made at any one time or the work and labor required to be performed, shall exceed Five Hundred Dollars ($500.00) in value, except in case of emergency, said Board shall invite bids or proposals for the furnishing of the material or supplies or performance of such work and labor upon advertisement * * * , and such contracts shall be let to the lowest responsible bidder * * * .'

"On August 30, 1946, the Water and Light Commission advertised for sealed proposals for the furnishing and erection of a 5000 KW. Turbine-Generator Unit. Notice to bidders, instructions to bidders, form of proposal, equipment data sheet, proposed construction contract, proposed contractor's bond, detailed specification, and addendums Number 1 and 2 were made available to those interested in submitting proposals. A copy of each of those instruments is being sent to you under separate cover. The sealed bids were opened on September 30th pursuant to the notice to bidders.

"According to the instructions to bidders (Page 3, Par. 8), 'the time of completion as specified by the Bidder in the proposal may be used as a factor in deciding the award of the contract.' The detailed specifications included the following requirement (Page 16, Par. 2); 'Turbine shall be designed to extract a maximum of 175,000 lbs. of steam per hour at 165# gauge.' You may assume that the usual meaning of this requirement is as follows: 'Turbine shall be designed to extract a maximum of 175,000 lbs. of steam per hour at 165# gauge **at full load.**'

"The proposed construction contract included the following provision (Page 11): 'The time of completion of the construction of the project is of the essence of the contract.'

"The opening of the sealed proposals revealed that four concerns submitted proposals, copies of which are being sent to you under sepa-

rate cover. The bids were tabulated as to price, time of delivery, and performance data. A copy of said tabulation is also being sent to you under separate cover.

"I wish to call your attention to two possible deviations from the specifications or proposal as set out by the Commission:

1. The G Company qualified their undertaking as to shipment of the unit by including the following paragraph in their proposal: 'Shipment to be as follows: In twenty-two (22) months, subject to prior sales, after receipt of order with complete information at the Company's factory. An additional thirty (30) days will be required for erection.'

2. The E Company did not bid in accordance with the specifications, and in particular deviated from the requirement that 'Turbine shall be designed to extract a maximum of 175,000 lbs. of steam per hour at 165# gauge.' This is substantiated by the first page of the E Company's specifications where it is stated that 'E Company will not bid in accordance with the specifications * * * . In lieu of this we are offering etc.'

"You will note from examination of individual proposals which were submitted that G proposed to complete installation within 715 calendar days after date of contract, subject perhaps to their provision as to prior sales. E Company proposed to complete installation within 495 days after date of contract.

"The acceptance of the E Company's bid would result in the erection of the unit about six and one-half months sooner than if the G bid were accepted. This saving in time would save the Commission and the City of Virginia about $25,000 or more. The consulting engineers are of the opinion that the E unit would meet the practical requirements of the Commission notwithstanding the fact that the unit does not meet the published specifications."

You request the opinion of this office as to whether or not the water and light commission may accept the E Company bid under the circumstances above set forth.

After a study of the various documents submitted to me, I asked that you procure from the engineers the following information:

(a) The purpose of specifying maximum extraction rather than minimum;

(b) Whether maximum extraction of 133,000 lbs. per hour meets purpose of specifications;

(c) Whether reduction in maximum extraction in proposal gave bidder any advantage in price.

The superintendent of your water and light department has given me the following answers to these questions:

(a) A maximum extraction was specified because an extraction in excess of 175,000 lbs. per hour would reduce efficiency of equipment.

(b) Maximum of 133,000 meets the purpose of the specifications.

(c) The reduction in maximum extraction did not give the bidder any advantage in price.

I should also note that the statement by the E Company that it would not bid in accordance with the specifications is limited by the second paragraph of its exception to the flow of steam extracted. It is my understanding that in all other respects the bid of the E Company conforms to the specifications.

While it is not mentioned in your opinion, I note that the base bid of G Company was $138,400, while that of E Company was $139,100. Both bids have attached to them escalator clauses in the form provided for in the addenda furnished to bidders.

**Opinion**

Although not specifically mentioned in your request for an opinion, the question might be raised as to whether or not the commission may properly determine that the E Company is the lowest responsible bidder in view of the fact that their base bid is $700 higher than that of the G Company. While there is no question as to the financial responsibility of G Company and its skill, ability, and integrity, in view of the fact that the instructions to bidders stated that the time of completion as specified by the bidder in the proposal might be used as a factor in deciding the award of the contract, that the proposal of G Company provides for completion of installation within 715 calendar days after date of contract with the additional condition as to prior sales while the E Company's proposal calls for completing installation within 495 days after date of contract, and that the saving of 6½ months' time would result in a saving to the commission and the city of about $25,000 or more, I am of the opinion that the commission would be justified in determining that E Company was the lowest responsible bidder.

> "While it has been adjudged that it ('lowest responsible bidder') also means the lowest one who is pecuniarily responsible, it is generally held to mean not merely the lowest bidder whose pecuniary ability to perform the contract is deemed the best, but the bidder who is most likely, in regard to skill, ability and integrity, to do faithful, conscientious work, and promptly fulfill the contract according to its letter and spirit. Accordingly, the requirement that the contract shall be let to the 'lowest responsible bidder' does not require the letting to the lowest bidder upon ascertaining his financial responsibility only, but the term 'responsible' includes the ability to respond by the discharge of the contractor's obligation in accordance with what may be expected or demanded under the terms of the contract." — **McQuillin Municipal Corporations,** Second Edition, Revised, Vol. 3, § 1330.

"The city authorities are required to act fairly and honestly upon reasonable information, but when they have so acted their decision cannot be overthrown by the court."—**Ibid.**

"To sum up, the general rule is that the lowest bid may be rejected if, in the exercise of an honest discretion, another seems to be better for the object to be accomplished."—**Ibid.**

See also **Pallas v. Johnson** (Colo.), 68 P. 2d 559, 110 A. L. R. 1403; **People v. Dorsheimer** (N. Y.), 55 How. Prac. 118, 120; and **West v. City of Oakland**, 159 P. 202, 204.

As to the second question, I am of the opinion that the proposal of E Company that its turbine shall be designed to extract a maximum of 133,000 lbs. of steam per hour at 165# gauge is not such a substantial variation as to destroy the competitive character of the bid and that the commission may in its discretion accept that bid in spite of the deviation.

In the first place, it should be noted that the specifications do not call for a **minimum** extraction of 175,000 lbs. of steam per hour. There are certain minimums: to-wit, that the turbine shall be designed to operate with initial steam pressure of 400# gauge with 700° Fahrenheit total temperature at turbine throttle, and with 165 lbs. gauge extracted steam and 10 lbs. exhaust. These minimums are all met by the proposal of E Company. Then appears the language:

"Turbine shall be designed to extract a maximum of 175,000 lbs. of steam per hour at 165# gauge."

This is equivalent to saying that the turbine shall be designed to extract not more than 175,000 lbs. of steam per hour. Therefore, taking the language of the specifications and proposal alone, without reference to any extraneous matters, a turbine which is designed to extract not more than 133,000 lbs. of steam per hour is certainly within the limit set out in the specifications. However, as heretofore pointed out, it appears that a maximum rather than a minimum was specified for the purpose of insuring efficiency, that the maximum of 133,000 lbs. meets the purpose of the specifications, and that the reduction in maximum extraction did not affect the amount of the bid.

The rule is stated as follows in 43 **American Jurisprudence** at pp. 781, 782:

"Generally, before a variation from the specifications will be deemed to destroy the competitive character of a bid for a public contract, the variation must be substantial, that is, it must affect the amount of the bid. * * * A variation from the advertised specifications does not destroy the competitive character of a bid unless it affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by other bidders. There is no dispute about the rule itself; the practical question in the cases is whether there was substantial conformity or a material variance, and this is determined largely with reference to

whether the bidder's proposal gives him an advantage or benefit which is not enjoyed by other bidders."

See especially **Pascoe v. Barlum,** 247 Mich. 343, 225 N. W. 506, 65 A. L. R. 833, and annotation at 65 A. L. R. 838.

As applying the rule that departure from specifications to void a bid must be a substantial and material one beneficial to the successful bidder, see **Rice v. City of Saint Paul,** 208 Minn. 509, 522-523, 295 N. W. 529. See also **Fuller Co. v. Elderkin** (Md.), 154 A. 548, 550.

Tested by these rules, it seems clear that the departure from the specifications was not a substantial and material one beneficial to the E Company.

WM. C. GREEN,
Assistant Attorney General.

Virginia City Attorney.

October 15, 1946. 707-A-7

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BOUNDARIES

## 82

**Annexation—Territory sought to be annexed to city which merely corners upon such city does not abut thereon so as to authorize annexation under M. S. 1945, Section 413.14.**

### Facts

You state that Marshall is a city of the fourth class under general law, having less than 10,000 inhabitants; that the owner of a tract of land comprising approximately 30 acres desires to plat the same and to have it annexed to the city for residential purposes; that this tract of land proposed to be platted and annexed corners upon the city, that is, the northeast corner of the tract sought to be annexed corners at the southwest corner of the city.

### Question

Whether or not the tract of land sought to be annexed and which touches the southwest corner of the city limits constitutes a parcel of land "abutting upon any incorporated city" which may be annexed to the city by ordinance on petition of the owner or owners of such land pursuant to Minnesota Statutes 1945, Section 413.14.

### Opinion

Your inquiry must be answered in the negative.

I have found no court decisions in this state that bear directly upon

the question submitted. From court decisions of other jurisdictions and the definition of the words "abutting" or "adjoining" which seem to be synonymous, it would be my conclusion that where tracts of land merely corner, such cornering is not to be construed as "abutting" as used in the statute. Furthermore, the statute which permits the annexation of lands to a village or a city contemplates that such lands shall, after being annexed, be susceptible to city or village government. This would necessitate such physical contact between the land sought to be annexed and the city or village so as to afford the extension of municipal improvements such as streets, sewer, and water without the necessity of trespassing upon other properties. Such a situation would not physically result where the land sought to be annexed merely corners upon the limits of the municipality.

In Smith v. Sherry, 6 N. W. 561, 564, the Supreme Court of Wisconsin said:

> "The idea of a city or village implies an assemblage of inhabitants living in the vicinity of each other and not separated by any other intervening civil division of the state."

In McQuillin Municipal Corporations, Second Edition, Volume 1, Section 294, it is stated:

> "Tracts of land are not contiguous where the only place they join each other is at a point at the corner of the two." (Citing Wild v. People, 227 Ill. 556, 81 N. E. 707.)

In this case the court in passing upon the question as to whether the territory there involved was contiguous territory so as to permit incorporation under the statutes of Illinois stated:

> "No vehicle, and in fact no person, could pass from one strip to the other without passing over or upon lands not within the village."

A similar situation is involved in the facts which you have submitted. The tract of land sought to be annexed joins with the municipal limits at almost an infinitesimal point. It would be physically impossible to even walk from one tract to the other without trespassing upon property outside of the corporate limits of the municipality.

In Kresin v. Mau, 15 Minn. (Gil.) 87, the court had before it for consideration the question as to whether two tracts of land which merely cornered with each other constituted one body or tract of land so as to permit homestead exemption. In the course of that decision the court said:

> "Two tracts of land mutually touching only at a common corner —a mere point—cannot, according to any ordinary or authorized use of language, be spoken of as constituting one body or tract of land."

In Words and Phrases, Volume 1, commencing at page 191, appear excerpts from various court decisions which indicate that the words "abutting" and "contiguous" as used in various statutes relating to the annexation of property by villages and cities are synonymous. We have not found any

court decision which holds that where property merely corners with the corporate limits of a municipality this constitutes either abutting upon or contiguous to the corporate limits of the municipality.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Marshall City Attorney.

December 24, 1946. 59-A-1

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## 83

**Property Incorporated within village should be contiguous and susceptible to local village government. If there be within such village real estate purchased or improved with taxes theretofore levied upon property "within and without the village boundaries" such property shall remain joint property of the town and village**—MS1945, C 412; MS1945, § 413.06.

### Facts

A petition has been filed with the county board for the incorporation of a village pursuant to Minnesota Statutes 1945, Chapter 421; objections have been made to the allowance of this petition on the part of town officers of the township surrounding the area proposed to be incorporated as a village; the town hall is located almost exactly in the center of the area proposed to be incorporated, and neither the petitioners nor the members of the town board desire to have the premises used for town hall purposes included within the incorporated area.

### Opinion

We have not been able to find any decision which bears upon the situation presented. Legal questions have arisen in connection with the inclusion of unplatted property, and from these decisions and the statutes an answer must be found to the question which has arisen in connection with the incorporation of this village.

Minnesota Statutes 1945, Section 412.02, relates to the territory which may be incorporated and contemplates incorporation of property which has been platted into lots and blocks and also adjacent lands so that when incorporated the territory will be so conditioned as properly subject to village government.

Section 413.06 provides that when there is included within such incorporated village real estate purchased or improved with taxes theretofore levied upon the property both within and without the village boundaries, the same shall be and remain the joint property of the town and village. This section contemplates that town property used for town hall purposes should be included within the village and thereafter remain the joint prop-

erty of the town and village. The statute makes no provision for excluding such property from the area incorporated. If the town property could be excluded, then other property may likewise be excluded and the result would be that such property would not be subject to village government; also the town board and the electors might determine to sell and dispose of the town property to some individual for private purposes. In that event, the village would have no control or jurisdiction over such property until it had been made a part of the village.

In **State ex rel Simpson v. Village of Dover,** 113 Minn. 452, on page 456, the court stated:

> "The line must be drawn somewhere. What territory shall and what shall not be included is a question of fact, to be determined by the people immediately interested. The soundness of their judgment in passing on the question must be tested as questions of fact in other cases are tested on appeal. If the evidence reasonably tends to show that the decision is within the statute, then the courts cannot interfere."

Then follows citation of several other court decisions from this state. While these decisions do not bear upon the factual situation which you have presented, they do seem to be helpful in reaching a proper solution to the question presented.

The statute contemplates that the lands incorporated should be one continuous area. Otherwise the result would be a "hop and skip" situation which would result in isolated areas that would not be subject to village government.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

McLeod County Attorney.

December 17, 1946. 484-E-4

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CHARTER COMMISSION

## 84

**Amendments — Petition for — Certain questions answered as to submitting charter amendments.**

**Facts**

"The Charter Commission of the City of St. Paul at its meeting held on May 6, 1946, requested that I obtain an opinion from your department relative to certain provisions of the statutes relating to the submission of amendments to home rule charters.

"Attention is called to Section 1286 of Mason's Minnesota Statutes, Vol. 3, which carries the 1939 amendment to the act.

"Certain committees in the City of St. Paul are about to circulate petitions whereby certain charter amendments are to be proposed by the petition of at least 5% of the voters in the city. There are five such amendments, all being individual amendments to be voted upon separately, and none of the said amendments contains more than 1,000 words."

**Question 1**

"In the event an amendment contains less than 1,000 words, is it necessary that the entire text of the amendment be attached to the circulated petitions?"

**Opinion**

Yes.

**Question 2**

"Is it proper in such a case to also have attached to the petition a summary of such charter amendment?"

**Opinion**

No.

**Question 3**

"Is it necessary that the Charter Commission pass on a summary prior to the circulation of the petition in the event the amendment contains less than 1,000 words?"

**Opinion**

No. See answer to question 2.

**Question 4**

"Is it necessary that the Charter Commission pass on the form of the petition which is being circulated?"

**Opinion**

No.

**Question 5**

"Is it necessary that the Charter Commission pass upon the form of the proposed amendment?"

**Opinion**

When a summary is attached to a petition, it is then necessary that the commission approve the amendment as to form and substance.

**Question 6**

"In the event such amendments might be consolidated, whereby the total amendment would contain more than 1,000 words, in which case a summary of such amendment would necessarily have to be presented to the Charter Commission for approval, would such approval not only be of the form, but also an approval of the substance of the amendment itself? In other words, could the Charter Commission pass upon the substance without passing upon the merits of an amendment? Does not the statute merely require that the Charter Commission in such a case determine whether or not the summary fairly discloses the effect of the proposed amendment?"

**Opinion**

If the commission could pass upon the merits of an amendment, it could in effect veto the amendment. The statute simply requires that the Charter Commission determine whether or not the summary fairly discloses the effect of the proposed amendment.

You have orally submitted another question as follows:

**Question 7**

May all five questions be contained on one petition, but stated separately thereon?

**Opinion**

I think the answer to this question is yes, but of course in balloting the questions must be submitted so that the voters may express an opinion on each question separately.

This opinion is based upon the provisions of the statute found in Mason's Supplement 1940, Section 1286.

RALPH A. STONE,
Assistant Attorney General.

St. Paul Charter Commission.

May 7, 1946. 58-C

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## 85

**Member — Qualified if he owns freehold estate anywhere in the state — Member must have been for five years last past a qualified voter of the city**—MS1941, § 410.05 (MMS1927, § 1269).

**Question**

Must the freehold estate owned by a member of the Board of Freeholders appointed pursuant to Minnesota Statutes 1941, Section 410.05 (Mason's

Minnesota Statutes of 1927, Section 1269) to frame a new city charter be located within the city?

**Opinion**

The statute reads that the judges may appoint a Board of Freeholders. The statute does not say that the freehold estate of the member must be located within the city. A person is eligible if he holds a freehold estate within the state.

**Question**

Whether a person is eligible for appointment on such Board of Freeholders when he has not been a qualified voter of the city for five years preceding his appointment.

**Opinion**

The statute provides that "they (the judges) may appoint a board of freeholders to frame such charter, composed of 15 members, each of whom shall have been a qualified voter of such city or village for five years last past." You state that one appointee has not at the time of his appointment been a qualified voter of the city for five years last past. Such a person is not eligible to serve on the board. The statutes answer your question.

RALPH A. STONE,
Assistant Attorney General.

Moorhead City Attorney.

May 1, 1945. 58-G

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CIVIL SERVICE

## 86

**Firemen—Commission has jurisdiction over members of volunteer fire department who are paid for service at fires.**

**Facts**

"Brainerd has a paid fire department consisting of the chief and several drivers who are full time employees and who are under the regular civil service set-up. In addition to this, we have a large volunteer department. This volunteer department has been in existence for many years and has developed rules and regulations for its own management. The members respond to fire alarms and are paid by the City at so much for each fire attended. This volunteer department has never been classified as one of the groups of employees by the local civil service commission.

"The problem comes about by a dispute that has arisen between the local chief and one of the volunteer department members. The chief

has refused to allow this man to attend fires but his right to do this has been contested by the volunteer organization who claim the chief has no authority to dictate to members of the volunteer department. They admit that the chief has authority to direct the work at fires but that he can go no further and cannot decide who shall and who shall not be members of the volunteer group. The volunteer organization has a regular established procedure whereby prospective members have to serve two years on an approval basis, and at the end of that time the volunteer organization decides whether or not they can become regular members of the volunteer department."

**Question**

"Whether or not this volunteer department is under the jurisdiction of the civil service commission."

**Opinion**

Mason's Supplement 1944, Section 1933-29, Laws 1941, Chapter 434, Section 1, reads as follows:

"The commission shall have absolute control and supervision over the employment, promotion, discharge and suspension of all officers and employes of the fire department of such city or village and these powers shall extend to and include the chief and assistant chief of such, and all inspectors, fire wardens, electricians, engineers, auto mechanics, clerks and other persons engaged in the fire prevention and protection service in said city or village.

"The commission shall immediately after its appointment and organization grade and classify all of said employes of the fire department of said city or village and a service register shall be prepared for the purpose, in which shall be entered, in their classes, the names, ages, compensation, period of past employment and such other facts and data with reference to each employe as the commission may deem useful.

"The commission shall keep a second register to be known as the application register in which shall be entered the names and addresses in the order of the date of application of all applicants for examination and the offices, or employments they seek. All applications shall be upon forms prescribed by the commission and shall contain such data and information as the commission shall deem necessary and useful."

The law as originally enacted contained the word "exclusively" after the words "other persons" and before the word "engaged" in the first paragraph of the law. On December 30, 1938, when the law contained the word "exclusively" this department gave an opinion to the city attorney of International Falls to the effect that the civil service law, as it then stood, extended only to persons exclusively engaged in the fire prevention and protection service in the city. It is presumptive that the legislature had this

opinion in mind when in 1941 it amended the law by dropping out the word "exclusively."

It must be presumed that the legislature intended to make some change in the law by dropping that word. The only change which they could have intended by dropping that word, so far as I can foresee, was to make the civil service law applicable to employes who were paid only for their services during fires. I think that was the intention of the 1941 amendment. Therefore, your question is answered in the affirmative. The civil service commission has "absolute control and supervision over the employment, promotion, discharge and suspension" of all members of the volunteer fire department who are to be paid for their services at fires.

RALPH A. STONE,
Assistant Attorney General.

Brainerd City Attorney.

June 4, 1945. 688-B

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## 87

**Firemen—Examinations of applicants for employment by fire department may be conducted by the commission or persons appointed by it unless council otherwise orders**—MS1941, C 420, L 1945, C 197.

**Facts**

"I call your attention to Chapter 197 of the Session Laws of Minnesota of 1945 which provides as follows:

" 'Section 1. Minnesota Statutes 1941, Section 420.10, is amended to read as follows: All examinations shall be impartial, fair and practical and designed only to test the relative qualifications and fitness of applicants to discharge the duties of the particular employment which they seek to fill. No question in any examination shall relate to the political or religious convictions or affiliations of the applicant. All applicants for positions of trust and responsibility shall be specially examined as to moral character, sobriety and integrity, and all applicants for positions requiring special experience, skill or faithfulness shall be specially examined in respect to those qualities. It shall be the duty of the chief of the fire department and of every employee to act as an examiner or assistant examiner, at the request of the commission, without special compensation therefor. Examinations shall be conducted and examination papers scored by some experienced and competent person who is not a resident of the city or village where the examinations are being held, when by resolution or motion it is so ordered by the council of such city or village.'

"Previous to the above amendment, Section 420.10 also included the words that 'the members of the commission collectively or individually

may act as examiners or assistant examiners.' These words were omitted by Chapter 197.

"It has been the practice of the local commission to act as examiners in conducting examinations for the fire department."

**Questions**

"What effect will the omission of the words mentioned have with regard to the powers of a commission to continue to act as examiners? Are these powers curtailed entirely or does Chapter 197 merely limit the power of the commission to act as examiners in those cases other than when the city council, by resolution or motion, orders outside examiners?"

**Opinion**

1. Minnesota Statutes 1941, Section 420.06, gives the firemen's civil service commission absolute control and supervision over the employment of firemen.

This power to control the employment of firemen is not taken away by the 1945 act and includes the power to give examinations.

2. Minnesota Statutes 1941, Section 420.07, confers upon the commission power to make rules providing for examinations to test the qualifications of applicants. The powers conferred by this section are not retracted by the 1945 law. Power to make rules governing the examinations includes power not only to provide for the preparation of the questions by the commission but also the correction of the papers by the commission; and as to oral examinations, it includes power to provide by rule that oral examinations shall be conducted by the commission or other person whom it is authorized to call upon, absent any action by the council.

3. Minnesota Statutes 1941, Section 420.09, refers to "its" examination. The antecedent of the pronoun "its" is the "commission." Therefore the examinations are the examinations of the commission. If the examinations are "its examinations," it has power to originate, conduct and control the examinations.

I hold that it is only where the municipal council has so ordered pursuant to the 1945 law that the examinations must be conducted and scored by some disinterested non-resident.

On the other hand, the commission can, if it sees fit, appoint disinterested non-resident persons to conduct examinations, and may so provide by its rules.

RALPH A. STONE,
Assistant Attorney General.

Eveleth City Attorney.

June 1, 1945. 688-B

# 88

**Police—Civil Service Commission—Laws 1943, Chap. 381, applying only to City of Virginia, is unconstitutional.**

### Facts

The city of Virginia is the only city of the third class in this state having an assessed valuation in excess of $15,000,000.

### Question

As to the constitutionality of Laws 1943, Chapter 381, which applies only to third class cities with the valuation aforesaid.

### Opinion

Heretofore you raised some question as to the validity of this 1943 law by reason of an asserted irregularity in the passage of the law by the legislature. It is my understanding that that question has been disposed of. You are concerned now with the question of the constitutionality of the 1943 law inasmuch as it applied only to one city at the time of its adoption, that is to say, at the time of the passage of Laws 1943, Chapter 381, the city of Virginia was the only city of the third class which had $15,000,000 assessed valuation. It still is.

It is not necessarily fatal to the validity of the law that at the time of its passage there was only one member of the class to which it applied. But the distinguishing features of the classification must have some other reason behind it; the characteristics setting apart the classification from other cities must be germane to the subject of the legislation.

It occurs to me that there is very little, if any, reason for saying that a third class city with a $15,000,000 valuation may have a police civil service commission of a certain kind when a like privilege or power is denied to a third class city with a $14,000,000 valuation. But there are other indications that this law was passed with reference to Virginia only and was intended to apply to that city alone without regard to the class.

We have in this state a police civil service law which may become operative in any city of any class (except a first-class city) following the adoption of a favorable resolution by the council. I refer to Minnesota Statutes 1941, Chapter 419. The provisions of this chapter, which is of general application, are precisely the same as those of Laws 1943, Chapter 381, with one exception as you will note.

Minnesota Statutes 1941, Section 419.01, reads the same as Laws 1943, Chapter 381, Section 2.

Minnesota Statutes 1941, Section 419.02, is different from Laws 1943, Chapter 381, Section 3. This difference will be commented on later, and is

the only difference of any importance in the wording of the general law and the wording of the 1943 law.

Minnesota Statutes 1941, Section 419.03, reads the same as Laws 1943, Chapter 381, Section 4; and continuing on through Minnesota Statutes 1941, Chapter 419, each succeeding section finds its counterpart, word for word, in the 1943 law. There is no difference in the language or phraseology (except, however, a difference in the number of voters required to sign the petition for the discontinuance of the civil service commission).

The distinction first above mentioned is between Minnesota Statutes 1941, Section 419.02 and Laws 1943, Chapter 381, Section 3. In the Minnesota Statutes of general application, this section provides for the membership of the commission and the appointment thereof and the terms of service of the commissioners and the filling of vacancies. These are requisites necessary to make the law workable and complete.

But in place of this section in the 1943 law, I find Section 3 thereof, which provides simply that in any city having a police and fire commission of three members, such police and fire commission shall constitute the police civil service commission. Virginia has such a police and fire commission of three members in charge of the police department under its charter.

The 1943 law would be entirely unworkable, incomplete and invalid unless it applied to a city (as Virginia) containing a police and fire commission, as otherwise there would be no provision in the law for the appointment of the commission. In this respect the 1943 law is invalid, because unless the third-class city happened to have such a commission, the law would be unworkable and incomplete.

If there were any third-class cities with the necessary valuation without a police and fire commission of three members, the 1943 law would be totally worthless and unworkable because it contains no provision for the appointment of the commissioners, who is to appoint them, their number, their tenure of office or the filling of vacancies.

Hence it is that Laws 1943, Chapter 381, could only apply and be of avail in a city of the third class containing an assessed valuation of $15,000,000, and also having a three member police and fire commission.

This indicates quite clearly that the law was intended by the legislature to apply only to the city of Virginia which has such a three member police and fire commission controlling the police department. It is so apparent that the 1943 law was intended for Virginia and Virginia alone, and because the apparent reason for its adoption was to make the police and fire commission of the city of Virginia the police civil service commission of that city (and that is the only advantage or distinction which the 1943 law gives to the city of Virginia over other cities), I hold the 1943 law to be invalid.

The assessed valuation of $15,000,000 is no factor in determining whether a city of the third class should have a police civil service commis-

sion selected by the council or one composed of the three members of a police and fire commission.

Although I hold the 1943 law to be unconstitutional, this does not deprive the city of Virginia of any substantial benefits which might have been available to it under the 1943 law.

As stated, all of the provisions of the 1943 law are contained in the general law applicable to all except first-class cities. The city of Virginia may take advantage of this general law and have a commission with exactly the same powers and prerogatives as one appointed under the 1943 law, the only difference being that the members of the police and fire commission may not be members of the police civil service commission.

Under the general law applying to all except first-class cities, the members of the police civil service commission could not hold any other office while serving on the commission. Minnesota Statutes 1941, Section 419.02. Under the law passed for the city of Virginia in 1943, the members of the civil service commission would also hold the office of members of the police and fire commission operating the police department.

A civil service commission should not be dominated by the same officers who are to make the appointments. For that reason I doubt if the advantage which the city might imagine to result from having the police and fire commission act also as the police civil service commission would be in fact a real advantage.

However that may be, Laws 1943, Chapter 381 was beyond question adopted solely for the city of Virginia to enable it to have a civil service commission composed of the three members of the police and fire commission.

I will summarize and condense my reason for holding Laws 1943, Chapter 381, invalid and unconstitutional:

1. It is invalid because it is incomplete in that it contains no provisions for the appointment of a police civil service commission, the number of commissioners, their term of office, or as to who is to appoint them, except in a third class city which contains a three man police and fire commission in charge of the police department—in which event such police and fire commission is to be the police civil service commission.

2. The only effect of the 1943 law upon third class cities, was to enact that the city of Virginia should have a police civil service commission consisting of the three members of the Virginia Police and Fire Commission, whereas under the general law (which is the same in every other particular as the 1943 law) other third class cities must have an independent police civil service commission appointed by the council and the members of which do not hold any other office. The fact that a third class city has an assessed valuation in excess of $15,000,000 is no reason whatever for enacting a law that such a city may have a civil service commission of different composition than the ordinary third class city. Under both the general law and

the 1943 law, all civil service commissioners serve without pay. The classification is arbitrary. The law is special legislation and is for that reason unconstitutional.

It is my conclusion that Virginia may have a police civil service commission under the general law with all the powers, duties and prerogatives which are set out in the 1943 law, but that it may not have the three members of the police and fire commission act as members of the civil service commission as provided in the 1943 law, because that law is invalid.

This opinion applies only in the city of Virginia.

RALPH A. STONE,
Assistant Attorney General.

Virginia City Attorney.

November 14, 1945. 785-E-3

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## 89

**Police — Resignation — Acceptance — Withdrawal of resignation** — MS1945, C 419.

**Facts**

The city charter provides for a police department to consist of a chief of police and such patrolmen as from time to time may be authorized by the council; the Police Civil Service Commission Act, Minnesota Statutes 1945, Chapter 419, has been adopted by the City of Alexandria; under the provisions of that act certain policemen, including the chief then in office, are under the act; on August 5, 1946, the chief of police and the three patrolmen qualified under civil service delivered to the city council and the mayor resignations, which read that they are to become effective August 15, 1946. At the meeting of August 5, 1946, the city council deferred action on the resignations, or tabled them, until the next meeting of the council to be held on August 12, 1946, and at the meeting of August 5, 1946, a letter signed by the chief and the three patrolmen requesting permission to withdraw their resignations was submitted. The civil service commission has not promulgated any rules or regulations but is operating under the statutory provisions.

**Questions**

"1. Were the resignations tendered on August 5th, 1946, effective without further (or any) action by the City Council, and did such written resignations actually terminate the civil service status of the employees?

"2. If the resignations required further action by the City Council in either accepting or rejecting the resignations, or accepting some and rejecting others, could the city council accept one or more resignations

of the patrolmen, and reject one or more, or must they by reason of the form of resignation being joint, accept or reject all?

"3. If the resignations required further action by the city council, in accepting or rejecting, was that duty taken from them by the form of withdrawal request made by all members who had previously tendered their resignation?

"4. If the resignations are accepted, could these same men be certified as eligible for appointment without the necessity of a new examination? (This same question might arise if the resignations were effective without additional action by the city council.)"

**Opinion**

The question as to whether or not the resignation of a public officer or employee becomes effective upon its submission without the necessity of acceptance is one upon which there is a considerable division of authority. I call your attention to an opinion to the Village Attorney of Buhl, Attorney General's 1932 Report, No. 25, in which the principal authorities are reviewed. You will note, however, that the cases holding that an acceptance is not necessary in practically every instance have dealt with resignations becoming effective immediately.

The Supreme Court of this state in State ex rel. Weber v. Williams, 180 Minn. 157, passed upon the question of a resignation effective immediately, under the charter of the City of Minneapolis. The rules of the civil service commission of Minneapolis provided for a report in writing of the written resignation of any officer or employee in the classified service to the commission. They further provided that the commission might permit withdrawal of the resignation at any time within ten days after the filing of the same and that an officer or employee who had been permitted to withdraw his resignation should be reinstated to his former position unless it had been filled in the meantime by a permanent appointment, in which case his name should be placed on the lay-off eligible register for reemployment.

The secretary of the fire department had executed a resignation in duplicate to take effect at once. The duplicate copies were delivered to the chief of the fire department on December 16 and one of the copies filed with the civil service commission on the same day. On the next day the employee died. On the day following his death, the acting secretary of the fire department procured from the office of the civil service commission the duplicate resignation which had been filed with it and placed it in his own desk. A mandamus proceeding was instituted by the widow of the employee to compel the Minneapolis Fire Department Relief Association to award her a pension, claiming that no effect could be given to the resignation for the reason that the civil service commission had made no record of it and that it had been withdrawn. The court said:

"It had been demanded by the chief of the fire department. It had been executed and delivered and by its terms took effect at once. One

duplicate had been deposited in the office of the fire department and the other in the office of the civil service commission. Nothing more was required for it to become effective. 5 Dunnell, Minn. Dig. (2 ed.) § 7989; annotation, 16 L. R. A. (N. S.) 1058."

The court further held that the employee had made no request to withdraw his resignation and no one else had a right to make such request; further that his death terminated the right to request the withdrawal.

It would seem from this decision that our Supreme Court has followed the rule in those courts which hold that where an unconditional resignation to take immediate effect has been transmitted to the power authorized to accept it it may not be withdrawn (43 Am. Jur. Public Officers, § 170, and cases under notes 10, 11 and 12; Note 16 L. R. A. (N. S.) pp. 1059-1060) and apparently would follow those courts which hold that an acceptance is not necessary to make such resignation effective (see annotation, 95 A. L. R., p. 218), although the weight of authority is to the contrary (id. p. 216; 43 Am. Jur. Public Officers, § 167, p. 23, especially Curtright v. Ind. School Dist., 111 Ia. 220, 82 N. W. 444; Le Masters v. Board of Education (W. Va.), 141 S. E. 515). It may be that a proper construction of the decision is that it was based upon the Minneapolis charter provision referred to. In the present instance, however, the resignations were not made effective immediately and the settled rule appears to be that a conditional or prospective resignation may be withdrawn at any time before acceptance (Note 16 L. R. A. (N. S.) pp. 1060-1061) and see leading case Biddle v. Willard, 10 Ind. 62, cited in State ex rel. Ryan v. Murphy (Nev.), 97 Pac. 391, 18 L. R. A. (N. S.) 1210-1214.

Our Supreme Court has held consistently that a resignation of a public office is not complete and operative unless there be an intention to relinquish a part of the term, accompanied by the act of relinquishment, and that intent to relinquish the office or employment, together with the act of relinquishment, constitutes the resignation. 5 Dunnell, Minn. Dig. (2 ed.) § 7989; State ex rel. Young v. Ladeen, 104 Minn. 252, 116 N. W. 486, 16 L. R. A. (N. S.) 1058; Hosford v. Board of Education, 201 Minn. 1, 3, 275 N. W. 81.

Assuming that the chief of police and the policemen involved have not yet relinquished their duties, I am of the opinion that their resignations have not yet become effective and that they had the right to withdraw them on August 12.

This answers your first and third questions and an answer to the second and fourth questions is not necessary.

With reference to your fourth question, while an answer is not necessary to this opinion, I would say that if the resignations of the officers had

become complete they would not be entitled to be certified as eligible for appointment without the necessity of a new examination.

WM. C. GREEN,
Assistant Attorney General.

Alexandria City Attorney.

August 14, 1946. 785-E-2

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FINANCES

## 90

**Appropriation—County Agriculture Society—Authority for appropriation by county board to county agricultural association in county. Fact that use of appropriation is limited—immaterial**—MS1945, § 375.18 (8).

### Facts

The county board of Kandiyohi County by a motion carried appropriated $1,000 to the county fair association to be used for the purpose of paying the expenses and fees of the 4-H Fair and School exhibits at the fairgrounds in October, 1946, instead of the usual appropriation of $1,000 to pay premiums at the county fair.

The fair association had prepared to hold its fair when it was prohibited from doing so in the interest of public health.

### Question

Does the law authorize the county board to make such appropriation?

### Opinion

M. S. 1945, Sec. 375.18 (8) empowers the county board to "appropriate to any county agricultural society of its county, which is a member of the state agricultural society, * * * a sum of money not exceeding $1,000 * * * annually; * * *." It would appear that this is authority to the county board to make the appropriation of $1,000. You will observe that the statute does not limit the purpose for which the appropriation may be used. If the use mentioned by the county board is one which the agricultural association considers an improper use of its money, I assume that the agricultural association will not spend the money for the purpose indicated. So far as the county board is concerned, since it has the power to appropriate $1,000 to the fair association without any limitation as to the purpose for which it shall be used, and if the board considers that this was a proper use, I can see no objection to the limitation imposed.

I consider that the appropriation is authorized by the law.

CHARLES E. HOUSTON,
Assistant Attorney General.

Kandiyohi County Attorney.

October 18, 1946. 772-E

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## 91

**Appropriation—County fair grounds—New buildings on may be erected and paid for from county funds.**

### Facts

"Hormel & Company of Austin, Minnesota, has made a donation to Mower County of $25,000.00 to be used by Mower County in construction of a stock barn on the Mower County Fair Grounds in the City of Austin, Minnesota. This donation was made about two years ago. Because of priority regulations it was impossible to build the barn heretofore. Mower County is now calling for bids to be submitted some time in January, 1946. The architects and the engineers estimate that the barn that is proposed to be built will cost considerably more than the $25,000.00 donation. The cost may exceed the donation by $15,000.00. Of course, we do not know exactly until the bids come in."

### Question

Whether the county may expend county money in addition to the money donated for the purpose of erecting a new stock barn on the county fair grounds?

### Opinion

Minnesota Statutes 1941, Section 375.18, Subdivision 9, authorizes the county board to erect buildings on the county fair grounds, using this language:

> " * * * to improve and erect structures thereon, for which purpose they may receive donations of money, materials, or labor; * * * ."

It seems quite clear that the power to erect new buildings on the county fair grounds carries with it the power to pay for the same with county money. If the county had to rely on donated money to construct fair ground buildings, it might be a long time before there would be buildings adequate for holding any fair.

I hold that even if no donations were received the county would have power to erect new buildings with county money. The clause authorizing the acceptance of donations does not mean that the cost of new buildings must be paid for entirely from donated money.

Minnesota Statutes 1941, Section 375.18, Subdivision 8, limits the annual appropriation which the county board may make to the county agricultural society. It also provides for the appropriation of county funds for the repair, upkeep, improvement, extensions and alterations of the fair grounds and buildings. But this section does not prohibit the erection of new buildings from funds supplied wholly or in part by the county.

RALPH A. STONE,
Assistant Attorney General.

Mower County Attorney.

December 21, 1945. 772-A-1

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## 92

**Appropriation—Recreational program—Village has authority to appropriate money for rental of building for recreational program** — MS1941, §§ 471.15, 471.16.

**Question**

As to the right of the village of Spring Valley to appropriate money for the rental and maintenance of a large building for recreation purposes.

**Opinion**

I call your attention to the provisions of Minnesota Statutes 1941, Sections 471.15 and 471.16, being Mason's Supplement 1940, Sections 1933-9a and 1933-9b. You will there find that the village is authorized to acquire, equip and maintain land, buildings and other recreational facilities and spend funds for the operation of a recreational program. This is very broad authority. Under the following section the village is authorized to cooperate with the school district or other municipality in the carrying out of a recreational program.

I do not pass upon the question whether the program contemplated is one upon which the village may spend public funds because I do not know the facts; but, conceding that the program is one contemplated by the statute, the village has the right to carry it out by the expenditure of money therefor. The law seems to indicate that the program should be "operated" by the municipality or municipalities which join in the project.

You will note that Minnesota Statutes 1941, Section 471.16, Mason's Supplement 1940, Section 1933-9b, provides that the village may delegate the operation of the program to a recreational board created by it and "may appropriate money voted for this purpose to such board." If the village council should create the present acting committee as a board to have charge of the recreational program, then the village could appropriate and pay over the money to such board.

I do not think it would be illegal for the village to appropriate the money voted by it for recreational program to a recreational board created by the village, even though the board received contributions and moneys from private sources; it would still be a village board under the control of the village.

I call your attention to the provisions of the law which permit a village and a school district to cooperate in the operation of a recreational program. It may be that the school district will desire to enter into the program also and cooperate with the village.

RALPH A. STONE,
Assistant Attorney General.

Spring Valley Village Attorney. 476-B-10

April 10, 1945.

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## 93

**Bond issue—Hospital—Home rule charters—Fixing debt limitations—Control over**—MS1945, C 475 to 477.

### Facts

The city of Worthington proposes to build a new city hospital and issue bonds for the payment thereof; the assessed valuation of the city is about $2,500,000, and the hospital would cost about $500,000, which amount the city would have to borrow; the city has no other bonded indebtedness of any nature to be considered in the limits of its indebtedness. Section 90, Chapter 5 of the city charter, as amended, provides that the bonded debt shall not exceed 10% of the assessed valuation.

### Question

"What is the highest amount of bonds that the city may issue for this purpose?"

### Opinion

Minnesota Statutes 1945, Section 475.02, relating to public indebtedness, provides as follows:

> "Nothing in chapters 475 to 477 is to be construed as abrogating any restriction imposed or as modifying or extending any power conferred upon a city, village, or borough by any provisions of its charter relating to corporate indebtedness. Except as so limited, all municipal corporations shall be governed in respect thereto by the provisions of chapters 475 to 477."

Your city charter containing a debt limitation of 10%, we believe that such charter provision would be controlling on the question of the limitation of indebtedness of your city.

You further state that if it is impossible to issue bonds to the required extent you would appreciate any suggestions relative to otherwise financing this project.

The only other method that occurs to us in view of the charter limitations would be to finance the cost of the construction of the hospital out of the earnings. In the event that bonds were issued which provided that the same should be paid out of the earnings from the hospital, such bonds would not be considered as a general obligation of the city, and consequently the debt limitation contained in the charter would not be controlling. See Williams v. Village of Kenyon, 187 Minn. 161, 244 N. W. 558.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Worthington City Attorney.

December 17, 1946. 36-C

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## 94

**Bond issue—Limitations—Cities of the fourth class operating under a home rule charter—Bond issues which are general obligations to be paid by tax levies and those to be paid out of earnings of municipal enterprises — Charter provisions construed relating to bond issues — Question of issuance of bond must be first submitted to voters — Sewage disposal plant—Heating system—Electric distribution system.**

### Question

"1. May the City of International Falls legally issue its Revenue Bonds for construction of a Sewage Disposal Plant, an electric distribution system, municipal heating system, or other utility having a source of income? If so, must the question first be submitted to the voters?"

### Opinion

You use the term "Revenue Bonds" for the purpose, we assume, of distinguishing between bonds that are general obligations of the city to be paid out of the proceeds of taxes levied upon the taxable property within the city, and bonds (revenue) which are to be paid out of the earnings from a particular municipal enterprise or utility, such bonds (revenue) having been issued for the express purpose of providing funds for the construction, improvement, or extension of such enterprise or utility.

Your charter, section 17, page 29, provides in substance that the city council shall have power to borrow money on its credit for city purposes, and to issue bonds therefor as provided in the charter. Section 12 provides:

"Any ordinance authorizing the issuance of any bonds of the City shall require the affirmative vote of a majority of all the members of the City Council.

"Provided, however, that before such bonds shall be issued the question shall be submitted for ratification to the electors of the City at the next regular City election, or at a special election called for that purpose, the form of ballot to be used at which shall be prescribed by the City Council. * * * "

The specific purpose for which bonds may be issued is set forth in section 17. In addition to these charter provisions statutes relating to certain municipal improvements, such as sewer, water and lights, contain specific provisions authorizing municipalities to issue bonds for the purposes stated in such statutes even though the charter is silent in respect thereto. In those instances the specific statutory provisions should be controlling.

Our court has held that a city may issue its bonds under a particular statute even though the charter contains no specific provision for such authority. **Oakman v. City of Eveleth,** 153 Minn. 117.

Returning to the specific purposes for which your city may issue bonds as stated in your first question, you are advised that bonds may be issued for the construction of a sewage disposal plant. Minnesota Statutes 1945, Sections 443.02 to 443.07 inclusive.

Your city may also issue bonds for the purpose of "purchasing, constructing, regulating, maintaining, extending, enlarging or improving water and light plants." Section 17, page 29, City Charter.

We do not find any specific grant in your charter authorizing your city to own or operate a municipal heating system, and in the absence of such grant in your charter we believe that before the city may be authorized to embark upon the enterprise of a municipal heating system your charter should be amended so as to give such authority to your city.

You further inquire relative to "other utility having a source of income." This portion of your question covers a rather wide field. Any answer thereto would of necessity be vague and general. As bearing upon the issuance and payment of bonds by a municipality where the same are to be retired out of the income of the enterprise for the payment of which such bonds were issued, we direct to your attention the case of **Williams v. Village of Kenyon,** 187 Minn. 161.

Your charter contains a specific provision, section 12, page 27, which requires the question of the issuance of bonds by your city to be first submitted to the electors for approval, and in our opinion this charter provision is controlling upon that question unless the statute permitting your city to issue bonds contains language which clearly indicates that bonds may be issued under such statute without first submitting the question to the electors.

**Question**

"2. In the event such revenue bonds are issued, are they to be considered a part of the general indebtedness of the city so as to come within the 10% maximum bonded debt limitation under the charter or the statutes?"

**Opinion**

You will find the answer to this question in **William v. Village of Kenyon**, supra, and section 17 of your charter.

**Question**

"3. Does section 443.02, Statutes 1945, remove all limitation as to amount of bonds to be issued, irrespective of charter and statute limitation provisions? Does any other section restrict such removal of limitation?"

**Opinion**

The last paragraph of Section 443.02 provides:

"The bonds authorized by sections 443.02 to 443.07 or any portion thereof, may be issued and sold by any such village or city, notwithstanding any limitations contained in the charter of the city or in any law of the state prescribing or fixing any limit upon the bonded indebtedness of the city or village."

The language of this section seems clear and renders further comment unnecessary.

**Question**

"4. Would bonds issued under 443.02 be considered within the 10% maximum limitation of the charter and statute in event of a subsequent attempt to issue bonds for a Municipal Hospital or other public improvement?"

**Opinion**

If the bonds to be issued for a municipal hospital or other public improvement are general obligations of the city to be retired out of taxes levied and collected then we answer this question in the affirmative. On the other hand, if such bonds are to be retired out of the earnings from such hospital or other improvement, then what our court stated in **Williams v. Kenyon**, supra, supplies the answer.

**Question**

"5. I find no specific authorization in our charter for the city to build a hospital. Would such authority as given in the general welfare clauses in the charter, or in any statute, be sufficient?"

**Opinion**

You will find the answer to this question in Minnesota Statutes 1945, Sections 447.05 to 447.08, inclusive.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

International Falls City Attorney.

December 12, 1946. 59-A-7

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## 95

**Bond issue—Roads—Not authorized where road improvement is not of a permanent nature or does not constitute the laying out of a new road—** MS1945, § 163.04 and § 475.23.

**Facts**

The town board of the town of Glasgow is considering the matter of a bond issue to obtain funds for road purposes; it is their intention to use the proceeds from the bond issue for the purpose of improving existing roads. The proposed road improvements do not include the laying out or construction of any new road, but include grading and sloping in making a so-called "snow road," and in such proposed improvement the existing road bed will be of very little value.

**Question**

Whether bonds may be issued for the purpose of making the road improvements mentioned under Minn. Stat. 1945, Sec. 163.04, or under Sec. 475.14.

**Opinion**

Upon the basis of the information submitted we do not believe that the contemplated improvements constitute permanent improvements as used in Sec. 163.04 supra, and for which the issuance of bonds is thereby authorized. While it is not clear to us as to what you mean by the term "snow road," and the particular changes that will have to be made so as to convert the existing road into a "snow road," we believe that such a change is not one of the road improvements mentioned in said Sec. 163.04, and for which a bond issue is authorized.

Referring to Sec. 475.14, it seems clear to us that the proposed improvements do not come within the language of that statute. Subsection 3 of this statute provides:

> "In the case of towns, for the erection and furnishing of a town hall, and for the laying out and opening of town roads, and the building of bridges thereon."

Obviously improving an existing road bed does not constitute "laying out and opening of town roads," and for that reason this statute would not be applicable.

We would suggest that you examine Laws 1905, Chapter 64, as amended by Laws 1907, Chapter 63, and perhaps this statute might meet the requirements of the town board. This law is still in effect except as the same is inconsistent with Minn. Stat. 1945, Sec. 475.23 to Sec. 475.32. I do not find that Chapter 64, supra, as amended by L. 1907, c. 63, has ever been repealed or superseded, and repeal by implication is not favored.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Glasgow Town Attorney.

September 16, 1946. 43-B-4

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## 96

**Bond issue—Road machinery—Towns—Purchase of for the building of new roads only**—L 1905, C 64.

### Facts

"Laws 1905, Chapt. 64, (G.S. 1913, Secs. 1960-1967), authorizes the issuance of bonds by townships 'to build roads and bridges in said town and for the purchase of material and apparatus therefor.' The quoted language and the title of the Act seem to tie the purchase of apparatus (road machinery) to construction of new roads and/or bridges."

### Question

"Are the provisions of Laws 1905, Chapt. 64, broad enough to authorize the issuance of bonds, by towns, for the purpose of purchasing road equipment or machinery for road maintenance only?"

### Opinion

It is axiomatic that the substantive provisions of a law cannot be broader than its title. The title of Laws 1905, Chapter 64, is—

"An act to authorize the issuing of bonds by organized towns for the purpose of building roads and bridges and purchase of material and apparatus therefor."

It is clear that apparatus may be purchased under its authority for use in building roads and bridges. It becomes necessary, then, to determine if the word "build" means maintenance or repair. An examination of the decisions reveals that a sharp line of demarcation is drawn between building

and maintaining or repairing. Build means new construction. Maintenance or repairs means to restore to a sound state or to mend. **State v. White,** 16 R. I. 591, 18 A. 179, **Attorney General ex rel. Gibson v. Board of Supervisors,** 141 Mich. 590, 104 N. W. 792, 794. The cases indicate that there may be situations where the improvement of an existing road is so great that it becomes in effect the building of a new road.

It is our conclusion, and we hold, that L. 1905, c. 64, does not authorize the issuance of bonds for the purpose of purchasing road equipment or machinery for road maintenance only.

In order that there may be no misunderstanding, we wish to make it clear that this opinion does not limit the right of the town board to purchase any necessary road tools, including such machinery as graders, tractors or trucks, provided, first, that such apparatus is paid for out of the road and bridge fund, and, second, that the road and bridge fund, together with the moneys that will come into such fund from taxes already levied, is sufficient to pay in full for such apparatus, nor does it limit the right of the board to use any apparatus paid for by the proceeds of bonds for maintenance and repair work when it is no longer needed for the building of the road for which the bonds were issued.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Hennepin County Attorney.

April 24, 1946. 43-B-4

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## 97

**Certificates of indebtedness: City of Austin may not, under particular circumstances stated in opinion, issue certificates of indebtedness payable out of taxes to finance purchase of portable houses to be leased to veterans—May issue certificates payable entirely out of rentals to be received from houses—Purchase price of all houses cannot exceed $5,000.00 without vote.**

**Facts**

Attention is called to the recent opinion of this office that the City of Austin may purchase portable houses from the government to be used in the present emergency to house returning veterans. The budget for the city has been passed, and no provision was made for these portable houses. The fiscal year closes April 1, 1946. The local post of the American Legion wants to advance $100,000 to the city to be used for the purpose of purchasing these houses, and the suggestion has been made that the city issue its certificates of indebtedness and that these be issued to the American Legion, which is incorporated.

Section 15 of Chapter V of the charter provides as follows:

"Sec. 15. The common council may, during any fiscal year, by vote of two-thirds of all the members elected, the 'yeas' and 'nays' being taken and entered upon the journal, issue certificates or other evidences of indebtedness of said city, bearing interest at a rate not exceeding six (6) per cent per annum, and for a time not exceeding the then fiscal year, in such amount and under such regulations as the common council may prescribe, in anticipation of the taxes and revenues of such year. Provided, that the amount of such certificates or other evidences of indebtedness shall not at any time exceed one-third of such taxes and revenues. And provided further that the proceeds of such certificates or other evidences of indebtedness shall be applied to the same purpose as the taxes and revenues in anticipation whereof they may have been issued.

"Provided further, that when the taxes are collected a sufficient amount shall be immediately set aside and used to pay the temporary loans and interest thereon."

These houses when purchased would be rented for approximately $30 to $35 per month. It is proposed that the city would use the money loaned to it for purchasing these houses, installing them, and connecting them up to sewer. It is estimated that 100 houses at $30 per month would produce $3,000 a month.

The estimated revenue and taxes for the present fiscal year would probably equal $175,000.

**Questions**

(a) "Can the City of Austin lawfully issue its certificates of indebtedness for ⅓ of $175,000.00 at this time, and if so, when will said certificates have to be paid?

(b) "Can they do this without entering it in their budget and levying therefor, and does not the $5000.00 restriction prevent the City from levying in any amount for purchasing these portable houses in excess of $5000.00?

(c) "Can the City use income from rental of these houses to retire these certificates of indebtedness?"

**Opinion**
**(a)**

Assuming that your present budget indicates the purpose for which the revenues to be derived from taxes are to be used, I am of the opinion that certificates of indebtedness cannot be issued in anticipation of the $175,000 tax revenue which it is estimated will be received during the present fiscal year. If such certificates could lawfully be issued, clearly, under the terms of the charter provision, it would be necessary that they be paid by the end of the fiscal year.

(b)

The $5,000 restriction has *nothing to do* with the question of issuing certificates of indebtedness under either the circumstances referred to in (a) or those referred to in (c), **infra.** The $5,000 limitation relates to the acquisition of property without a vote of the people. As stated in the previous opinion, I am satisfied that the council may not, without a vote of the people, exceed an expenditure of $5,000 in all for the acquisition of these portable houses. I believe, however, that the words "price or value of property" include in them the original cost of the houses and the cost of transporting them to Austin and setting them up. Any improvements made later by way of sewer connections, etc., I believe, would be considered as improvements and not as a part of the acquisition cost.

(c)

On the authority of **Williams v. Village of Kenyon,** 187 Minn. 161, 244 N. W. 558, and prior opinions of this office (November 6, 1936, to City Attorney, Staples, Minnesota; February 18, 1937, to City Attorney, LeSueur, Minnesota; and January 6, 1939—No. 71, 1938 Reports—to City Attorney, Detroit Lakes, Minnesota), I am of the opinion that, if certificates of indebtedness were to be issued, payable entirely from receipts from rentals of these houses and clearly stating that they did not constitute any general obligation of the city, such certificates might properly be issued and that there would be no limit as to time of payment. In my opinion the provisions of Section 15, Chapter V, of the charter, would not apply to them. Neither need there be any limit as to the amount of such certificates which might be issued, keeping in mind that, in the expenditure of the funds, the provisions of Chapter V, Section 11, must be followed.

**Question**

Whether Section 11 of Chapter V applies only to real estate.

**Opinion**

At various places in the charter real and personal property are distinguished. In the last sentence of Section 11 the words "real estate" are used. I am of the opinion that since the first sentence of the section uses the words "such private property" the section applies to both real and personal property.

WM. C. GREEN,
Assistant Attorney General.

Austin City Attorney.

October 19, 1945. 59-A-51

## 98

**Funds—Investments—Must advertise for bids—In the city's own bonds—** MS1945, §§ 471.56, 475.30, 475.15.

### Facts

"The City of Granite Falls has approximately $90,000.00 in what we call our 'Public Improvement Revolving (or Reserve) Fund.'

"The City has recently, by an overwhelming vote, authorized the issuance of some $80,000.00 Municipal Bonds to be used to finance the construction of a new Municipal Hospital. And the City Council has passed an ordinance authorizing the sale of such bonds by the City in any manner permitted by the Laws of the State of Minnesota.

"The City Charter provision providing for the creation of the Public Utility Reserve fund provides, in part, 'The fund so created, or any part thereof, may be invested in any interest bearing securities available for the investment of sinking funds of Cities, under the laws of 1927, Chapter 131, Section 9, or acts amendatory thereof.'

"A large part of the Public Improvement Revolving (or Reserve) Fund is at present invested in United States Bonds and Treasury Certificates, being really surplus money which the City has no present need for, other than investment."

### Questions

"1. Can the City of Granite Falls use this money for the purpose of purchasing its own Municipal Hospital Bonds, under authority of Laws of 1927, Chapter 131, Section 9 (also found in Mason's Minnesota Statutes of 1927 sec. 1938-11) and under authority of Laws of 1943 Chapters 193 and 532?

"2. Assuming that the City can use the money to purchase its own bonds, would it be necessary for the City to call for bids on the bonds before purchasing them with the funds mentioned above?"

### Opinion

Your statement of facts leaves me in a state of uncertainty as to whether the $90,000 referred to is in the "public utility reserve fund" or is in the "permanent improvement revolving fund." I do not deem it important to determine which fund the money is in, because I consider that Laws 1943, Chapter 193, as amended by Laws 1943, Chapter 532, Minnesota Statutes 1945, Section 471.56, is sufficient authority to justify the investment of moneys in either fund in securities issued by the city of Granite Falls.

The section cited authorizes the investment of "municipal funds" in any obligation in which sinking funds are now authorized to be invested, pursuant to Minnesota Statutes 1945, Section 475.30.

Minnesota Statutes 1945, Section 475.30, authorizes the investment of sinking funds:

> "(3) In any bond certificate of indebtedness, warrant, order or interest-bearing obligation issued pursuant to law by such municipality * * * ; provided that no municipality shall invest any moneys in any sinking fund in its own warrants or orders which have no definite or fixed maturity."

Before selling the bonds to the city of Granite Falls, the city would first have to advertise, as required by Minnesota Statutes 1945, Section 475.15, Mason's Statutes 1927, Section 1943.

RALPH A. STONE,
Assistant Attorney General.

Granite Falls City Attorney.

October 3, 1946. 59-A-22

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## 99

**Funds—Right to borrow money in emergencies under city charter. Charter of City of Saint Paul, Section 206 — Teachers' salary — Teachers on strike.**

### Facts

"The teachers of the City of Saint Paul are on strike. There is enough money appropriated for teachers' salaries to pay them for 1946 in the amount specified in the present salary ordinance. As the schools are closed the children are unable to attend school. It has been suggested that an emergency exists thereby so that under Section 206 of the Charter the Council can declare an emergency and borrow sufficient money to re-employ the teachers and pay, beginning January 1, 1947, increased salaries to the teachers, amounting to approximately $1,800,000 for the year 1947. The budget for 1947 has already been adopted to the limit of the $30.00 per capita expenditure limitation and the tax levy therefor has been certified."

### Question

"Under these facts does an emergency exist as contemplated under Section 206 of the Charter so that the Council can borrow funds for such purpose?"

### Opinion

Section 200 of the charter of the City of Saint Paul makes it the duty of the comptroller not later than August 15th of each year to transmit to the city council detailed estimates in writing of the expenses of the city for the next succeeding fiscal year (which in the City of Saint Paul corresponds

with the calendar year) and of the revenue necessary to meet those expenses. In his report of budget estimates the comptroller is required to divide the estimates into 31 separate funds, No. 15 of which is "'A public school fund' to meet all school expenditures."

Section 201 of the charter provides that the total cost of the government, including schools, of the City of Saint Paul, in any one calendar or fiscal year, with the exception of the amount necessary to meet maturing bonds or levy certificates due, or similar obligations as they become due, shall not exceed $30.00 per capita for each inhabitant of the city, with certain provisions not material here.

Under sections 202 and 203 of the charter the council, upon receipt of the comptroller's report, is to cause it to be published once in the official paper of the city; ten days after that publication the council shall hold public hearings from day to day for not less than 20 days, at which all residents of the City of Saint Paul desiring to be heard may be heard in reference to any of said estimates or any item thereof; and, upon completion of the hearings, and not later than December 15th of each year, the council shall, by ordinance to be adopted by a four-sevenths vote of all members, fix the amount of expenditures in dollars that may be made by the several departments, bureaus, or activities of the city government of the City of Saint Paul during the next following fiscal year. In fixing the expenditures the council is to specify as to the expenditure from each of the funds and make appropriations in fullest practicable detail, designating the purpose of each expenditure as specifically as may be.

Section 205 provides in part as follows:

> "No department, bureau, activity, board or officer of said city shall have power or authority to expend any of the public moneys, or to incur any liability on behalf of the city in any fiscal year in excess of any fund or of any item of any fund as fixed by the council except as hereinafter provided. Violation of this section shall be deemed malfeasance in office on the part of the person or persons violating it, and shall make such person personally liable to the other contracting parties for the excess for which said person has attempted to bind said city. * * * "

Section 386 authorizes the commissioner of education, under the direction and control of the council, to appoint supervisors, principals, teachers, one or more medical inspectors and nurses, one or more truant officers, janitors, engineers, firemen, and such other employes as may be necessary for the proper conduct and maintenance of the schools and of the real and personal property of the district.

Section 387 makes it the duty of the commissioner of education to prepare in the form of an ordinance rules and regulations for the proper transaction of the business of the schools, defining the duties of its officers and employes, and fixing the number, titles, and compensation of said employes, and for the proper execution of all powers vested in and duties imposed upon the commissioner by the charter. As soon as he has prepared the ordinance

he shall present it to the council, and the council shall pass the ordinance after having amended it as it may see fit.

Section 389 provides for the appointment of a superintendent of schools by the commissioner, subject to the approval of the council; and section 390, that, on nomination by the superintendent, the commissioner shall appoint all assistants and office assistants to the superintendent, all principals and all teachers in the public schools. Provision is made for removal of these persons for cause, but it is stated to be the intent of the charter that, unless removed for cause, teachers and assistants once appointed shall serve during efficiency and good behavior. Teachers in the City of Saint Paul are subject to the Teachers Tenure Act.

Section 206, the section here in question, is as follows:

> "In the event of destruction of or injury to public buildings or structures, by fire, flood, tornadoes or other elemental causes, or of the invasion or threatened invasion of the city by epidemic or contagious diseases, **or of any other sudden and unexpected emergency** wherein the funds appropriated for any of the purposes above and in this chapter provided for become inadequate properly to protect the public interests, the council by unanimous vote of all members thereof shall have power to authorize the mayor and comptroller, to borrow temporarily and upon such terms as the council may prescribe, such sum or sums of money as the council may by unanimous vote of all the members determine to be necessary to meet such emergency, and to execute and deliver to the party or parties making such loan, such notes, bonds, or other evidences of indebtedness as the council may prescribe. The payment of such temporary loans shall be provided for either by issuing bonds therefor or by tax levy within one year from the date of such loan. All acts of the council under this section must be approved by the mayor and the comptroller by signing and countersigning the ordinance or ordinances, resolution or resolutions by which such action is taken, and if such ordinance or ordinances, resolution or resolutions are not so signed and countersigned, they shall be void and of no effect."[1]

We are informed that the budget for the fiscal year 1947 was adopted on September 26, 1946, and that a complete school code was adopted on October 16, 1946, by which some changes in the salary schedule previously adopted were made. We are further informed that the last prior complete ordinance relating to salaries was adopted September 23, 1943, and that there were some minor amendments between that date and October 16, 1946.

It was held by the Supreme Court of this state in **Doyle v. City of St. Paul et al.**, 204 Minn. 558, 284 N. W. 291, that the yearly salaries of the permanent teachers in the public schools of the City of Saint Paul for the calendar year may not be fixed in such amounts as to exceed the budget item appropriated therefor under the provisions of the city's charter; that all teaching in such schools must be under express contract fixed by ordi-

[1]All emphasis in this opinion supplied.

nance as to salary; and that, by whatever method the yearly salary is fixed, the charter provisions become a part of the agreement. In that case the budget for the year involved did not cover the salaries fixed by the salary ordinance, but it was held that the salaries fixed by any ordinance adopted are limited each year to the item budgeted for teachers' salaries for the succeeding calendar year and that there could not be any recovery on the theory of the quasi contract for the difference between the salaries provided by the ordinance and the amount which could be paid under the budget.

The word "emergency" has been variously defined, but all the definitions are essentially the same. We will give some of them:

> "An unforeseen combination of circumstances which calls for immediate action; also, less properly, exigency." **Webster's New International Dictionary,** 2nd Edition.
>
> "A sudden or unexpected occurrence or condition calling for immediate action." **Funk & Wagnalls New Standard Dictionary.**
>
> "An emergency is a condition of things appearing suddenly or unexpectedly; that is an unforeseen occurrence." **Words and Phrases,** Permanent Edition, Volume 14, p. 300.
>
> "By definition the term 'emergency' implies a sudden or unexpected necessity requiring speedy action." **Los Angeles Dredging Co. v. City of Long Beach,** 210 Cal. 348, 291 P. 839, 843, 71 A. L. R. 161.
>
> "An 'emergency' is equivalent to a public calamity resulting from fire, flood, or like disaster, or through some unusual occurrence not reasonably subject to anticipation by any provision." **Lyons v. City of Bayonne,** 101 N. J. L. 455, 130 A. 14.

In the case of **San Christina Inv. Co. v. San Francisco,** 167 Cal. 762, 141 P. 384, 52 L. R. A. (N. S.) 676, which involved an attempt to tax in excess of the levy limit provided by the charter of the City and County of San Francisco on the ground that the earthquake had created a great emergency, the court, after defining "emergency" as defined by Webster, said that, by the use of the adjective "great," the charter plainly meant a necessity or emergency of grave character and serious moment and in connection with the discussion of that matter said:

> "And, finally, it must be said that no argument of hardship or inconvenience will justify a court in setting at naught the written terms of a city's charter, even at the instance of the city's officials. As was said by this court in Connelly v. San Francisco, 164 Cal. 101, 127 Pac. 834: 'An inconvenience to the city does not justify the despoiling of its taxpayers'."

That was a taxpayer's suit brought to recover taxes paid under protest for the asserted invalidity and illegality of a tax levy, and the court noted that they were there dealing with the taxing power — "a power which, when exercised under delegated authority by a municipal corporation, is always

subject to rigid scrutiny, first, to determine whether the power actually exists; and, second, to determine whether it has been exercised under the limitations imposed."

This case was cited with approval in the later case of **Burr v. City and County of San Francisco,** .... Cal. ...., 199 P. 1034, 17 A. L. R. 581, in which it was held that the fact that the expenses of the city government had increased so that they could not be met by the imposition of taxes within the limit prescribed by the city charter did not create a great necessity or emergency within the meaning of a provision in the charter authorizing the city to exceed that limit in the case of such necessity or emergency.

Speaking of the results which would follow if municipal authorities were authorized to exceed the charter limits of taxation whenever the taxes raised within that limit did not equal the expenses of the city on the ground that a great emergency existed, the court said:

> "The charter may as well have provided that such taxes should not exceed the dollar limit, unless a higher rate was necessary to raise the money required to pay the regular annual expenses of the city. * * * The restriction to the dollar limit, which was intended to compel reasonable economy, would have no effect of that kind whatever. All that the supervisors need do to circumvent the provision would be to create a necessity by their own extravagance or by engaging in new municipal activities and enterprises, benevolent or otherwise, and the power to levy the increased rate would automatically follow."

In **DeAngelis v. Laino,** 252 N. Y. S. 871, a board of education had submitted a special estimate on the ground that a fire hazard in the schools constituted an emergency. It appeared that the fire hazard had existed for many years, but attention was focused on it by a report of a committee appointed to make a survey of the school system. The court, quoting from **Brooklyn City R. Co. v. Whalen,** 182 N. Y. S. 283, affirmed 229 N. Y. 570, 128 N. E. 215, said:

> "The word 'emergency' is defined as a sudden or unexpected occurrence or condition, calling for immediate action. This can hardly be applied to a permanent condition of inadequacy of service, and it is plainly to be seen that there is no emergency which justifies the continued operation of the stage lines."

In that case the City of New York had attempted to operate bus and stage lines on the ground that the service of the street railway lines was inadequate.

Continuing, the court in the **DeAngelis** case said:

> "The danger of fire hazard in the above schools has existed since the construction of the same. It is no worse now than it has been for many years past. The mere fact that the Strayer report focuses attention on it does not convert it into an emergency, at least, not as a matter of law."

Coming to the instant question, it should be noted that section 206 of the charter does not use the word "emergency" alone, as is the case in many statutes. The words are "any other sudden and unexpected emergency."

We understand that the situation which it is claimed would authorize the council to borrow money under the provisions of section 206 is that the salaries of the teachers in the public schools of Saint Paul are inadequate. It is a matter of common knowledge that this fact is conceded. However, this is not a "sudden" or "unexpected" situation, nor is it something unforeseen. That condition existed at the time the hearings were being held on the budget and on the date when the budget was adopted, to say nothing of the date of the adoption of the ordinance fixing the schedule of teachers' salaries, although that is immaterial since the Supreme Court has held that the amount paid for salaries cannot exceed the budget. Section 206, by its terms, applies only to situations arising after the adoption of the budget and the making of the appropriations. The provision is that, in the event of the calamities specified or other sudden and unexpected emergency "wherein the funds appropriated for any of the purposes above and in this chapter provided for **become** inadequate properly to protect the public interests, * * * ."

We must also keep in mind the well known rule of law that where words of a specific and limited meaning are followed by words of a generic or general meaning, the latter are to be construed as applicable only to things of a like nature to those designated by the former and that the word "other" in such condition is to be read "other such like." Applying this rule, we find that the specific words are "destruction of or injury to public buildings or structures, by fire, flood, tornadoes or other elemental causes, or of the invasion or threatened invasion of the city by epidemic or contagious diseases." In other words, the emergencies specified are calamities and matters which affect the public health or safety, and, applying the rule, an interpretation would be that the other sudden and unexpected emergencies referred to are those of that same general character.

If it be said that the strike has created an emergency, the answer is that no person can create an emergency for the purpose of benefiting himself. If the contrary view were to be taken, it would mean that any group of public employes could, after the full amount permitted by the charter had been appropriated, go on strike, argue that an emergency existed, and call upon the city council to nullify the limitations contained in the charter. If, as stated in the **Burr** case, the city council itself could not create such an emergency, certainly far less can a group of employes.

If the argument be made that an emergency exists so far as the public is concerned because a strike has been called and the schools closed, the answer is the same. The only way, according to the theory of those who hold that view, to remedy the situation is to meet the demands of those who have themselves attempted to create the so-called emergency and thus accomplish indirectly what cannot be accomplished directly.

This matter cannot be approached on the basis of sympathy. Even though the members of the city council might desire to remedy an injustice, which has existed, we must remember, for a considerable length of time, and take it upon themselves to declare a "sudden and unexpected emergency" despite the law, their action would be subject to review at the instance of any dissatisfied taxpayer, and they might find themselves, under the provisions of section 205, not only guilty of malfeasance in office, but personally liable to the teachers for the unauthorized increases they had agreed to pay.

It is our opinion that it cannot be said that a sudden and unexpected emergency has arisen since the approval of the budget and the making of appropriations for the year 1947 which would permit the City Council of the City of Saint Paul to borrow funds under section 206 of the charter.

We do not believe the situation here is comparable to that involved in the opinion of this office to the deputy commissioner of education dated November 8, 1937.

WM. C. GREEN,
Assistant Attorney General.

City of Saint Paul Corporation Counsel.

December 4, 1946. 59-A-22

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## 100

**Funds—Trust fund to maintain memorial park—Court order must be complied with.**

**Facts**

Pursuant to order of the Probate Court of Wabasha County, Minnesota, dated April 28, 1923, the City of Lake City received from the estate of Mary E. McCahill the sum of $2230, conditioned as follows:

> " * * * and said $2230 to constitute a trust fund and the same to be invested in securities which are legal investments for trust funds under the laws of the State of Minnesota, the principal thereof to be forever kept invested in such securities, and the interest and income thereof, as the same shall become due, to be collected and paid over to said City of Lake City, and by it to be applied and used solely towards the care and maintenance of said Louis McCahill Memorial Park."

However, instead of being invested in securities, in accordance with the order of the Probate Court, this sum, upon its receipt, was deposited by the city in its general revenue fund and has never been held apart as a separate fund. It is claimed that during the more than 20 years since the sum has been received by the city, it has spent at least as much as, if not more than, the original $2230 for the upkeep of the park.

The 1945 report of the Public Examiner recommends that the provisions of the court order be complied with and a separate trust fund be established.

**Question**

What should the City of Lake City do in this matter?

**Opinion**

The city has not complied with the terms of the trust in that it has failed to deposit this sum in a special trust fund and invest the principal thereof in authorized securities as directed by the court. The claim that the city has spent as much as or more than the original $2230 for the upkeep of the park during the past 20 years is no defense for its failure to comply with the court order. The city is duty bound to establish this fund and should do so as expeditiously as possible.

IRVING M. FRISCH,
Special Assistant Attorney General.

Lake City City Attorney.

February 28, 1946. 59-A-22

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HIGHWAYS

# 101

**Bridges—May not be lost by adverse possession subsequent to 1899.**

**Facts**

Springdale Township duly laid out and designated a certain township road, and for a distance of 150 or 200 feet the road as laid out, in order to obtain a more feasible place for a bridge, deviated from the section line upon which the road was designated and established; several years ago the road was straightened out so as to follow the section line, eliminating that part of the road which deviated from the section line, and the old bridge is not now being used and has not been used for the past 15 or 20 years; the town now desires to salvage the steel and other material in the old bridge, but the owner of the adjacent property claims that the bridge has become his by reason of adverse possession.

**Question**

Whether the old bridge has been lost by adverse possession.

**Opinion**

The question as to whether a road has been lost by adverse possession or abandonment is a question that can only be determined after all of the

material facts have been presented. Ordinarily that is a matter for the courts to pass upon.

However, title to a highway may not be acquired by adverse possession subsequent to the enactment of Laws 1899, c. 65. See Hastings v. Gillitt, 85 Minn. 331, 88 N. W. 987.

A bridge is a part of a highway. Minn. St. 1945, Section 160.01, Subdivision 6.

It does not appear from the facts stated in your letter that there was any adverse possession of the road or bridge in question prior to 1899, and if our assumption of the facts in that respect is correct then it would seem clear that the title to the bridge in question has not been lost by adverse possession.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Redwood County Attorney.

October 15, 1946. 50-B

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## 102

**Cartways—Towns—Right to hire an attorney to give legal advice to the board in the matter of the establishment of a cartway—Term "Cost and expense."**

**Questions**

What is included in the term "cost and expense," as used in Minnesota Statutes 1941, Section 163.15, Subd. 1, Mason's Supplement 1940, Section 2585?

Does this expense include the fees of an attorney for drawing the petition for a cartway, notices and order establishing the cartway and awarding damages?

**Opinion**

I think that the petitioners for the cartway should prepare their own petition, and that if an attorney is required for that purpose, the fees of the attorney for drawing the petition would be paid by the petitioners.

But as to drawing notices, conducting the proceedings, drawing up the minutes and the order establishing the cartway and awarding damages, the situation is different.

The town board may need legal advice in preparing these papers. They are of a somewhat technical nature and the need for the expert services of an attorney may very well be necessary. It should not be held that the town could not incur the expense necessary to the establishment of a valid

and legal cartway. If the services of an attorney in this connection are necessary, I think that the town board has the authority to incur such expense; attorney's fees would be just as necessary as the fees of a surveyor for surveying and describing the route of the road.

Of course the power to hire attorneys for the institution or defense of actions is vested in the town meeting. Minnesota Statutes 1941, Section 365.10, Subd. 3, Mason's Statutes 1927, Section 1002.

But there are many occasions on which the town board needs the services of an attorney other than in the institution and defense of actions. I think there is implied power in the board to hire an attorney in such case. Furthermore, I point to the statute which vests in the town supervisors the charge of all the affairs of the town not by law committed to other officers. Minnesota Statutes 1941, Section 366.01, Mason's Supplement 1944, Section 1049.

Therefore I would say that in a matter of establishing a cartway, the town board has the right to retain and pay an attorney for legal services necessarily required by the town board, whether the same be regarded as included in the quoted words "costs and expense" or whether the same be regarded as otherwise authorized. I think the town board has authority to secure legal advice where necessary and where litigation is involved.

There is another ground upon which the attorney who rendered the services might be compensated. The town has received the benefit of the services in question. Having received the benefit thereof, the town would be liable for their reasonable value. Attorney General's opinion dated June 22, 1935, file 434a-1.

In an opinion dated April 17, 1925, file 434a-1, a deputy attorney general held that "the town board, acting at a regular meeting, may employ an attorney to advise them as distinguished from conducting the defense." Also see L. R. A. 1917, D. p. 240.

RALPH A. STONE,
Assistant Attorney General.

Redwood County Attorney.

October 16, 1945. 434-A-1

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## 103

**Cartways—Towns—Taxpayer may petition county board for improvement of impassable cartway without first petitioning the town for the allocation of funds therefor**—MS1945, §§ 160.01, Subd. 5, 162.24 and 163.15, Subd. 3.

**Facts**

"A complaint is about to be filed with the County Board of Faribault County under the provisions of Section 162.24, Minnesota Statutes,

1945, wherein it is alleged that a certain two-rod cartway in the Town of Blue Earth City in said County, which was duly established many years ago, is neglected by the Town and that said Town refuses to maintain and keep in repair the said cartway.

"Section 163.18 defines town roads as including cartways which have been established under the authority of Town Boards. Section 163.15, Subdivision 3, provides that any Town Board may expend road or bridge funds upon a legally established cartway, the same as on town roads if, in the judgment of such Board, the public interests require it. It is further provided, however, that where a Town Board has refused to allocate funds for the upkeep of a cartway, then, upon the petition of ten taxpayers of the Town, the Town Board shall present for the approval of the voters at the annual Town Meeting such petition for allocation of funds, and at such Town Meeting the electors of the Town shall allow or refuse such petition."

**Question**

"Whether or not proceedings may be instituted for the maintenance and repair of a cartway under the provisions of Section 162.24 where no petition has been presented at the annual Town Meeting under the provisions of Subdivision 3 of Section 163.15."

**Opinion**

Laws 1921, Chapter 323, Section 1, Subd. 4, Minnesota Statutes 1945, Section 160.01, Subd. 5, provides that:

"The words 'town roads' shall be construed to include those roads and cartways which have heretofore been, or which, as provided by Chapters 160, 161, 162, 163, and 164, hereafter may be, established, constructed, or improved under the authority of the several town boards, and also all roads lying within the town established by user."

Laws 1921, Chapter 323, Section 67, as amended, now appearing as Minnesota Statutes 1945, Section 162.24, provides for presenting a complaint to the county board reciting that a town road is neglected by the town and that by reason of such neglect the road is impassable, and prescribes the procedure which is to follow the filing of the petition, and authorizes the county board to compel the making of the necessary repairs to make the road passable, and authorizes the county to do the work itself if the town fails to do so, and in such cases provides for the levy of a tax to pay the cost of making the road passable.

Laws 1921, Chapter 323, Section 45, as amended by Laws 1937, Chapter 208, Section 1, now appearing as Minnesota Statutes 1945, Section 163.15, Subd. 3, provides as follows:

"Any town board may expend road or bridge funds upon a legally established cartway the same as on town roads if, in the judgment of

such board, the public interests require it; provided, that where any town board has refused to allocate funds for the upkeep of a cartway, then, upon the petition of ten taxpayers of the town, the town board shall present for the approval of the voters, after due notice, at the annual town meeting such petition for allocation of funds, and at such town meeting the electors of the town shall allow or reject such petition. If the majority of those voting approve the petition for allocation of funds, the town board shall expend road and bridge funds for such cartway."

Therefore, in the present state of the statute law there are two separate and distinct provisions with reference to compelling the improvement of town roads, which include cartways:

First is the proceeding before the county board as authorized by Minnesota Statutes 1945, Section 162.24, which applies when a town road (cartway) is neglected by the town board, and by reason of such neglect is not reasonably passable. This provision has been in the law since 1921.

The second is that procedure provided by Minnesota Statutes 1945, Section 163.15, Subd. 3, which applies when the town board has refused to allocate funds for the improvement of a cartway, and which provides for the submission of the question of the allocation of funds for use upon the cartway to the voters at the town meeting.

These two laws are somewhat inconsistent in that they prescribe two different methods of procedure for reaching and remedying the same condition.

The provision for resorting to the town meeting was the later law. It was enacted in 1937. That law, however, contains no express repeal of the earlier provisions of the 1921 law providing for a recourse to the county board. A repeal of the earlier law is not necessarily implied. The two laws can both stand and the aggrieved taxpayer can resort to one or the other as he may be advised.

Therefore, I would say that a taxpayer is not required to first petition the town for the allocation of funds for the improvement of a cartway before petitioning the county board, as provided in the statute above cited.

RALPH A. STONE,
Assistant Attorney General.

Faribault County Attorney.

September 13, 1946. 377-B-1

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## 104

**Condemnation—Towns—May acquire lands necessary for township roads by condemnation—MS1945, C 117.**

**Facts**

"A township in this County has a duly existing township road, and desires to acquire adjacent land for the purpose of straightening out this road."

**Question**

"May it acquire these lands by condemnation and if so, pursuant to what section of the statute?"

**Opinion**

The town may acquire the necessary right-of-way for a town road by condemnation. Minnesota Statutes 1945, Section 160.02, authorizes the town board to acquire the necessary right-of-way by purchase or condemnation. If by condemnation, the proceedings should conform to the provisions of Minnesota Statutes 1945, Chapter 117. Before condemnation proceedings are initiated by the town board pursuant to this chapter, a resolution should be duly adopted by the town board setting forth that the land which it deems desirable to obtain is necessary for town road purposes. After such resolution has been adopted, then the procedure should conform to Chapter 117, supra.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Goodhue County Attorney.

September 5, 1946. 817-N

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# 105

**Easements—Registered lands—Highway easements need not be recorded so as to constitute notice—MS1945, § 508.25, Subd. 4. Sewer and water main easement affecting registered land should be filed and registered in order to constitute notice—MS1945, §§ 508.48, 508.49.**

**Question**

1. "When the City of Mankato takes from an owner of registered land a deed of an easement for highway purposes, and so reciting in the deed, is there a legal requirement that this easement must be memorialized on the certificate?"

**Answer**

No. Minnesota Statutes 1945, Section 508.25, provides in part that every person receiving a certificate of title pursuant to any decree of registration and every subsequent purchaser of registered land who receives a certificate of title in good faith and for a valuable consideration shall hold the same subject to all rights in public highways upon the land.

Even though a highway easement need not be registered in order to constitute notice, we believe that it would be desirable to have the same registered and memorialized upon the owner's duplicate certificate. This is the practice that has been followed by the department of highways of this state.

**Question**

2. "May we not create such highway easements and record the same without regard to whether or not the land is registered under our torrens act? And without regard to the certificate where the title is torrensed?"

**Answer**

Where the title to land is registered, then such highway easement may only be recorded and filed with the registrar of titles. Minn. St. 1945, §§ 508.48 and 508.49. We are not aware of any statute which permits the filing and registering of an easement affecting registered land except with the registrar of titles. However, as pointed out in our answer to your first question, a person receiving a certificate takes the same subject to rights of highway easements even though the instrument granting such rights has not been filed and registered.

**Question**

3. "When a title is registered and there is a city sewer or water main easement, or other easement of the city, recorded against the premises, is it not better to have this right to which the land is subject in the description rather than put it in a memorial?"

**Answer**

Section 508.49 provides in part as follows:

"All interests in registered land, less than an estate in fee simple, shall be registered by filing with the registrar the instrument which creates, transfers, or claims such interest, and by brief **memorandum or memorial** thereof made and signed by the registrar upon the certificate of title. A **similar memorandum** shall also be made on the owner's duplicate. The cancellation of such interests shall be registered in the same manner."

We believe that this statute contemplates that all easements which are filed and registered with the registrar of titles should be memorialized in the space as provided for upon the certificate, and that the same should not be written into and made a part of the description.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Mankato City Attorney.

August 26, 1946. 374-J

# 106

**Establishment County and State aid roads—Platted areas outside the municipality are constructed and maintained by county—Placement of sidewalks, gutters, curbs—MS1941, § 296.36.**

**Facts**

"In this county there are several township plats filed but the platted portions have not been incorporated into villages. Through these areas over streets dedicated in the plats, county aid and state aid roads have been built."

**Question 1**

May a county road be established in such platted areas?

**Opinion**

Yes.

**Question 2**

If so, what rights does the county have to govern the placement of curbs, sidewalks, gutters, etc., normally a part of the street?

**Opinion**

All county aid roads should be constructed, improved and maintained by the county. Minnesota Statutes 1941, Section 296.36, Mason's Supplement 1940, Section 2720-92e.

**Question 3**

Who is responsible for maintaining curbs, sidewalks and providing for drainage?

**Opinion**

See answer to question 2.

**Question 4**

Does the county have authority to order the removal of curbs, sidewalks and gutters which may be deemed obstructions, and must permission be obtained from the county before gutters and walks are built?

**Opinion**

Authority over the road and its maintenance and the structures to be maintained in it is governed by the will of the county board. If the structures are built in the county aid road without the permission of the county

board, the person who constructed the same would gain no right to continue maintaining the same.

**Question 5**

Would the fact that a state aid road passes through such a platted portion raise any different question from that of a county aid road in the same situation?

**Opinion**

No.

RALPH A. STONE,
Assistant Attorney General.

Kandiyohi County Attorney.

October 8, 1945. 379-C-4

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## 107

**Gravel pit—Town board—Powers—To acquire gravel pit without vote of electors**—L 1945, C 59.

**Facts**

"An organized township in this county is regraveling certain roads in the township and there is only one good gravel pit available in the township. The owners of this pit do not wish to sell the gravel by the yard but have offered to sell the five acres on which the pit is located for the sum of $1500.00, there being about 20,000 yards of gravel left in this pit."

**Question**

"The Town Board wishes an opinion from you as to whether they have the right to purchase this five-acre tract of land without the approval of the voters of the township at a general or special election."

**Opinion**

You are advised that the town board may acquire the gravel pit mentioned without the approval of the voters of the township. Such authority is vested in the town board pursuant to Minnesota Statutes 1941, Section 160.32, as amended by Laws 1945, Chapter 59.

However, the power rests in the electors to make available the necessary funds for township purposes. Minnesota Statutes 1941, Section 365.10, subdivision 6.

Section 366.01, relating to the powers of the town board of supervisors, provides in part as follows:

"The supervisors * * * shall have charge of all the affairs of the town not by law committed to other officers. They shall draw orders on the treasurer for the disbursement of money to pay the town expenses, and for all money raised by the town to be disbursed for any other purpose."

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Nobles County Attorney.

May 8, 1946. 442-A-6

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## 108

**Improvements—Financial aid by city in improving and maintaining certain town roads lying beyond its boundaries—MS1945, § 163.10.**

**Facts**

"Between the City Limits of Worthington and the 'belt-line' trunk highway lies about a half mile of township road. This road is used to connect the city with the main highway and has been maintained by the city for a number of years. The city desires to pave this road."

**Question 1**

"May the city use general funds of the city to pave this road?"

**Answer**

This question is answered in the affirmative. Minnesota Statutes 1945, Section 163.10, provides that any city of the fourth class may appropriate and expend such reasonable sums as it may deem proper to assist in the improvement and maintenance of roads lying beyond its boundaries and leading into it. Under this act, we believe that the city may use any of its available funds for the purpose of improving and maintaining roads as provided for in this act.

**Question 2**

"If so, may it proceed to do so on its own accord without reference to the town board, or must it proceed through the town board by contributing the money for the project and with the town board carrying out the project otherwise?"

**Answer**

Section 163.10, supra, does not divest the town board of such supervision and control of town roads as the legislature has given to town boards. Section 163.10 permits the city to assist in the improvement and mainte-

nance of roads as therein provided for, but this section does not grant to the city supervision and control of such roads. We believe that the proper procedure would be for your city to cooperate with the town board by giving to it financial aid in making the contemplated road improvement.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Worthington City Attorney.

August 20, 1946. 59-A-22

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## 109

**Maintenance—Town has duty to maintain county roads—County board may appropriate money to town for road purposes—MS1945, §§ 162.01, 160.08.**

### Facts

A county road needs immediate repairs. The county board has insufficient funds to pay for the repairs. In order to put the road in condition for travel during the coming winter, it will be necessary to repair the road this fall. Otherwise, the people living tributary to the road will be unable to travel it during the coming winter and spring. You have submitted these

### Questions

1. May the county board issue bonds for the purpose of raising money to repair this county road, without a vote of the people, by authority of M. S. 1945, Sec. 162.39, Mason's Statutes 1927, Sec. 2645?

2. Is there any limitation on the amount of outstanding warrants that the county may issue by authority of M. S. 1945, Sec. 385.31, Mason's Supplement 1944, Sec. 869?

### Opinion

By authority of M. S. 1945, Sec. 162.01, Subd. 2, "The county board * * * may appropriate from its road and bridge fund to any town * * * such sums of money as are available and which it deems advisable to aid such towns, * * * in the construction and maintenance of roads, streets, or bridges therein, and such appropriations may be directly expended by the county board, upon such roads, * * * as shall be designated by the governing bodies of such towns, * * * ."

By authority of Subdivision 4 of the same section "The county board shall provide and set apart a fund for the construction and maintenance of road and bridges in such county, to be known as the county road and bridge fund, * * * ." You will note that this relates to appropriations.

Section 160.08, Mason's, Sec. 2551, imposes upon the town the duty to maintain and keep in repair the county roads situated therein.

When **permanent improvements** of any road are to be made, the county board by authority of Section 162.39, Mason's, Sec. 2645, is authorized without a vote of the people to issue and sell bonds of the county to raise the money required. But you will note that this is not for maintenance but for permanent improvements. Section 162.42, Mason's, Sec. 2649, provides that the proceeds of such bonds shall be used for permanent improvements and makes provision for the disposition of the surplus if any.

The duty of maintenance of county roads being imposed upon the town, and not upon the county, by authority of the foregoing statutes, the first question must be answered "no."

M. S. 1945, Sec. 385.31, prescribes the duty of the county treasurer in respect to payment of warrants drawn upon the treasurer. When sufficient funds to pay a warrant presented to the treasurer are not in his hands, he numbers and registers the warrant and it then bears interest at 4 per cent per annum from the time presented. Procedure for redemption of such warrants by payment is provided. But he is merely a disbursing officer and has nothing to do with the auditing of claims or directing claims to be paid.

If this second question relates to the same problem as the first, it appears that Section 162.01, Subd. 4, indicates the legislative intent that warrants may be drawn for the construction and maintenance of county roads in the county. The warrants are drawn on the road and bridge fund.

Where a town neglects to maintain a road which it is the duty of the town to maintain, Section 162.24 provides the method by which the county board may proceed in order to put the road in passable condition.

The county is prohibited by M. S. 1945, Sec. 475.22 from issuing warrants during one calendar year in anticipation of the collection of taxes levied or to be levied for that year in excess of the average amount actually received in tax collections on the levy for the three previous calendar years plus ten per cent thereof.

CHARLES E. HOUSTON,
Assistant Attorney General.

Rice County Attorney.

August 27, 1946. 377-B-3

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## 110

**Vacation—Petition—Town road**—MS1945, § 163.19.

**Facts**

M. S. 1945, Sec. 163.19 reads:

"The town board of any town may alter, vacate, and abandon a town road upon petition of **all the owners and occupants of all the land contiguous thereto,** which petition shall be filed with the town clerk and proceedings thereon by the town board shall be in conformity with the provisions of section 163.13 as far as the same are applicable."

A petition has been presented to the town board signed by all the owners and occupants of property contiguous to **a portion of** a township road, requesting that that portion of the road contiguous to the property of the petitioners be vacated.

Inasmuch as the proceedings to be taken by the board in pursuance of the petition, for their validity, rest upon the sufficiency of the petition, there has arisen in your mind the

**Question**

Does the statute require the petition to be signed by all the owners and occupants of all land contiguous to the entire road, or does it require merely that the petition be signed by all the owners and occupants of all the land contiguous to a specified portion of the road which the petition seeks to have vacated?

**Opinion**

Sec. 163.19 has its origin in Laws 1933, Chapter 228. That was a new act. The term "town road" is defined in Sec. 1 thereof. See M. S. 1945, Sec. 163.18.

In seeking to resolve the intention of the legislature in enacting Sec. 163.19 we consider the mischief to be remedied and the object to be attained and the former law upon the subject. M. S. 1945, Sec. 645.16. When we consider Sec. 163.13 it appears that the purpose of the legislature in enacting Sec. 163.19 was to enable the town board to take the proceedings therein authorized upon a petition which was not known under the terms of Sec. 163.13. That seems to be the object to be attained by the new act.

It would appear that where a town road crosses the entire town, for example, on the south line of Sec. 1 to 6, inclusive, it is unreasonable to suppose that the legislature intended where the term "town road" is used that it meant that this road, crossing the entire township, must be considered as a unit and dealt with as such, and that no part thereof could be vacated without vacating all. So, it would appear that we must avoid any absurd construction. Sec. 645.17.

It appears to me sensible to say that if a petition is presented to the town board asking for the vacation of a specified portion of a town road, signed by all of the owners and occupants of all the land on both sides of the portion of the town road proposed to be vacated, such petition conforms with the requirements of Sec. 163.19 so as to give the town board authority to act thereon. And continuing further, if the petition asks that only that portion of the road mentioned should be vacated which lies upon the south

line of Sec. 1 and it was signed by the owners of land on both sides thereof, that is, by the owners of the land in Sec. 1 on the north side of the road and by the owners of the land in Sec. 12 on the south side of the road, and also signed by all the occupants of all the land of such owners, the petition is sufficient.

CHARLES E. HOUSTON,
Assistant Attorney General.

Rose Township Attorney.
October 25, 1946. 377-A-11

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LIABILITY

## 111

**Claim—Requiring presentation of notice of injury as condition precedent to maintaining action to recover damages is mandatory—MS1941, § 465.09.**

**Facts**

Subsequently to the construction of a certain sidewalk within the village by the property owner, the village in making sewer connections excavated under such sidewalk leaving the sidewalk in a weakened condition; as a result of such weakened condition the village on two different occasions made repairs thereto; a pedestrian stepped on the sidewalk and apparently, because of the weakened condition thereof, broke through the sidewalk and sustained a broken leg; the village recorder took the pedestrian so injured to the hospital; the village officers directed the doctor to attend to the injured pedestrian, and the pedestrian so injured has failed to file a notice of claim for damages against the village as required by Minnesota Statutes 1941, Section 465.09.

**Question**

"Where village officers have actual notice of the accident and have directed the physician to present his bill to the village for payment, can suit be maintained against the village where no notice has been served?"

**Opinion**

Upon the basis of the information submitted, your question is answered in the negative.

There are numerous decisions by our Supreme Court which hold that the notice required by Section 465.09, supra, is mandatory and a condition precedent to maintaining an action to recover damages.

In Olson v. City of Virginia, 211 Minn. 64, it appears that the plaintiff was injured while walking on a crosswalk on one of the streets of the defendant city. The accident occurred in the presence of a police officer who was an investigator for the defendant city. This officer called an ambulance

to take the plaintiff to the hospital. Thereafter, the officer filed a report showing that he had investigated the accident, which report contained the facts and circumstances thereof. The plaintiff obtained a copy of the report and signed the same and caused it to be presented to the defendant's city council for the purpose of giving notice of claim for the injuries which she had sustained. While the copy of the report showed the time, place and circumstances of plaintiff's injuries, it contained no statement as to the amount of compensation claimed by her or that she was giving notice of claim.

The court held that the notice was insufficient and did not meet the statutory requirements.

The most recent case on the subject of your inquiry is Johnson v. City of Chisholm, No. 34175, St. Louis County, decision filed June 21, 1946. This decision has not as yet been printed in the advance sheets and it would be my suggestion that you write to the clerk of the Supreme Court or the West Publishing Company for a copy of this decision. This decision reviews earlier decisions of this court and decisions of other jurisdictions upon the question as to what acts or actions on the part of the governing body of a municipality might constitute a waiver or an estoppel of the necessity of giving the statutory notice.

In this case a demurrer to the complaint was overruled by the trial court, and upon appeal reversed by the Supreme Court. The pertinent part of the complaint is stated in the decision on page 3 as follows:

> "That from and after the time of said fall, the plaintiff was confined to the Hibbing General Hospital for hospital care and treatment for a long time, and during said time the plaintiff sent friends to interview and see the city officials of the City of Chisholm and the city attorney in order to be advised what, if anything, he should do in order to protect his interests and particularly his claim for damages; **that the defendant city by and through its officials and the city attorney represented to the plaintiff that his case would be taken care of, and that as soon as plaintiff was able to leave the Hibbing General Hospital, the city ambulance would take him to the Buhl Hospital, and that it would not be necessary for the plaintiff to do anything further to protect his claim, and this plaintiff, relying upon said representations which defendant's agents knew would be communicated to the plaintiff, and upon which plaintiff did rely, by reason thereof neglected to furnish or to serve upon the defendant city the 30-day written notice; that by reason thereof the defendant, City of Chisholm, is estopped to assert the failure of this plaintiff to furnish said notice, and the failure to furnish said notice was excused and waived by defendant by reason of said circumstances.**" (Emphasis supplied.)

On page 7 the court said:

> "Likewise, it has frequently been held that actual knowledge by the governing body of a municipality of all facts required to be set forth in the notice does not supply the omission to file such notice or excuse

the failure of the claimant to meet such statutory or charter requirement with respect thereto." (citing cases.)

On the last page of the decision the court said:

"The complaint clearly indicates that the acts or conduct relied upon to establish waiver or estoppel were not the acts of the governing body acting as such in its representative capacity, but rather the isolated and unauthorized acts of its city attorney or individual officials, and, as such, not binding upon defendant."

From the facts stated in your letter, I do not believe that the action taken by the village officers would be construed by the court as a waiver of the necessity of giving the statutory notice.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Caledonia Village Attorney.
July 15, 1946. 844-B-8

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## 112

**Streets—For damages caused by invasion of private property resulting from flooding of streets.**

### Facts

In the year 1910 the City of Faribault constructed a brick pavement on one of its streets, and at the time of such construction several areaways were provided for in such streets; after many years of heavy travel the brick pavement has sagged along the curb line so as to leave openings adjacent to the wall of such areaway; recently one of the employees of the city water department opened a hydrant and flushed water into the streets so as to pass some of these areaways, which water reached the depth of some six to eight inches; a merchant contends that by reason of the running of this water along the curb, and by reason of the defect in the pavement, his basement has become flooded, that he has sustained damages to his merchandise, and that such merchant has never been troubled by reason of any water condition prior to the incident mentioned in your letter.

### Question

Whether or not the city is liable under the rule laid down in National Weeklies v. Jensen, 235 N. W. 905, or under some other rule of law or decision.

### Opinion

At the outset, the answer to your question involves an examination of all of the material and pertinent facts. This office is reluctant to express an opinion which must necessarily be based upon facts for the reason, among

others, that upon the trial of a case involving a question of liability many facts might be disclosed which, at the present moment, are not available for consideration.

However, I am inclined to believe that there is liability on the part of your city if on a factual basis the damage to the merchandise in the basement was proximately caused by and the result of the flooding of the street by the employee of the water department.

In the case of National Weeklies v. Jensen, referred to in your letter, the question of liability was whether the city was negligent in paving its street, and such negligence was the proximate cause of the damages when the basement was flooded. The water that caused the damage in that case came from natural sources. The defense claimed that the water conditions which caused the flood were unusual and unnatural, and constituted an act of God, which, if accepted as such by the jury, would have resulted in a verdict favorable to the city. That case is distinguishable from the facts that you have submitted for the reason that here we have a positive and deliberate act on the part of a city employee opening one of the city hydrants and flooding the street to a depth of six or eight inches, which, it seems to me, should be considered as the proximate cause of the damages rather than the sagging of the street at the areaways resulting from the use of the street over a period of time. Such sagging of the street, it seems to me, is only incidental and, of course, not the proximate cause of the damages which resulted from a flooding of the streets.

In McClure v. City of Red Wing, 28 Minn. 186, one of the early cases upon the question of the liability of a city for damages caused by the invasion of private property on account of flooding, it was therein held that the city was liable where it caused water to be diverted onto the plaintiff's premises by artificial obstruction of a ravine where waters had previously passed and without injury to plaintiff's property. In that case the court also considered the liability of a city on account of water damages caused by the inadequacy of a sewer. The case, however, was determined upon the deliberate act of the city in diverting water so as to flood plaintiff's premises. I think that the rule therein announced by the court is applicable to your case.

The liability, if any, is not because of negligence on the part of the city or any of its employees, but rather upon the theory of trespass. On page 193 the court said:

> "The true rule to adopt in such cases is that no one has a right to obstruct or divert such waters so as to cast them upon the property of others to their injury. * * * They have no absolute right in such cases to dam up the natural channel, and divert the water by artificial means upon private property."

Again on page 195 the court said:

> "Now, in the present case, it is not mere non-action on the part of defendant in providing sewers that is complained of, nor is it merely

the adoption of an imperfect system of sewerage, but it is of a positive invasion of plaintiff's premises, by obstructing the natural flow of the water, and diverting it into artificial channels, in such a manner as to cast it in large and destructive quantities upon plaintiff's land. Such an act has always been held actionable." And cases cited.

Sometimes the question arises as to whether the city was acting in a governmental or proprietary capacity. Generally it is held that no liability exists for negligence on the part of a city when acting in a governmental capacity. The rule is otherwise when relating to negligent acts arising out of the performance of municipal functions by the city in a proprietary capacity.

However, the court has made no distinction between governmental or proprietary functions where the damages sustained are the result of trespassing.

In Jacob Newman v. County of St. Louis, 145 Minn. 129, there was involved the question of the liability of the county as the result of the destruction of property caused by fire originating upon the right of way of a county road. The trial court sustained a demurrer to the complaint which was reversed on appeal. The court in the course of its decision cites numerous cases where a municipality has been held to be liable as the result of water impounded or flowing upon property caused or resulting from a street improvement. In those cases liability is not predicated upon negligence but upon an invasion or a trespass. I believe that the underlying principle stated in that case is applicable to the situation which you have presented.

As stated at the beginning of this letter, a determination of the liability of the city can only be determined after all of the facts have been presented, such as will result upon the trial of a case. It would not be possible to definitely state that the city would or would not be liable until all of such facts are known. We believe that when you have examined the cases referred to herein, by applying the principles of law therein stated to all of the facts a proper conclusion can be reached. However, on the basis of the information submitted, we are inclined to believe that there is liability on the part of your city.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Faribault City Attorney.
July 17, 1946. 844-B-8

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**LOCAL IMPROVEMENTS**

## 113

**Assessment — Costs — L 1919, C 65, MMS1927, §§ 1815 et seq., MS1941, §§ 434.01, 434.14 to 434.27, inclusive, as amended by L 1945, C 335.**

**Facts and Question**

"The Village of Winnebago plans to widen the pavement for two blocks on its Main Street, from a width of about 65 feet to 70 ft., and lay and maintain new gutters and curbs for the two blocks. Also the Village plans to resurface about 6 blocks of its Main Street, including the first two blocks mentioned above; that is, it plans to resurface the paving which the State does not resurface in the six blocks. The State has stated that it will resurface the center 24 feet of the Street plus 50 per cent of the balance of the pavement. I have talked to Bert McMullen, attorney in the Highway Department, and with Mr. Motl of the same Department. Mr. Motl has agreed that the State would go ahead and put in the resurfacing of the 6 blocks of Main Street and charge the Village with its proportionate share. This is agreeable to the Village. Thus this will leave only the widening and the curb and gutter work for the Village to complete.

"The Village has no money for this purpose in the general fund, so it wishes to assess as much of the cost as we can to the property owners benefited. In order to finance this we are proceeding under Section 1815 et seq. Mason's Minn. Statutes of 1927 and amendments. Petitions have been filed for this work, and a hearing has been had and the work has been authorized by the Council. There was one notice published to cover both items of work. We wish to proceed from here on by the Village letting a contract for the widening and curb and gutter work, and the State letting the contract for the resurfacing work.

"The question is, is there any legal reason for not proceeding as we have planned under the said Section 1815? Would this procedure be contrary to anything in your opinion of July 15, 1941, as printed at No. 181 in 1942 Report? The work to be done has been carried as two items, as stated in paragraph one of this letter, in all proceedings up to date. There were two separate petitions for the two items, but both items were included in one notice of hearing and in the resolution passed by the Council."

**Opinion**

Upon the basis of the information contained in your letter I am of the opinion that your village council may proceed with the "widening and the curb and gutter work" as provided for in Laws 1919, Chapter 65, Mason's Minnesota Statutes 1927, Sections 1815 et seq., Minnesota Statutes 1941, Sections 434.01 and 434.14 to 434.27 inclusive, as amended by Laws 1945, Chapter 335.

It appears from your letter that the village will undertake to do the work above referred to by separate contract aside from the improvement to be made by the Commissioner of Highways of the State of Minnesota, and that the improvements to be made by the village will be under the direction of the village and not under the direction of the Commissioner of Highways.

**Question**

Whether the contemplated procedure would be contrary to anything stated in our opinion of July 15, 1941, as printed in the 1942 Report, No. 181.

**Opinion**

The circumstances and facts submitted and upon which Opinion No. 181, 1942 Report was given are entirely different from those stated in your letter. The printed opinion No. 181 dealt with the authority of the municipality to enter into a contract with the Commissioner of Highways pursuant to Mason's Minnesota Statutes 1927, Section 2557, and did not involve nor consider a situation such as presented by the facts recited in your letter.

As bearing upon the authority of your village council to proceed under the statutes above referred to, I direct your attention to the case of Borgerding v. Village of Freeport, 166 Minn. 202.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Winnebago Village Attorney.
May 18, 1946. 396-G-7

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# 114

**Assessments—Cumulative and not repugnant**—L 1903, C 382; L 1917, C 364; L 1919, C 65; L 1925, C 382.

**Facts and Question**

"Is it the opinion of your office that Minn. St. Sec. 434.28-434.36 inclusive (L. '03, c. 382), dealing with special assessments, is in effect and gives an alternative method of levying special assessments for village improvements to Minn. St. 434.14 (L. '19, c. 65) and Minn. St. 429.01 (L. '25, c. 382)?

"I have found no express repeal of the 1903 law, though it may be impliedly repealed by the subsequent statutes covering the same subject matter. Certain features of the 1903 law make it a desirable one and I am of the opinion that it is still effective. Apparently the Revisor of Statutes thought so, for he included it in his volume notwithstanding that Mason's appears to have dropped it. Mason's in its parallel table (Minn. St. to Mason's) in the 1941 Supplement states that the 1903 law has been superseded by Sec. 1186, which seems to me clearly not the case.

"The editors of Mason's also assume that Minn. St. 434.01, et seq., and Minn. St. 434.14, et seq., are the same law, contrary to the Revisor of Statutes. These laws are respectively L. '17, c. 364, and L. '19, c. 65.

Cf. G. St. 1923, Sec. 1815. Apparently if the 1917 statute was repealed it was by implication; yet the two statutes differ, as I see them, in that the 1919 statute (MMS 1815, Minn. St. 434.14) requires that the proceeding be initiated by property owners and the 1917 statute (Minn. St. 434.01) permits initiation by the council on its own motion. With respect to these statutes, i. e., L. '17, c. 364, and L. '19, c. 65, what is the opinion of the Attorney General as to (a) Does the last enacted one supersede the first, so that (b) the law now requires initiation of any of the improvements included in the scope thereof by property owners?"

**Opinion**

Before answering your inquiries it is necessary to examine the history of the various laws involved.

L. 1903, c. 382 now comprises Minnesota Statutes 1941, §§ 434.28 to 434.36 inclusive. I do not find that there has been any amendment or repeal of this law. The revisors of Minnesota Statutes 1941 omitted Section 9 of the original act which is in the nature of a curative or validating act and has reference to acts occurring prior to the enactment of this law.

Minn. St. 1941, §§ 434.02 to 434.13 inclusive comprise L. 1917, c. 364, being M. M. S. 1927, §§ 1907 to 1918 inclusive. L. 1945, c. 335 is the last amendment to this act.

Section 434.01 of Minn. St. 1941 is a part of L. 1919, c. 65, § 1. Just why the revisor of statutes gave it the position in the 1941 statutes which he did is not clear to me. It would have been more appropriate to have placed § 434.01 supra immediately preceding § 434.14 rather than numbering it 434.01, thereby making it appear that this section is part of L. 1917, c. 364.

L. 1919, c. 65, M. M. S. 1927, §§ 1815 to 1828 inclusive now comprise Minn. St. 1941, §§ 434.14 to 434.27 inclusive, except the definitions occurring in the original act, which are now found in § 434.01 supra.

L. 1925, c. 382, M. M. S. 1927, §§ 1918-15 to 1918-32 inclusive, now comprise M. S. 1941, §§ 429.01 to 429.18 inclusive.

Answering your inquiries, it is my opinion that the acts above referred to each constitute a whole and complete law, and that neither of said acts are repugnant to each other, nor are said acts or any of them to be construed as repealing each other.

Repeals by implication are not favored. See State v. McCardy, 62 Minn. 509, 64 N. W. 1133; 25 R. C. L. 918.

Our court had before it for consideration the effect of the enactment of L. 1925, c. 382 upon L. 1919, c. 65 in the case of Borgerding v. Village of Freeport, 166 Minn. 202. In the course of that decision the court said, at page 205:

"Where a new mode of procedure is authorized, without express repeal of a former one relating to the same matter, and the new rem-

edy is not inconsistent with the former, the later act will be regarded as creating a concurrent mode and not abrogating the former mode of procedure. 36 Cyc. 1077. If it is not perfectly manifest, either by repugnancy which cannot be reconciled, or by some other means clearly showing the intent of the lawmakers to abrogate the former statute, both must be held to be operative. This has long been the rule. Wood v. U. S. 16 Pet. 342, 10 L. ed. 987. There is little, if anything, in either of these statutes that indicates that they were intended to supersede any other law. We think it was meant to add to and not to wholly replace the prior laws with the one new law. There is no reason why these laws may not stand with the prior laws relative to the same subject matter. Perhaps, as counsel for respondents argue, there may be some confusion, but not necessarily. If so, the legislature may readily meet that situation. We think it will be more practicable and workable to permit the municipalities coming within the scope of these laws to have their choice of procedure."

What the court stated in that decision I believe is applicable to each of the laws involved in your inquiry, and it is my opinion that any village that may avail itself of the provisions of any of the laws above referred to may proceed under either of said acts independent of the other laws. It would not be proper to adopt a part of the provisions of one act and also a part of the provisions of another act in proceeding to make local improvements by the village. The procedure to be adopted in the course of making village improvements must be taken from the act under which the village proposes to proceed.

It is my opinion that L. 1919, c. 65 does not supersede nor repeal L. 1917, c. 365, and that each of these acts is complete and the village may proceed under either. These acts are to be construed as alternate and cumulative, and not as repugnant to one another.

Neither of these laws contains any express repeal provisions and as previously pointed out herein, repeals by implication are not favored.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Royalton Village Attorney.
May 13, 1946. 396-G-7

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## 115

**Assessments—Sidewalks—Expense of constructing—Corner lots.**

**Question**

Whether under the city charter the lot owner on a corner should be assessed for the sidewalk from the curb to the corner of the lot.

**Opinion**

Section 199 of the Charter of Windom reads as follows:

> "The city shall have the right to cause to be constructed sidewalks along any of the public streets and highways of said city that it may deem necessary, and cause the same to be relaid, repaired or removed when necessary; and it is hereby made the duty of all owners of land adjoining any street or highway in the city to construct, relay, repair or remove such sidewalk along the side of the street, or highway next to the land of such owners respectively as may have been heretofore constructed or as shall hereafter be constructed or directed by the council to be built, and the same shall be constructed of such material and width and according to the plans and specifications adopted by the council therefor."

Section 200 provides for the building of sidewalks by the city where the owners fail to construct them after being ordered so to do and provides with reference to the cost of such sidewalks as follows:

> "Within ten days after the filing of said report the mayor and clerk, acting as commissioners therefor, shall ascertain the expense of such building or relaying, and assess and levy such expense upon and against each lot and parcel of land upon which such sidewalk shall front, in accordance with the provisions herein made."

I am clearly of the opinion that the charter contemplates that the portion of the sidewalk referred to in your letter is to be laid at the expense of the property owner. In statutes and charters relating to sidewalks the words "abutting," "adjoining," "along the side," and "front" are given a liberal construction. It is contemplated by your charter that all sidewalks shall be paid for by the property owners, and in the case of corner lots it is, of course, necessary that the sidewalk be continuous. Any other construction of the charter would, in my opinion, lead to an absurdity.

WM. C. GREEN,
Assistant Attorney General.

Windom City Attorney.
September 28, 1945. 480-A

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## 116

**Assessments—Sidewalks—Payment of cost in constructing under provisions of home rule charter—Council borrowing from general fund and using money so borrowed for disbursements out of permanent improvement fund.**

**Facts**

The city contemplates an extensive program for the construction of new sidewalks, most of which will be within the downtown area, and such

construction will involve a considerable amount of expense; some of the members of the council feel that the benefits from such sidewalk improvements will be of a general nature and beyond the abutting property, and for that reason desire to pay a part of the expense and cost of the construction out of the general fund and to assess the balance against the abutting property.

**Question**

Whether the city may pay a part of the cost of the sidewalks out of the general fund and assess the balance of such cost against the abutting property.

**Opinion**

Your inquiry must be answered in the negative, except as hereinafter qualified.

Your charter, Section 202 thereof, grants power to the city, acting by its city council, to make certain improvements and provides in part as follows:

"* * * to construct, lay, relay, enlarge, and repair sidewalks, * * *."

The following section, 203, provides as follows:

> "The expense of any improvement mentioned in the foregoing section, except as otherwise specially provided, shall be defrayed by an assessment upon real estate benefited thereby, to be levied, enforced and collected in the manner hereinafter prescribed in this article, except that all or any part of the expense for paving, repaving, graveling, macadamizing, filling, grading, and sewering of the space occupied by street intersections or any part thereof that cannot be met by assessment on property benefited by such improvement, including construction or repair of sidewalks, shall be paid out of the permanent improvement fund of the City."

From this section it is apparent that the cost of any improvement authorized by Section 202 shall be defrayed by an assessment upon the real estate benefited thereby, except as otherwise specially provided. The exception is contained in this section and is as follows: "that all or any part of the expense for paving, repaving, graveling, macadamizing, filling, grading, and sewering of the space occupied by street intersections or any part thereof that cannot be met by assessment on property benefited by such improvement, including construction or repair of sidewalks, shall be paid out of the permanent improvement fund of the City." We construe the words "including construction or repair of sidewalks" to mean that portion of any sidewalk being within the space occupied by street intersections, or, in other words, the area lying and being within a prolongation of a line connecting the property corners abutting upon a street intersection.

We believe that the two sections mentioned are a limitation upon the powers of the city council, and restrict the payment of the cost of improvements authorized by Section 202 by an assessment upon real estate bene-

fited thereby except any part of the cost of such improvement which cannot be met by assessment on the property benefited by such improvement being within the space occupied by street intersections. As to the cost of the improvement being within the space of the street intersection, the same may be paid out of the permanent improvement fund of the city. It seems clear to us that the cost of any improvement authorized by Section 202, which is not paid for by assessment as provided for in Section 203, shall be paid out of the permanent improvement fund and cannot be paid out of the general fund for the reason that Section 203 is specific in providing that such cost shall be paid out of the permanent improvement fund.

Section 177, subparagraph fourth, relates to the permanent improvement fund and provides the purposes for which such fund may be used. The sixth subparagraph relates to the general fund and states that such fund is to provide for the current and incidental expenses of and judgments against the city not otherwise provided for, and for such other disbursements as may be authorized by law. The second paragraph of subparagraph sixth authorizes the council to borrow from the general fund to aid and help any other fund at such times as in its judgment public necessity requires. We believe that under this provision the council would be permitted to borrow from the general fund and use the money so borrowed for disbursement out of the permanent improvement fund.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Stillwater City Attorney.
July 31, 1946. 480-A

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# 117

**Assessments—Streets—Sewer system—Power to pay cost out of general fund — Necessity of levying assessments — Manner of establishing streets.**

**Question 1**

May a village council establish, open and improve a street without assessing the costs against the property which may receive some special benefits?

**Opinion**

I would say that a village may open and improve a street which has already been established without assessing the costs thereof against the property benefited. The cost can be paid from the general fund. There is a difference, of course, between **establishing** a street and opening a street. Right of way for a street or a street easement may be acquired by donation, purchase, condemnation or dedication, and if the street easement has been acquired by the village, the street may be opened at the expense of the general fund.

**Question 2**

May a village council extend a sewer system without assessing property which may have special benefits?

**Opinion**

I think the answer to this question is in the affirmative. The village may pay for the cost of the sewer out of the general fund.

**Question 3**

May a village council on its own motion open up a new street and must there be a petition therefor as in the case of townships opening new roads?

May a village council on its own motion extend a sewer system or must there be a petition?

**Opinion**

Here again it is necessary to distinguish between "opening" a street and "establishing" a street. If a street exists, the village may open on its own motion and grade it or otherwise improve it. If no street exists, a public easement must be acquired by the village before the street can be opened. If the owners of the property along which the street is to run will not deal with the village or donate the necessary right of way, the village can proceed to acquire the right of way by condemnation.

I think that a village council could extend the sewer system along a public street without a petition. See Minnesota Statutes 1941, Section 429.21, Mason's Statutes 1927, Section 1918-35.

**Question 4**

Is it the intention of the law under section 412.27 that the council shall determine special benefits to land and general benefits to the public and in such manner divide the costs of the improvements?

**Opinion**

Under this particular section the council may assess the cost not less than half against the benefited property to the extent of and not exceeding the benefits conferred upon abutting property.

The ordinances relating to the letting of special assessments are in confusion, and it is hoped that the whole subject will be clarified in the new village code which is in process of preparation.

There are other sections which you do not mention under which improvements may be made. See Minnesota Statutes 1941, Chapter 431, as

to sewers and special assessments therefor; also Minnesota Statutes 1941, Chapter 434.

RALPH A. STONE,
Assistant Attorney General.

Sibley County Attorney.
June 19, 1946. 396-G-7

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# 118

**Assessments—Water mains—Platted and unplatted property**—MS1945, §§ 432.01 and 432.11 to 432.24 inclusive.

**Facts**

The village is proceeding under Laws 1921, Chapter 425, being M. S. 1945, §§ 432.01 and 432.11 to 432.24 inclusive, and some of the property which is benefited is platted property and other benefited property is unplatted and used for farming purposes; both of such properties will be benefited by the proposed improvement and are all situated within the village.

**Questions**

"(1) May the Village assess unplatted property as well as platted property?

"(2) May the Village assess the property on both sides of the street where they are both owned by the same person and the property on one side of the street is not platted but is used for farming?"

**Opinion**

Section 432.12 provides as follows:

"The cost of any such improvement, including cost of engineering, interest during construction, and necessary incidental expenses, may be assessed against property abutting upon the street or public alley in which these water mains, appurtenances, and service connections are laid, upon the basis of benefits to the property, but the council may pay the cost of laying these mains across street and alley intersections and one-half of the cost of laying mains in any street or public alley opposite any public park or municipal property and the cost of fire hydrants and their connections to the mains, and may also pay such portion of the cost of laying the mains between street intersections or between street and alley intersections, as the council may determine."

Section 432.17 provides, in so far as the same is pertinent to your questions, as follows:

"After a contract is let or work ordered done by day labor, the clerk, with the assistance of the engineer or superintendent of the work

shall forthwith calculate the amount proper and necessary to be especially assessed for the improvement against every assessable lot, piece, or parcel of land within the district affected, without regard to cash valuation, in accordance with the provisions of section 432.12."

It is obvious that these sections authorize an assessment against each lot, piece, or parcel of land benefited irrespective of whether the same is platted or unplatted. For all practical purposes, the council might determine the benefits to the property upon a cost per foot of the property abutting upon the street where the improvement is made, and assessment made upon that basis. The basis of making the assessment must be upon the benefits to the property, and when the assessment is made upon that basis it does not then become material whether the property is platted or unplatted, neither is it material as to the ownership of the property for the reason that the assessment is against the property and not against the individual.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Park Rapids Village Attorney.
August 8, 1946. 624-D-10

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# 119

**City planning—Whether a city may engage the services of a city planning engineer**—MS1941, § 471.26 et seq., as amended by L 1945, C 287.

### Question

Whether the city council of Granite Falls may properly hire a city planning engineer to lay out certain new additions to the city. The additions will be upon private property and the city will have no control over the additions after they have been laid out.

### Opinion

Minnesota Statutes 1941, Section 471.26 et seq., authorizes any municipality in the state to carry on city planning activities which may include the preparation and adoption of an official map of all proposed alterations of existing lands, and the future development of unplatted properties. It may approve subdivisions. (§ 471.26 ibid.) It may provide for the future laying out of streets outside of platted territory and extending across unplatted territory, and reserve undedicated lands for that purpose. (§ 471.28 ibid, as amended by Laws 1945, c. 287.)

Chapter 10, Section 76 of the Charter of the City of Granite Falls authorizes the city council, with the assistance of the city engineer, city planning council (to be appointed by the city council) and such other service as it may deem necessary, to prepare and adopt a complete plan for

the physical development of the city. This plan may contain provisions for the platting and developing of new areas.

It is my opinion that if, in the exercise of their judgment, the city council deem it necessary they may engage the services of a city planning engineer to assist in the preparation of a city plan contemplated by the Minnesota Statutes and City Charter.

This is not to say, however, that the city council may undertake, at public expense, the platting of subdivisions or new additions privately owned. It is my opinion that Minnesota Statutes 1941, Sections 471.26-471.33, as amended by Laws 1945, Chapter 287, contemplate that the owner of the property shall bear the expense of subdividing and platting. The adoption of the city plan does not constitute a platting of the area involved. It provides a standard to which future subdivisions and plats must comply. The adoption and publication of the map gives the city no right to or interest in the unplatted streets or other reserved areas except the right to acquire such areas in the usual manner without payment of compensation for improvements made after its adoption and publication. (§ 471.28-2 ibid.) The city may provide platting regulations which are consistent with the city plan in which case no plat may be accepted for filing unless it has been approved by the city council. (§ 471.29-1 ibid.) All streets on a proposed plat must conform to the street plan of the municipality. As a condition precedent to the approval of the plat, the municipality may prescribe requirements relating to the grading of streets, construction of water sewers and other utility requirements, and may require a bond in lieu of completion of such work. (§ 471.30 ibid.)

It is my opinion that the above statute looks toward the adoption by the city of a plan for future development, together with supervision and regulation of new developments, and does not contemplate improvements to private property at public expense.

KENT C. van den BERG,
Assistant Attorney General.

Granite Falls City Attorney.
January 17, 1946. 59-A

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## 120

**Rest rooms—City of the fourth class may erect and maintain rest rooms on county courthouse property—County may contribute toward the expense of the facilities—Title remains in county.**

### Facts

"The County Board of Cottonwood County has deemed it necessary to provide more adequate toilet facilities for the use of the public having business in the Courthouse in the City of Windom.

"The Council of the City of Windom wishes to provide toilet facilities and a rest room for persons doing business in said city.

"The County Board and the City Council desire to cooperate in the building of this rest room and a plan was suggested and agreed to by these respective bodies that the City should build said rest room on the Courthouse property and joining and connected with the Courthouse. The design of said structure to be approved by said County Board. The cost thereof to be paid by the City and the up-keep thereof to be paid by the City. The County Board, besides allowing the City to build such an addition to the Courthouse, wishes to defray some of the building cost.

"There seems to be some question whether Cottonwood County and the City of Windom can get together on such a deal.

"Both municipalities are desirous of having such rest room built and as I stated, they wish to add a small addition to the Courthouse and the present plan is that the City should pay the cost of construction and maintenance of same with the County contributing the site."

**Questions**

"1. Whether the County Board may grant to the City of Windom the right to build a rest room on County property?

"2. May the County Board contribute financially to a rest room constructed by the City on County property?

"3. May the City appropriate and spend money for a rest room built on County property?

"4. Under what procedure could such building or rest room be legally constructed and maintained as before outlined?"

**Opinion**

Minnesota Statutes 1941, Section 459.15, Mason's Supplement 1940, Section 1933-5, Laws 1921, Chapter 294, as amended by Laws 1933, Chapter 169, provides that all cities of the fourth class "may at the discretion of their respective governing bodies, provide and maintain in or near the business center of the village a public rest room * * * ."

This is sufficient authority to the city to provide in the most feasible and businesslike manner toilet and rest room facilities which are needed by the city. I do not see that it would detract from the power of the city that the facilities were erected and maintained upon the courthouse grounds belonging to the county.

The county possesses no power to grant to the city any right, title or interest in the county courthouse property. If the facilities were erected upon the courthouse grounds at the expense of the city, the title thereto would vest in the county. However, I see no objection if the county permits

the city to pay the expense of erecting and maintaining the facilities as long as such facilities are needed by the county also, and I see no objection to the county contributing to the cost of such facilities which are needed in connection with the courthouse.

I think an agreement could be drawn between the city and the county permitting the city to build and erect the facilities upon the county property according to plans approved by the county board, but I would suggest that such an agreement contain provisions amply indemnifying the county against loss and liability.

RALPH A. STONE,
Assistant Attorney General.

Cottonwood County Attorney.
December 5, 1945. 125-A-20

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## 121

**Sewers—Authority to divert surface waters into private lake without incurring liability to be determined upon facts.**

**Facts**

"The City of North Mankato is a city of fourth class and organized under Chapter No. 462, Laws of 1921.

"Lying within the corporate limits of the city is a small lake. The property around the lake is owned by one individual. There are no public roads or cartways leading to it and it is considered to be a 'private' lake.

"The City of North Mankato wishes to construct storm sewers to drain surface water from the streets into the lake. The only waters going into the lake through these storm sewers will be from the natural waterway normally drained by the lake."

**Question**

"Will you please inform me whether the city can drain this surface water into the lake without being held responsible for damages by the owner, and too, if the City cannot legally drain surface water into the lake, does it have the authority to condemn the right to drain off water into the lake."

**Opinion**

It would be impossible to express an opinion as to the legal liability of the city on account of draining surface waters into the lake mentioned without being fully advised as to all of the facts. A further factual question to be determined is whether the lake is private or public water. The

mere fact that the land riparian to the lake involved is owned by one party does not necessarily constitute the waters as private waters. If the waters can be used for public purposes they may be classified as public waters. Where waters are private the owner of such private waters has rights therein similar to land that he owns in fee, so that before the question which you have submitted with respect to the city's liability for diverting surface waters into this lake can be answered, it would be necessary to be advised of all of the facts. Ordinarily that is a function for the court, and can only be determined after all of the facts pertinent to the question involved have been fully presented to the court.

However, I direct to your attention certain cases and authorities which I think will be of some help to you in determining the proper course to take after you have applied the facts to the principles of law stated therein:

St. Paul and Duluth Railroad Co. v. City of Duluth, 56 Minn. 494;
Joyce v. Village of Janesville, 132 Minn. 121;
Dunnell's Digest, 2d Edition, Section 10172.

Involved in your question above quoted is the authority of the city to condemn the right to drain off the water into the lake.

I believe that the practical solution to the situation would be for the city to condemn a strip of ground for road purposes to the lake, and such strip of ground could be used for the purpose of laying sewers so as to drain the area involved into the lake. That would give the city access over these private lands for the purpose of laying the necessary drain pipes. However, the question of the city's liability for discharging waters into the lake would have to be considered and such right obtained. The city has the power of eminent domain and that power will be exercised for the general welfare of its citizens and, I believe, could be extended so as to acquire the necessary right to discharge the surface waters into the lake mentioned.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Mankato City Attorney.
October 4, 1946. 387-B-10

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## 122

**Sewers—Whether village may pay cost of sanitary sewer extending across river and interceptor sewer depends upon facts. Municipality authorized to pay cost of outlet disposal plant and certain excess costs of sewer under Minn. St. 1945, § 429.09. Opinion Jan. 20, 1940, No. 168 of 1940 printed opinions modified in part.**

### Facts

The village of Preston, which has established sewer district number three in the village, is proceeding under Chapter 429, Minnesota Statutes 1945 to construct a sanitary sewer in this sewer district.

The sewer district lies on both sides of the Root River, so that a river crossing will be required. It will also be necessary to construct an interceptor sewer for the sole purpose of connecting the new sewer to the system already established.

**Question**

"Your opinion is requested as to whether the municipality may pay the cost of the river crossing and of the interceptor sewer, or either, under the provisions of section 429.09, Minnesota Statutes 1945."

**Answer**

Section 429.09 provides in part as follows:

> "The cost of outlets, tanks, and treatment of disposal plants and the excess cost of trunk sewers over the estimated cost of a sewer of an 18-inch diameter, or any part thereof, may be paid by the municipality or may be assessed against property found benefited thereby including the property abutting on that sewer."

This section also permits the municipality, if the council shall determine, to pay the cost of any such improvement applicable to intersecting streets and between street intersections and between street and alley intersections, as the council may determine. If the interceptor sewer or the sewer to be constructed across Root River constitutes an area between street intersections or between street and alley intersections, the cost of any portion thereof may be paid by the municipality.

From the facts submitted it is not possible for us to determine whether the sewer across the Root River or the interceptor sewer might be construed to be an outlet. Such a determination can only be made after all of the facts are known.

The act does not define the term "outlet." The term "sewer outlet" is defined in Black's Law Dictionary, 3rd Ed. as follows: "As used in a statute, that portion of a sewer which serves no other purpose than to connect the sewer system with the point of discharge." See Mogaard v. Robinson, 48 N. D. 859; 187 N. W. 142, 143.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Preston Village Attorneys.
August 26, 1946. 387-G-3

# 123

**Sidewalks—Construction—Repairs—Notice to property owners** — MS1941, §§ 429.21 et seq.

**Facts and Question**

"The sidewalks in said village (Ellendale) have apparently become broken up and in such a condition that the council, in view of public safety, wants to renew all walks. Some of the property owners, however, seem to feel that the present walks are sufficient. The council, however, wants to go ahead and they are wondering how much notice, if any need be given these property owners."

**Opinion**

The answer to your inquiry may be found in Minnesota Statutes 1941, Sections 429.21 et seq.

Section 429.21 provides that whenever the council of any village incorporated under the general laws of this state shall deem it necessary and expedient to construct or rebuild sidewalks or sewers in the village it may do so, acting on its own motion, or it may do so if a majority of the owners of the property fronting on the street or streets where such improvement is proposed petition the village council therefor, by adopting a resolution to that effect; such resolution shall specify the place or places where such sidewalk shall be constructed or rebuilt, the kind and quality of materials to be used therein, width, size and manner of the construction thereof, and the time within which the same shall be completed, which shall not be less than 40 days after the service of the resolution. This section further provides that the resolution shall contain the name of the owner of each lot, part of lot, or parcel of ground fronting on the street or streets where such walk is to be constructed or rebuilt.

The following section, 429.22, provides the manner in which the resolution shall be served. The next section, 429.23, provides that if the work shall not be fully done, and the sidewalk shall not be fully constructed or rebuilt in the manner and within the time prescribed in the resolution, then the village may order the same to be done by the street commissioner, or the commissioner of public works, or cause the same to be done by contract let to the lowest responsible bidder, the entire expense thereof to be paid out of the general revenue fund of the village.

Section 429.23 and the following sections provide for the manner and method of the assessment of benefits.

It is my opinion that your village council may proceed with the proposed improvement pursuant to the statutes above referred to.

I direct to your attention the case of **State v. Burnes**, 124 Minn. 471,

wherein the matter of procedure under the statutes referred to was before the court for decision.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Blooming Prairie Village Attorney.
June 7, 1946. 480-G

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## 124

**Streets—Approach—Dangerous places in approach walk extending to public sidewalks—Duty of municipality to guard or barricade—No power to make repairs or compel repairs outside of street except in case of nuisance.**

### Facts

"Some of the business buildings in the Village of Preston are built several feet back from the street line so that it necessitates an approach, platform or additional walk to reach the buildings from the main sidewalk. This additional walk is on private property belonging to the owner of the adjacent buildings. These approaches, from the main sidewalk, are in such disrepair that they are dangerous to people using them."

### Questions

"Has the village, under the general law, power to order these approaches rebuilt or repaired?

"If it has such power and the order is not complied with, can the village make the repair and charge the cost thereof to the adjacent property?

"If an ordinance is necessary to cover this situation, has the village power to enact such an ordinance?"

### Opinion

All of these questions are answered in the negative, subject to the following comment. From this answer it does not follow that the municipality is entirely relieved from any obligation in the premises.

A municipality has a certain duty with respect to its street if a condition arises close to it which renders it dangerous to travelers upon the street. This is true even though the dangerous condition was wholly the act of a third person. The duty of the municipality in such a case is to warn travelers of the danger so that they may turn back or avoid the dangerous place. Not only is the village required to repair its own streets, it is under the obligation of using ordinary care to keep its streets safe for use, and this includes the duty, where there are dangerous places near the

street, to take proper precautions to guard against accidents by the use of railings, barriers, or lights at night.

Where the dangerous place is outside the limits of the street, a test of the liability is not necessarily the distance of the dangerous place from the street. A municipality should erect and maintain suitable barriers where there are dangerous places near the street which without such protection would make the streets unsafe to travelers. However, the municipal duty to guard exists only where the danger is so near the street or sidewalk as to be perilous to travelers.

As a general rule, the village does not have to make safe for travel areas outside the public street. It has, however, power to provide guards where the street itself is unsafe for travel by reason of the proximity of pitfalls or dangerous places.

The foregoing observations are based partly upon the authority of McQuillin Mun. Corp. Rev. Ed. Vol. 7, pp. 264-268.

Therefore, if the defective places in the approaches to the sidewalk are so close thereto as to make travel upon the street itself dangerous, there might be circumstances under which the village could be held liable. The village could protect itself against such liability by erecting barriers in front of the dangerous approaches so as to warn people away from these dangerous places where pedestrians upon the street are likely to meet with injury.

In most instances, the erection of barriers in front of a man's place of business to protect the pedestrians on the street and prevent them from entering upon the dangerous places should be such an effective stimulus as to cause the abutter to protect his business, if not his patrons, by the making of the necessary repairs.

It is a question of fact in every case as to what would constitute negligence on the part of the village in respect to its streets. The village should not hesitate to exercise its authority to make and keep its streets safe by the erection of barricades if ordinary care dictates that that should be done.

Of course the village has power to abate nuisances.

RALPH A. STONE,
Assistant Attorney General.

Preston Village Attorney.
June 27, 1945. 396-G

# 125

**Streets—Establishment—May not establish cartway.**

**Opinion**

The city council of Granite Falls has no power to establish a cartway under the laws relating to the establishment of such cartways by town boards.

The city could, if the circumstances warrant it, lay out a new street to the property in question (Charter, Chapter 10, Section 76), and could exercise the power of eminent domain to acquire the right of way for that property (Charter, Chapter 7, Section 59). Whether the circumstances are such as to justify the council in taking such action is, of course, a problem for the council. It would depend upon the distance the street would have to be extended, the cost and the necessity for the taking in the public interest.

RALPH A. STONE,
Assistant Attorney General.

Granite Falls City Attorney.
October 8, 1945. 59-A-53

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# 126

**Streets—Paving—Petition under MS1941, § 434.14—Right of signers of petition to withdraw.**

**Facts**

"A petition was filed with the City Clerk for paving under Section 1815, Mason's Minnesota Statutes for 1927 (Chapter 65, Laws of 1919). The Council by resolution determined that the petition was signed by not less than 35 per cent in frontage of the real property abutting on such street and by resolution set the hearing on the petition for next Thursday, September 6.

"It now appears that since the action taken by the Council some of the signers on the petition wish to withdraw their names. One other has not asked to have his name withdrawn from the petition but has signed a petition opposing the improvement."

**Questions**

"1. After the Council has determined that the petition has the requisite number of signers and has by resolution set a date for hearing, can any signer on the petition withdraw his name therefrom and thus affect the percentage of signers on the petition?

"2. Under like circumstances as in question one, does the signing of a petition opposing the improvement have the same effect as withdrawing the name from the petition?

"3. Can a petitioner withdraw his name from the petition before the Council has determined that it has been signed by the requisite percentage of property owners and has set a date for hearing on the petition?"

**Opinion**

The three questions will be considered together.

The question as to the right of a signer of a petition to withdraw his name is treated at length in the annotation found in 126 A.L.R. page 1031.

The authorities seem to be quite well in agreement that a petitioner may withdraw his name before any action has been taken on the petition by the council. The authorities also seem to be to the effect that after final action has been taken on the petition, the signer has no right to withdraw. The question here, however, is whether a signer may withdraw his name after the council has determined the sufficiency of the petition and ordered a hearing thereon and (presumably) published the notice of hearing, but before the council has adopted a resolution ordering the improvement.

With respect to this question, I am inclined to follow the decision in Stringfellow v. Chouteau County, 42 Mont. 62, 111 Pac. 144, 126 A.L.R 1045, to this effect:

"While we have no doubt that any signer might have withdrawn his name by timely action, we are equally satisfied that no action of his, after the board passed upon the sufficiency of the petition, could be effective."

That a signer may withdraw before the sufficiency of the petition has been determined, see Slingerland v. Norton, 59 Minn. 351, and State ex rel. Streissguth v. Geib, 66 Minn. 266.

Here the council has not only approved the petition, but has taken jurisdiction, has ordered a hearing and published notice thereof. The filing of a sufficient petition gave the council jurisdiction and, once having acquired jurisdiction, the council is entitled to proceed notwithstanding some of the petitioners may thereafter attempt to withdraw or sign a counter-petition.

I am, however, further of the opinion that the council could in its discretion permit signers to withdraw even though the withdrawal would reduce the signers below the required percentage. If the council does in its discretion permit signers to withdraw so that the remaining signers will be less than the required percentage, the council would lose jurisdiction and would have no right to proceed thereafter.

By a parity of reasoning the council could, if it chose to do so, treat the signing of a remonstrance or counter-petition by one of the signers as a withdrawal although the council is under no obligation to do so.

This question, however, has a practical aspect. This ruling of the Attorney General is only an opinion. It does not settle the questions asked, and those who are opposing the petition are not bound thereby. They would still have a right to contest the validity of the assessment in court. If the council should proceed with the improvement, the city might thereafter be in this position, it would have incurred and made itself liable for the expense of laying the pavement but have no funds with which to pay the same because the assessment may have been held invalid for lack of sufficient signers.

In other words, if the council should proceed with the paving and the court should later hold contrary to the ruling herein given, the city might find itself in a serious predicament. It may be that under these circumstances it would be poor business policy to proceed with the improvement in the face of threatened litigation.

Authorities:

State v. Geib, 66 Minn. 266
Slingerland v. Norton, 59 Minn. 351
Evenson v. O'Brien, 106 Minn. 125
35 L.R.A. N.S. 1112
5 McQuillin Mun. Corp. Rev. Ed. p. 259
126 A.L.R. 1031
Minn. Stat. 1941, § 434.14
Mason's Supp. 1940, § 1815
Laws 1933, Chap. 200

RALPH A. STONE,
Assistant Attorney General.

Fairmont City Attorney.

September 5, 1945. 396-C-10

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## 127

**Streets—Widening—Petition signed by property owners prerequisite to widening streets under MS1945, § 434.14.**

**Question**

"Does Section 434.14, Minnesota Statutes 1941, formerly known as Section 1815, Mason's 1927 Statutes, apply to a petition by property owners for the WIDENING of a Street in a City otherwise qualified to come under this section?"

**Opinion**

Where a street widening is to be made pursuant to Mason's Minnesota Statutes 1927, Section 1815, being Minnesota Statutes 1941 and 1945, Section 434.14, a petition therefor must be signed by the owners of the real property abutting on the contemplated improvement as provided for in the above mentioned statute. Under this statute jurisdiction by the city council is acquired upon the presentation and filing of a petition. Furthermore, the act, of which the above section is a part, provides for the assessment to meet the cost of the improvement against the benefited property. It is therefore obvious that before the city council is authorized to widen a street under this statute, the necessary petition as therein provided must be presented to the city council.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

West St. Paul City Attorney.
September 16, 1946. 396-C-6

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OFFICERS

## 128

**County — Commissioner — Vacancy — Appointment by county board to fill caused by death—Duration of office by appointment**—MS1941, §§ 351.06 and 375.10.

**Facts**

A member of the county board of commissioners died on May 31, 1946; he was elected to this office in November, 1944, for a term which would expire on the first Monday in January, 1947.

**Question**

"Whether the appointee will serve the unexpired term of the man he replaces, or whether the appointment will be until the first Monday in January, 1947."

**Opinion**

The appointment should be not for the unexpired term of the decedent but for the official year ending December 31, 1946, or until his successor is duly elected and qualified. Assuming that at the general election in November this year someone is elected to the office of county commissioner, held by the decedent, the term of such elected person would begin January 1, 1947, and end December 31, 1948. The person appointed, as previously stated, would be for the balance of this year (official year) ending December 31, 1946.

Minnesota Statutes 1941, Section 351.06, is controlling on the duration of the term of the appointment. See **Prenevost v. Delorme**, 129 Minn. 359; **State ex rel Wells vs. Atwood**, 202 Minn. 50. Section 375.10 provides when and by whom the appointment shall be made.

Reference is made to several opinions that had been heretofore expressed by this office and you indicate that there appear to be inconsistencies in these opinions. You will have in mind that the facts do not always appear in the opinions, and upon examination of the facts submitted upon which the opinion was based the matter becomes clear and apparent inconsistencies in different opinions disappear.

In the opinion of June 17, 1944, file 126-G, the writer stated:

> "In your case I am of the opinion that the person whom the board of appointment shall select will hold the office of commissioner until the first Monday in January, 1945, when the person elected at the November general election in 1944 will take his seat on the board to serve for the balance of the unexpired term. The ballot should show by appropriate language that the election is for the unexpired term, and not for the full term."

In that case the county board member resigned in June, 1944, and his term of office would not have expired until December 31, 1946. You will note from the quoted portion of that opinion that the appointment to fill the vacancy was for the balance of the year 1944, and the person elected would take office on the first Monday in January, 1945, for the balance of the unexpired term of the commissioner who resigned.

The term "official year" should not be construed so as to mean for the "unexpired term" of the person who by death, resignation, or otherwise causes the vacancy.

You also refer to the opinion of October 30, 1942, file 126-G. I have examined this opinion and I do not find that the same is in any way inconsistent with what I have stated herein, or the opinion of June 17, 1944. In the opinion of October 30, 1942, the writer said:

> "If the vacancy in the office of county commissioner occurs less than thirty days before the next election, at which election the office is to be filled in the usual course of events, there should be no appointment to fill the vacancy, but otherwise there should be an appointment."

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Chisago County Attorney.
**June 11, 1946.** 126-G

# 129

**County—Commissioners—Vacancy—Appointment—Unorganized town situated within a commissioner district where the right to appoint is by statute MS1945, § 365.10, given to certain village and town officers—Unorganized townships within such commissioner's district may not participate in such appointment.**

**Facts**

There is a vacancy in the office of County Commissioner of Roseau County. Sec. 375.10 Minn. Stat. 1941, provides that such vacancy "shall be filled by a board of appointment, consisting of the chairman of the town board of each town, and the mayor or president of each city and village in the commissioner district in which such vacancy occurs." Included in the district are two townships the government of which has been dissolved and which are now unorganized territory.

**Question**

Is unorganized territory without representation on the board of appointment?

**Opinion**

Your question is answered in the affirmative.

Minnesota Statutes 1945, Section 365.45, relating to the dissolution of towns, provides in part as follows:

> "Upon the adoption of the resolution by the county board such town shall be dissolved and no longer entitled to exercise any of the powers or functions of an organized town."

Minnesota Statutes 1945, Section 375.10, provides for the manner and method of filling a vacancy in the office of county commissioner. The chairman of each town board within the commissioner district is entitled to participate in making such appointment. Obviously, when a town within the district becomes dissolved, the town officers as such cease to exist and consequently the dissolved townships within the district wherein the vacancy has occurred in the office of commissioner, have no representation in the matter of appointing a commissioner to fill a vacancy.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Roseau County Attorney.

November 25, 1946. 126-A

# 130

**County—Register of deeds—Recording—Deeds—Instruments—Re-recording—No statutory authority for re-recording a deed or other instrument—Same may be re-recorded under certain conditions—No authority to change or tamper with official records—After deed has been recorded and another description inserted in such recorded deed, the same may not be re-recorded**—MS1945, §§ 386.39, 507.22.

## Facts

A husband and wife, as grantors, executed and delivered a deed to one of their sons in January, 1932, conveying certain premises in Brown and Blue Earth Counties. The deed was recorded in both counties. Upon the deed, which was recorded, there now appears a description of an eighty-acre tract in Blue Earth County which is not shown upon the record. This additional description of eighty acres appears to have been made upon a typewriter different from the one used in writing the other description as recorded. The husband, one of the grantors, died shortly after the deed was recorded in Blue Earth County. The grantee now claims that the eighty acres which appears in different type upon the recorded deed was contained in the original deed, and that the recorder by error or otherwise failed to include in the record such eighty-acre tract. The register of deeds who recorded the deed in the first instance is not now in office. The grantee now insists upon having the recorded deed containing the additional eighty acres re-recorded.

## Question

Does the register of deeds of Blue Earth County have authority to accept the above-mentioned deed for re-recording?

## Opinion

For the reasons to which we shall hereinafter direct your attention and upon the decisions and statutes to which we shall refer, we believe that this question must be answered in the negative.

The law governing the recording of instruments and the duties of the register of deeds is purely statutory.

Minnesota Statutes 1945, Section 386.39, provides as follows:

> "Except where otherwise expressly provided by law, no register of deeds shall record any conveyance, mortgage, or other instrument by which any interest in real estate may be in any way affected, unless the same is duly signed, executed and acknowledged according to law; any such officer offending herein shall be guilty of a misdemeanor and liable in damages to the party injured in a civil action."

Section 507.22 contains the prerequisites for the execution of deeds and other like instruments. Section 507.24 contains the prerequisites entitling a deed or other like conveyance to record.

There is no statute in Minnesota which authorizes a register of deeds to re-record an instrument conveying an interest in land.

The record of a deed or conveyance when made by the register of deeds is prima facie evidence of what it contains. The presumption is that the register of deeds performed his duty as a public officer when the original recording was made. Of course, that presumption and prima facie evidence may be overcome by adequate proof. The function of determining whether the record has been overcome by extraneous proof is a judicial question and not one for the determination of the register of deeds.

Whether the eighty-acre tract was in the deed when it was first presented to the register of deeds for recording or whether it was inserted after the deed was recorded is a factual question. In your letter you state that the grantee contends that the description of the eighty-acre tract was in the deed when it was presented to the register of deeds for recording and that through, error, inadvertence or otherwise the register failed to record the eighty-acre tract upon his record.

While it is the duty of the register of deeds to properly record a deed or conveyance entitled to record accurately, yet there is also a duty upon the grantee to see to it that a proper record of the instrument has been made.

In **Latourell v. Hobart**, 135 Minn. 109, 112, 160 N. W. 259, our court said:

> " * * * We may assume that it is the duty of a grantee to see that his deed is correctly recorded, and that a misdescription of such a character that reformation is necessary in order to pass the legal title, is fatal to the effect of the record as notice. This is the rule in this state, Thorp v. Merrill, 21 Minn. 336; Bailey v. Galpin, 40 Minn. 319, 41 N. W. 1054; Bank of Ada v. Gullikson, 64 Minn. 91, 66 N. W. 131, though not in all jurisdictions. 2 Devlin, Deeds (3d ed.) § 686."

Assuming that the register of deeds made an error in recording the deed whereby the eighty-acre tract was not recorded, would he then be permitted to re-record the deed now with the eighty-acre tract included and typewritten therein upon a typewriter different than was used when the instrument as recorded was made?

We do not believe that the recorder would have such authority.

We think that it would be necessary, for the reasons stated in a United States Supreme Court decision to which we will hereafter direct attention, to have a new instrument executed and delivered so as to meet the statutory requirements for recording before a recording could be made. However, as stated in your letter, one of the grantors is deceased. Therefore, obviously, a new instrument cannot now be executed.

The remedy, it seems to us, for the grantee is to bring an action for a reformation of the deed as recorded and the record. In such a proceeding it would be permissible to prove by parol or other competent evidence that

the deed was incorrectly recorded. See **Gaston v. Merriam,** 33 Minn. 271; **Latourell v. Hobart,** 135 Minn. 109. The register of deeds, upon a proper decree of the court, could be authorized and permitted to correct his record so as to conform thereto.

Assuming that the description of the eighty-acre tract was inserted in the deed after the same had been recorded, then it seems clear to us that such instrument could not be re-recorded.

The further question would arise whether such insertion was made with the knowledge or at the request of the grantors.

It is a general principle of law that if alteration in a deed was fraudulent it would not be entitled to record. A forged deed is not entitled to record. **Nesland v. Eddy,** 131 Minn. 62, 154 N. W. 661. See also 16 Am. Juris. (Deeds), Sections 26 and 27.

If the alteration was made by agreement between the parties to the deed, and assuming that there are no statutory inhibitions, to hold that such deed could now be re-recorded so as to show upon the record a conveyance different from that shown by the record of the original deed would leave the doors wide open for the most flagrant fraud and abuses in the conveyancing of property.

Where the parties to the transaction are still alive after the error has been discovered, then it would be necessary to execute a new deed of conveyance and to have the same recorded.

The general rule of law which we think should apply and which should be followed was stated by the Supreme Court of the United States in **Moelle v. Sherwood,** 148 U. S. 21, as follows:

> "Even if it be conceded that the parties intended that the conveyance should embrace the premises in controversy, they did not carry out their intention, and in its original condition the deed was placed on record and there allowed to remain, giving notice to all parties interested * * * . The change in the description of the property, made after the delivery of the deed to the grantee and its record in the register's office of the county, did not give operation and force to the deed with the changed description as a conveyance of the premises in controversy. An alteration in the description of property embraced in a deed, so as to make the instrument cover property different from that originally embraced, whether or not it destroys the validity of the instrument as a conveyance of the property originally described, certainly does not give it validity as a conveyance of the property of which the new description is inserted. **The old execution and acknowledgment are not continued in existence as to the new property.** To give effect to the deed as one of the newly described property it should have been re-executed, reacknowledged and redelivered. In other words, a new conveyance should have been made."

In the absence of a statute making acknowledgment or attestation of a deed or conveyance a prerequisite to the validity thereof, there seems to

be a general rule that an alteration made in such an instrument, by consent of the parties, after execution and acknowledgment or attestation, and either before or after delivery, or even after recording, does not, as between the parties thereto, render invalid the instrument as originally executed. The alteration itself is generally held to be valid and effective as between the parties to the instrument, particularly where there is a redelivery after the alteration and without a new attestation or acknowledgment. However, there is authority to the contrary. See 67 A. L. R. 369.

This rule, however, would not be applicable under Minnesota statutes for the reason that such statutes, to which we have hereinbefore directed attention, contain the prerequisites for execution of an instrument and also the prerequisites entitling the same to record.

From what has been stated herein and incidental thereto, the question arises as to the authority of a register of deeds to re-record a deed under any circumstances.

There appears no statutory authority for the register of deeds to re-record an instrument. However, we believe that there are two instances where a register of deeds might be authorized to re-record a deed, as follows:

(a) To correct an error of a ministerial or clerical nature if it clearly appears to the register that such error was the result of the register's recording of the instrument and where the parties to the instrument have requested that the error be corrected. Of course, the more preferable way to correct the error would be to have the parties reexecute, reacknowledge and redeliver a new deed.

Authorities which sustain the proposition that a register may in good faith correct his record so as to conform to the original instrument even where the parties thereto have not consented are found in the case of **Sellers v. Sellers**, 3 S. E. 917 (N. C. 1887), wherein the court said:

> "If he found that he had by inadvertence omitted a word, a sentence, a paragraph, or a scroll representing a seal, we think he might, in good faith, complete the registration in these respects. Of course, he could not have authority to interpolate anything that was not in the deed or other instrument at the time the probate was made. It was therefore not improper for the register, as it appears he did, to add on the registry the scroll representing the seal affixed to the signature of the wife, which he had at first omitted."

In a Michigan case, **Hommell v. DeVinney**, 39 Mich. 522, the court said:

> " * * * Interlineations in the records of deeds are not so unusual as to render the record containing them doubtful or suspicious, and certainly fall far short of indicating a fraudulent alteration. Very clear proof should be required to thus destroy the effect of a public record. * * * I think that we must presume that all alterations or interlineations made or appearing in a public record, were done in a

proper manner by the person having the care and custody thereof, or by some one in his office, having authority so to do. In other words, the mere fact that a change has been made, in the absence of evidence showing the contrary, must be presumed to have been done in a proper and legitimate manner."

See also **Baldwin v. Marshall**, 21 Tenn. 116.

We think that the rule which is contrary to the above referred to decision and which is stated in 45 Am. Juris. 459, Records and Recording Laws, Section 71, is the better rule to follow, and is as follows:

"No custodian of records is authorized to tamper with them. Even where a record is defectively made, the recorder cannot correct the mistake on his own motion, especially where he acts at the suggestion of one not a party to the instrument; the alteration is to be disregarded, and the record is to be regarded as it stood before it was tampered with. * * * "

This rule was followed by the court in the following reported cases: **Aetna Life Ins. Co. v. Hesser**, 42 N. W. 325 (Iowa) and **Jackson v. Lee**, 277 P. 548 (Idaho).

(b) The second instance where there is authority by court decisions for a register of deeds to re-record a deed is where the deed as originally recorded was not then legally entitled to record and the legal disability has since the recording been removed without any alteration or change having been made in the deed as recorded. Such an instance would arise where the register recorded a deed, for illustration, on September 6, 1946, and the acknowledgment thereof was dated September 26, 1946. Such a deed would not be entitled to be legally recorded until after September 26, 1946, and while recorded on September 6, 1946, such instrument could be presented for re-recording after September 26, 1946. The following decision sustains the principal of law stated:

**Oliver v. Sanborn**, 27 N. W. 527. In this case the court at page 530, said:

" * * * Now, if this is the true date of the certificate of authentication, then the deed was not entitled to be recorded on the second of August, and, if attached afterwards, a serious question might arise whether the whole deed should not have been again recorded in order to protect the purchaser, and cut off a prior unrecorded deed. * * * "

Supplementing by adding to and making a part of the above, I have to say:

From an examination of the statutes of Minnesota, it appears that there is no statute which expressly forbids the recording more than once of a deed or other instrument. An examination of the decisions of the Supreme Court of Minnesota fails to disclose any decision of that court which holds that the recording of a deed or other instrument more than once is invalid.

If there has been no change or alteration made in a recorded deed or other instrument, except the addition thereto of the certificate of recording, there is not, either under the statutes or court decisions of this state, any express prohibition of the recording of such a deed or instrument for a second time if the register of deeds wishes to accept it for the record. The effect of such recording upon the chain of title, if any, remains for determination by the courts.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Blue Earth County Attorney.
September 6, 1946. 373-B-9

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## 131

**County — Register of Deeds — Recording — May record instruments even though title is registered.**

**Question**

Whether after the title to a description of land has been registered under the Torrens system, a mortgage covering that description only may thereafter be recorded with the **Register of Deeds.**

**Answer**

I know of nothing to prevent the Register of Deeds from recording such a mortgage, although I can see no possible reason for doing so. The recording of the mortgage with the Register of Deeds would be a useless act. The title to registered land is only affected by instruments filed with the Registrar of Titles.

RALPH A. STONE,
Assistant Attorney General.

Pipestone County Attorney.
June 26, 1945. 373-B-19

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## 132

**County—Register of deeds—Recording—Must record instruments word for word**—MS1941, § 386.19, MMS1927, § 884.

**Question**

"The City of Mankato wants to perfect its tax title to a tract of land, or anyone else for that matter, and the tract of land in question is listed and described with a number of other tracts likewise covered by said proceedings, such as in the posted notice carrying a number

of tracts of land. If we wish a record of these proceedings on file in the County Auditor's office and ask to have the originals recorded may the Register of Deeds not record the same and omit the descriptions of the tracts of land with which we are not concerned, either stating in his record in brackets that there are other tracts of land in the instrument recorded, or stating in his certificate of recording that the instrument is recorded only in so far as it concerns a certain tract of land and describing the same in the certificate? May the Register of Deeds be required to so record the instrument or instruments?"

**Opinion**

The register of deeds is required to record "word for word" all instruments left with him for record. Minnesota Statutes 1941, Section 386.19, Mason's Statutes 1927, Section 884. He must do so. It would be proper to secure a certified copy of the posted notice omitting therefrom other descriptions in which your client is not interested, showing the omission by asterisks. This could be certified as a true and correct copy of the notice except as to descriptions of land omitted therefrom.

I do not think that you could compel the register of deeds to record only a part of an instrument left with him for record.

RALPH A. STONE,
Assistant Attorney General.

Mankato City Attorney.
July 23, 1945. 373-B-17-d

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# 133

**County — Register of deeds — Recording — Real estate mortgages: Notice under L 1945, C 363, need not be recorded, but merely filed; provisions of recording act as to witnesses and acknowledgment do not apply—** MS1941, § 645.44, Subd. 8; MS1941, § 507.22 (MMS 1927, § 8213); MS1941, § 507.24 (MMS 1927, § 8217); MS1941, § 600.23.

**Facts**

Attention is called to the provisions of Laws 1945, Chapter 363, providing that no foreclosure of a real estate mortgage executed prior to November 1, 1909, shall be maintained unless a notice in accordance with the terms of that chapter is filed in the office of the register of deeds.

**Question**

Whether the notice provided for in this chapter is to be recorded or merely filed and, if recorded, whether the provisions of the recording act as to two witnesses and acknowledgment apply.

**Opinion**

Section 1 of the statute in question reads:

> "No action or proceeding to foreclose a real estate mortgage executed prior to November 1, 1909, shall be maintained after January 1, 1946, unless prior to said date the owner of said mortgage shall have filed in the office of the Register of Deeds of the county in which is located the real estate covered thereby, a notice setting forth the name of the claimant, a description of said real estate and of said mortgage including the volume and page at which it is of record and a statement of the amount claimed to be due thereon."

It will be noted that the word "filed" only is used.

Minnesota Statutes 1941, Section 645.44, Subdivision 8, contains the following definition:

> "When an instrument in writing is required or permitted to be **filed for record with**, or recorded by, any officer, the same imports that it must be recorded by such officer in a suitable book kept for that purpose, unless otherwise expressly directed."

This is the same language as was formerly contained in Mason's Minnesota Statutes 1927, Section 10933, paragraph 15.

The words "filed," "filed for record," and "recorded" are used in various sections of the statutes and, we must assume, have been used deliberately. Minnesota Statutes 1941, Section 600.23, makes specific provision for the filing of papers by a register of deeds.

In view of the fact that the legislature used the word "filed" alone, I am of the opinion that the statute does not require recording. Mason's Minnesota Statutes 1927, Section 8213 (Minnesota Statutes 1941, Section 507.22), requires that all conveyances made within this state of any interest in lands shall be executed in the presence of two witnesses, who shall subscribe their names thereto as such. Clearly the notice referred to in Chapter 363 does not constitute a conveyance, and, therefore, the provisions of the section last referred to would not apply.

Mason's Minnesota Statutes 1927, Section 8217 (Minnesota Statutes 1941, Section 507.24), provides as follows:

> "To entitle any conveyance, power of attorney, or other instrument affecting real estate **to record**, it shall be executed, acknowledged by the parties executing the same, and the acknowledgment certified, as required by law."

There is no such requirement with reference to instruments which are merely to be filed.

In view of the foregoing, I am of the opinion that it is not necessary to record the notices provided for by Chapter 363 and that, therefore, it is not necessary that such notices be witnessed or acknowledged.

WM. C. GREEN,
Assistant Attorney General.

Blue Earth County Attorney.

January 3, 1946. 373-B-16

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## 134

**County—Register of deeds—Recording—State tax forfeited lands—where title thereto is registered state deed may be recorded in register of deeds office.**

**Facts**

"Some time ago certain lots forfeited to the State of Minnesota for non-payment of taxes. The lots were duly sold to 'A' and a state deed was issued to him. The lots were registered under the Torrens system. 'A' presented the tax deed to the Register of Deeds of our County and asked to have the same recorded. He does not know where the record owner of the land is and did not present any certificate when he presented the tax deed for recording. 'A' insists that because the land is forfeited to the State of Minnesota his tax deed from the State is entitled to record even though he does not present any certificate, and that he is entitled to have a certificate issued by the Register of Deeds."

**Question**

Whether the register of deeds may accept "A's" tax deed for recording.

**Opinion**

This office has heretofore ruled that the register of deeds may accept for recording a mortgage covering registered lands under the Torrens system although there is no reason for doing so. The title to registered lands is only affected by instruments filed with the registrar of titles. In your letter you refer to the register of deeds and not to the registrar of titles. You request no opinion as to whether a new certificate may be issued by the registrar of titles upon the presentation of the state deed without presenting the owner's certificate of title, and no opinion is therefore expressed in regard thereto.

As to the procedure to be followed in securing a new certificate covering lands that have been registered under the Torrens system upon a state deed where the owner's certificate is not presented for cancellation, we refer

you to the following statutes: Laws 1939, Chapter 341, Minnesota Statutes 1945, Sections 284.11, 284.14, 284.16, 284.18, and 508.67.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Mille Lacs County Attorney.
October 9, 1946. 374-J

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## 135

**County—Sheriff—Deputy—Female—Under M.S. 1941, § 387.26, a female deputy sheriff may receive $5.00 per day, but when appointed under § 387.15, only $3.00 per day.**

### Question

Whether a woman deputy sheriff may be paid $5.00 per day.

### Opinion

The applicable statutes for construction are as follows: Minnesota Statutes 1941, Section 387.14, Mason's Statutes 1927, Section 917, reading 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."

Laws 1921, Chapter 369, Minnesota Statutes 1941, Sections 387.15 to 387.17, being Mason's Statutes 1927, Sections 918 to 920, read as follows:

> "387.15. The presiding judge of any district court at any time before the return of a verdict by a petit jury composed of both men and women, serving upon a case pending therein, by order issued to the sheriff and entered upon the minutes of the court, may direct the sheriff to appoint a female legal voter of the county as special deputy sheriff or bailiff to serve until the discharge of such jury from further service upon the pending case. The appointment shall forthwith be made and entered upon the minutes of the court and before entering upon the performance of her duties, the person so appointed shall take and subscribe the oath by law required of deputy sheriffs and file the same with the clerk."

> "387.16. Upon taking the oath by law required by officers in charge of petit juries the person so appointed may be directed by the court to have charge of such jury conjointly with the male deputy sheriff or bailiff performing such duty. Female special deputy sheriffs and bailiffs so appointed shall in all things perform the duties and be subject

to the penalties by law prescribed for other officers having charge of petit juries."

"387.17. Each such deputy shall receive as compensation $3.00 per day while in attendance upon the court in charge of such jury."

And Minnesota Statutes 1941, Section 387.26, Mason's Statutes 1927, Section 922, Laws 1941, Chapter 468, reads as follows:

"The judge of the district court in each county, before the commencement of any general term, shall by order issued to the sheriff fix the number of deputies required during such term and direct the sheriff to furnish the same. The sheriff shall file this order with the clerk. Each such deputy shall receive such compensation as the judge shall determine, not exceeding $5.00 per day, while attending such term of court."

It would be my opinion that if before the term commences the judge issues an order to the sheriff fixing the number of deputies required during the term and determines their compensation, such deputies shall receive the compensation not exceeding $5.00 per day as may be fixed by the court. In such instance it would make no difference whether the deputies were male or female.

I construe Sections 387.15 to 387.17 to refer to a case where a special female deputy is called in to serve upon a particular case, and in that case the deputy appointed receives $3.00 per day.

RALPH A. STONE,
Assistant Attorney General.

Winona County Attorney.
April 8, 1946. 390-B-2

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## 136

**County—Sheriffs—Vacancy—Incumbent to serve until successor is elected and qualified—any vacancy occurring therein to be filled by the county board by appointment for the balance of the entire term**—MS1945, §§ 375.88, 382.01, and 382.02.

**Facts**

At the general election held in Carver County, Minnesota, on November 5, 1946, the sheriff of Carver County was defeated by his opponent by a majority of 1207 votes.

The incumbent has commenced proceedings to contest the election of his opponent, claiming he has violated some of the provisions of the Corrupt Practices Act. The hearing on said proceeding is set for December 27, 1946.

**Question**

In case the election of the successful candidate is held void, will the present sheriff continue to hold office until the 1950 general election or will the office be vacated and will it be necessary for the Board of County Commissioners to appoint the present incumbent or someone else to fill that office until the general election in 1950?

**Opinion**

Under Section 382.01 the incumbent sheriff continues in office until his successor is elected and qualified. In the event that the sheriff who was elected on November 5, 1946, is declared disqualified in the election contest proceeding pending, then the county board would be authorized under Minnesota Statutes 1945, Section 375.08, to fill the vacancy. Any appointment made by the county board to fill such vacancy would be for the balance of the entire term. M. S. 1945, § 382.02. Of course, if the successful sheriff qualifies so as to take office on the first Monday of next January, then the incumbent sheriff's term would end when the new sheriff's term begins. In the event that the pending proceeding should result in disqualifying the sheriff so elected there would then occur a vacancy in the office to be filled by the county board under the statute above referred to.

See **State ex rel Evans v. Borgen,** 189 *Minn.* 216.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Carver County Attorney.
December 21, 1946. 390-A-2

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## 137

**County—Treasurer—Vacancy—Chief deputy may act until vacancy is filled by the board.**

**Facts**

The county treasurer has just died. He had a chief deputy in his office.

**Question**

Whether the deputy county treasurer may perform the duties and functions of the treasurer until the next election?

**Opinion**

You have quoted the statute, Minnesota Statutes 1941, Section 375.08. It reads:

"* * * when such vacancy occurs in any of the offices hereinbefore mentioned (county treasurer), in which office there is a chief deputy

or first assistant, then the chief deputy or first assistant is empowered and authorized to perform all of the duties and functions of the office until such time as the same is filled by appointment by the county board."

The chief deputy is empowered and authorized to perform all the duties and functions of the county treasurer until such time as the vacancy is filled by appointment of the county board.

RALPH A. STONE,
Assistant Attorney General.

Scott County Attorney.
May 2, 1946. 450-A-3

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## 138

**County—Veterans service officer—Compensation—Transfer of funds—Unneeded surplus in county welfare fund may be transferred by unanimous vote to the general fund to pay veterans service officer.**

### Basis of Inquiry

Laws 1945, Chapter 96, provides that a county may appoint a veterans service officer. Your county has made no provision in its budget for the expenses of such a veterans service officer during the current year and "it will be at least six months before any funds will be available as a result of including such appropriations for such purposes in the new budget." There is a surplus in the county welfare fund beyond the needs of the current year.

### Question

Can a transfer be made under these circumstances of a surplus in the county welfare fund to the county general fund to be used to pay the salary and expenses of the county veterans service officer?

### Opinion

Minnesota Statutes 1941, Section 375.18 (7), authorizes the county board "To transfer by unanimous vote any surplus beyond the needs of the current year in any county fund to any other such fund to supply a deficiency therein." (This does not apply to a county containing more than 75,000 inhabitants.)

If the county welfare board should certify to the county board that there exists a surplus in its funds not needed for the current year and that it desires to have a certain amount of that surplus transferred to the general fund to support the expense and salary of a veterans service officer, the county board may adopt by unanimous vote a resolution reciting such

request of the county welfare board and reciting further that there exists in the general fund a deficiency by reason of the additional unanticipated expense of the veterans service officer and directing the transfer of an amount named to the general fund to be used to pay the expenses and salary of the veterans officer and his assistants.

Handled in this manner, I can see no legal objection to the transfer being made.

RALPH A. STONE,
Assistant Attorney General.

Anoka County Attorney.
June 14, 1945. 104-B-15

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## 139

**County—What facts must exist in order to support a finding of misfeasance or non-feasance—Register of Deeds—There is no statute fixing office hours for public officers—Duties of register of deeds are statutory and county board does not have jurisdiction to control activities of register of deeds.**

**Facts**

"The duly elected, qualified and acting Register of Deeds of Carlton County has recently been hired by the school board of the City of Cloquet to coach basketball in the high school in Cloquet for which he will be compensated. In connection with his coaching duties he is required to teach two classes in high school in the morning and as a result thereof he arrives at his office in the court house at approximately 11:15 A.M. This schedule would apply on every day except Saturday and as to such day there has been no indication as yet as to whether he would or would not put in his full time in his office. It is possible that the discharge of the coaching duties involved might otherwise interfere with the discharge of his duties as Register of Deeds. He does have a full time clerk in the office, paid by Carlton County, who apparently is competent to handle routine work in the office but not qualified to pass upon technical matters which very often arise in such an office."

**Question**

"1. Assuming the foregoing facts to be true, would the Board of Commissioners of Carlton County have the right to require him, the Register of Deeds, to sever his relations with the school board and devote his full time to the duties of his office to the exclusion of his coaching duties?"

**Opinion**

This question is answered in the negative.

The duties of the register of deeds are fixed by statute; he is an elected public official. As a public official he holds his office as a public trust created for the benefit of the public and not for the benefit of himself.

We have no statute which fixes the office hours for public county officials. Minnesota Statutes 1945, Section 386.17 provides:

> "The register of deeds shall exhibit free of charge, during the hours that his office is or is required by law to be open, any of the records or papers in his official custody to the inspection of any person demanding the same, either for examination, or for the purpose of making or completing an abstract or transcript therefrom; but no such person shall have the right to have or use such records for the purpose of making or completing abstracts or transcripts therefrom, so as to hinder or interfere with the register in the performance of his official duties."

We believe that the law contemplates that public officers must faithfully perform the duties imposed upon them by law, and that the public must have reasonable access to public records.

Custom and precedent in practically every county in this state have established a rather universal time during which county officials have kept open their offices for transaction of public business. By reason of this situation the public has a right to expect that during reasonable hours public officials will be at their offices so that public matters pertaining to their office may be transacted. The public likewise has the right to consult and obtain information from public officials relative to the transaction of business with such public officials.

The members of the county board are elected public officials; likewise, their duties and their powers are fixed by statute. There is no statutory provision which permits the county board to fix or determine the duties or the office hours of another elected public official.

The statutes permit the Governor to remove certain public officers, including registers of deeds, for malfeasance or nonfeasance in office. Minnesota Statutes 1945, Section 351.03.

**Question**

> "2. What facts, generally, must exist in order to support a finding of misfeasance or non-feasance in office?"

**Opinion**

It is difficult to define what facts generally would constitute malfeasance or nonfeasance in office. However, malfeasance has been defined by our courts to refer to and include only such misdeeds of a public officer as to affect the performance of his official duties to the exclusion of acts affecting his personal character as a private individual. See **State ex rel Martin v. Burnquist,** 141 Minn. 308, 170 N. W. 201, 203.

Nonfeasance has been defined as the omission of some act which ought to be performed. See **Allas v. Borough of Rumson**, 181 Atl. 175, 115 N. J. L. 593, 102 A. L. R. 648; **Southern Railway Co. v. Sewell**, 18 Ga. Ap. 544, 90 S. E. 94.

**Question**

"3. In the event your answer to question number one should be in the negative would your opinion be changed if it could be shown that the office is not a 'fee office'?"

**Opinion**

We do not believe that where the compensation of the register of deeds is strictly on a fee basis the statutory duties of the register of deeds would be in any way affected thereby. We think that in either event the duties to the public as a public officer would be the same.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Carlton County Attorney.

December 16, 1946. 104-A-10

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## 140

**Town—Treasurer—Bond—Cost of surety bond to indemnify county on procuring duplicate for lost county warrant for legitimate township expense.**

**Facts**

"The treasurer of the Township of Marshfield mailed a County Warrant, payable to the Township, to the bank for deposit. It is claimed that the Warrant was lost in the mail. Thereafter the Township treasurer procured a surety bond to indemnify the County under the provisions of Section 1058-1060 Mason's Statutes, and a duplicate Warrant was issued to the Township. The Township treasurer paid the premium on this surety bond.

"At the last Township annual meeting the voters of the Township, by a vote of 18 for and 2 against, authorized the Township Board to reimburse the Township treasurer for the premium he paid on this bond, providing that it was legal."

**Question**

"Whether the town board, in view of the foregoing, may reimburse the Township treasurer for the premium he paid on this surety bond."

**Opinion**

The cost of procuring a surety bond to indemnify the county in such a case is an ordinary business expense incurred on behalf of the town. The town may lawfully pay this premium (or reimburse the treasurer for the amount which he advanced) the same as it could pay any other legitimate township expense. Rulings on the right of the town to pay the premium on the treasurer's official bond are not pertinent. Probably the town board could pay this expense without a resolution of the town meeting. With such a favorable resolution by the town meeting, I entertain no doubt on the question. The expense may be paid by the town.

RALPH A. STONE,
Assistant Attorney General.

Lincoln County Attorney.
April 12, 1946. 455-C

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## 141

**Village — Council — Contracts — Interest of councilman — Rule of Mares v. Janutka, 196 Minn. 87, applied—Council cannot pay member for labor performed but may pay reasonable value of materials furnished not to exceed $50.00 in any year.**

**Facts**

One of the council members is a blacksmith. From time to time he has performed labor and furnished material for the village. These have been paid on verified accounts which he has presented. Now two such accounts have been filed with the clerk, but the council has refused to allow the same on the ground that it is contrary to law to do so.

You do not state separately the amount claimed for labor and the amount claimed for materials, but the two accounts together exceed $50.00.

**Question**

"Will you kindly give me your opinion as to whether or not the council is justified in disallowing these bills?"

**Opinion**

You are familiar with and have referred to the case of Mares v. Janutka, 196 Minn. 87. This decision is controlling in so far as it is applicable to your situation. In that decision the court said:

"Where, as in Stone v. Bevans, 88 Minn. 127, 92 N. W. 520, 97 A.S.R. 506, the contract involves services by an officer for his municipality in violation of the statute ( §10305), no recovery may be had by

him in any form of suit or action; and if payment for such services has been made by the municipality, same may be recovered in an appropriate suit for restitution.

"Such illegal contract cannot be made the basis for a cause of action or defense. Currie v. School Dis. No. 26, 35 Minn. 163, 27 N. W. 922; Bjelland v. City of Mankato, 112 Minn. 24, 127 N. W. 397, 140 A. S. R. 460. But when such officer sells to his municipality property within its municipal powers to acquire and use, and it is so acquired and used, liability may be enforced quasi ex contractu, but in no event beyond the value of the property to the municipality. First Nat. Bank v. Village of Goodhue, 120 Minn. 362, 139 N. W. 599, 43 L.R.A. (N.S.) 84; Frisch v. City of St. Charles, 167 Minn. 171, 208 N. W. 650; Wakely v. County of St. Louis, 184 Minn. 613, 240 N. W. 103, 84 A.L.R. 920; and Lindgren v. Towns of Algoma and Norland, 187 Minn. 31, 244 N. W. 70, cited above."

To apply these rules of the Supreme Court, it is necessary to consider separately the claim for labor and the claim for materials. The Supreme Court has made a differentiation between such claims, but has not stated the reason why there should be a difference.

As to the labor bills: Following the case cited, there could be no recovery and the village council should not allow such bills.

As to the materials: Following strictly the language of this opinion, it would seem to follow that the claimant could be paid the reasonable value of the materials which he sold to the village. This results from the fact that the village has had the benefit of the materials and cannot return the same.

However, in the case cited, the court did not have before it for consideration Minnesota Statutes 1941, Section 412.21, Mason's Supplement 1940, Section 1199, which reads as follows:

"No member of a village council shall be directly or indirectly interested in any contract made by such council, and every violation hereof shall be a misdemeanor; provided, that any village council, otherwise having authority, may purchase merchandise or materials in which a member of such council is interested by four-fifths vote of such council, when the consideration for such purchase of such merchandise or materials does not exceed $50.00 in any year. All contracts for the purchase of merchandise, materials or equipment or for any kind of construction work undertaken by the village which require an expenditure of $100.00 or more, if not to be paid from road or poll tax, shall be let to the lowest responsible bidder, after public notice of the time and place of receiving bids."

I assume that neither of the bills in question exceeded $100.00, and consequently it was unnecessary to advertise for bids.

This section of the statute was not involved in the Mares case. I believe that should a case arise where a councilman sought to recover the

reasonable value of materials furnished in excess of $50.00 in any one year, the court might limit the application of the Mares case. It is my opinion that if a case arose in which this statute is applicable, the Supreme Court would consider the statute as creating an exception to the general rule stated in the Mares case; and hold that the village could not pay to a council member more than $50.00 in any one year for material sold by him to the village.

It is therefore my opinion that the village cannot pay the labor bills but can pay to the councilman the reasonable value of the materials furnished by him not in access of $50.00 in any one year.

RALPH A. STONE,
Assistant Attorney General.

Arlington Village Attorney.
June 20, 1946. 90-A-1

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## 142

**Village—Council—Powers—Authority of council and president of council over police officers—President of council and chief of police are incompatible.**

**Question**

"It has been customary in the conduct of the affairs of the Village of Deephaven for the Council, by motion, to appoint its president to act as the Chief of Police, whose general duty it was thereupon to supervise and direct the work of the police officer. If the Council fails or refuses to appoint the president of the Village Council as such police officer, does this office have any inherent or implied powers which would constitute him as the directive force to control and direct the policeman? If the answer to this question is in the affirmative, does such implied power still obtain if the Council appoints one or more people other than the president to act as a police committee to direct the work of such police officer?"

**Opinion**

The statutory authority for the appointment of police officers by a village council is found in Minnesota Statutes 1941, Section 412.19, Subdivision 5, Mason's Statutes 1927, Section 1186, and reads as follows:

"The village council shall have power to appoint when necessary * * * a marshal, and one or more policemen. * * * "

The "directive force to control and direct the policeman" is the council. The council may adopt such procedure as it pleases for the control and supervision of the policeman, but it may not appoint the president of the council as "chief of police." If the council by resolution directs the presi-

dent of the council to "supervise and direct the work of the police officer," he may and should exercise that authority. In the event that the council does not adopt such a resolution, the president has no more authority over the policeman than do other members of the council.

The president of the council has no inherent or implied power which vests in him greater power over policemen than are possessed by other members of the council.

Even though the council does appoint the president as a sort of committee of one to supervise and direct the police officer, still the council by a majority thereof could change that appointment or revoke it, or revoke the authority so given at any time or provide any definite course of procedure it may see fit.

In short, the governing body of the village is the village council.

I call your attention to other provisions in the law relating to law enforcement. See Minnesota Statutes 1941, Section 412.09, Mason's Statutes 1927, Section 1180, reading as follows:

> "The president and the trustees shall be peace officers, and may suppress in a summary manner any riotous or disorderly conduct in the streets or other public places of the village, and may command the assistance of all persons, under such penalties as may be prescribed by the by-laws and ordinances."

Under this law each member of the council, including the president, is a peace officer and may exercise all the powers of a policeman.

Referring now to constables (as distinguished from a policeman appointed by the village council): Two constables are required to be elected. They receive fees instead of salaries. They are required to "obey all lawful orders of the council, or the president thereof, and diligently enforce all laws and ordinances for the preservation of peace." Minnesota Statutes 1941, Section 412.13, Mason's Statutes 1927, Section 1179.

RALPH A. STONE,
Assistant Attorney General.

Attorney for Village of Deephaven.
June 13, 1945. 785-S

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OFFICES

## 143

**Employees — Vacations — Authority to grant vacation with pay to county highway employees.**

**Facts**

"The time check system is used in the Pipestone county highway Department with respect to certain work. Some of such employees work almost every working day of the year and others to a lesser degree."

**Questions**

"May the Board of Commissioners authorize vacations to such employees under the time check system, the length of the paid vacation in each case contingent upon the number of days worked each year? If such vacations with pay are permitted under the law then may the vacation pay be payable by time check? And if not, then how shall such vacation be paid?"

**Opinion**

I find no specific statutory provision which authorizes the county board to grant vacations to county highway employees, nor have I found any court decision in this state where the question has been passed upon. There do exist laws relating to civil service and under those laws authority is given by the legislature to promulgate the necessary rules and regulations, which includes authority to provide for vacations, sick leave, etc. However, your county does not operate under a civil service system.

The question immediately arises whether a vacation is in the nature of a gratuity or a gift, or a part of the contract of employment. Upon this question where the courts have had for consideration the determination of this question, where it has arisen under civil service regulations, the courts are somewhat divided.

In **Greene v. U. S.** (1937), 85 Ct. Cl. (F) 548, the court held that the provisions of certain executive orders with reference to commutation of accumulated leaves was not a gratuity but a part of the employee's compensation within the meaning of a statute authorizing the President to fix compensation of Canal Zone employees.

In **Ramey v. State et al**, 296 Mich. 449, 296 N. W. 323 (1941), the court in considering this question reached the conclusion that a vacation with pay is not a gratuity but is compensation for services rendered. The court said further:

"It is a rule that after the services are rendered under a law which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate and the contract cannot be impaired by subsequent legislation."

In **Oklahoma City v. Bucklew**, 243 Pac. 519, the court had before it for consideration a provision of the Oklahoma City Charter as follows:

"The head of any department of the city of Oklahoma City may grant any employee thereof who has been in the continuous service of said city one year since having received a previous vacation, not to exceed fifteen (15) days' annual leave or vacation, with pay."

The court said that the plaintiff was not entitled to vacation on pay as a matter of right.

In a Washington case decided in 1933, **State ex rel Bonsall v. Case,** 19 P. 2d 927, the court reached the conclusion that a vacation was in the nature of a gratuity or gift. The court said:

> "If this could be done (granting vacation on pay), it would be, in effect, the giving to the employee of a gratuity or bonus in addition to his regular salary which he agreed to accept at the time the employment or service began."

As previously stated, our court has never passed upon the specific question submitted.

In **Nollet v. Hoffmann,** 210 Minn. 88, the court had before it for determination under the declaratory judgment law of this state Laws 1939, Chapter 441. In this case the plaintiff had been employed with the highway department until April 10, 1940, for an agreed hourly pay. He had been paid in full for every hour's work for the highway department up to April 10, 1940. The ultimate purpose of this action was to secure pay for claimed vacations which he had not received up to April 10, 1940. In answering that specific contention the court on page 91 said:

> "To now allow each a period of vacation up to 24 days with pay, based on the period services were rendered since January, 1938, would be a pure gift."

The general powers of the county board are set forth in Minnesota Statutes 1941, Section 375.18, subdivision 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."

Subdivision 2:

> "To have the care of the county property, and management of the county funds and business, except in cases otherwise provided for, and to make such orders concerning the same as they deem expedient."

It is universally recognized that granting of vacations, sick leave, etc., has a beneficial effect to both management and labor. Modern labor contracts usually contain a provision for vacation, sick leave, etc.

I believe that it would be permissible for the county board to make reasonable provisions in future employment agreements with county highway employees for such vacation as the county board may in its judgment deem expedient. Such conditions, I believe, would become a part of the contract of employment. Of course, the county boards have no authority to give away public funds whether it be under the guise of the purchase of material or the payment of labor. Neither would it be permissible for the county board to compensate for vacations heretofore taken or authorized. **Nollet v. Hoffmann, supra.**

Having in mind the responsibility of the county board to the taxpayers for the disbursement of public funds, if the board in its judgment believes

that a reasonable provision for vacation of county highway employees is for the mutual benefit of the county and the employees, and within reasonable bounds, I think that the court would sustain such an agreement as being valid and within the inherent powers of the county board to make.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Pipestone County Attorney.
June 3, 1946. 125-A-33

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## 144

**Incompatible — City attorney and attorney for school board where boundaries of each coincide are incompatible.**

### Facts

The school district is an independent district which embraces the city; the office of city attorney is created by home rule charter of the city, and appointment is made by the city council. The school attorney is appointed by the school board of the school district.

### Question

"Are the offices of City Attorney and School Attorney incompatible?"

### Opinion

Public offices are incompatible when their functions are inconsistent and there results conflict of duty so that the incumbent of one office cannot with fidelity and propriety discharge the duties of the other office.

While you have not directed to our attention any duties which might devolve upon the city attorney and the attorney for the school board which might be inconsistent, we are not unmindful of the fact that such a situation might arise. Under certain statutes the property of the school district becomes subject to assessment for local improvements made by the municipality. No doubt the school board in the conduct of its public affairs obtains certain services, such as water and light, if there is a municipal plant, from the municipality. Out of these circumstances situations might arise wherein the interests of the school board might be adverse to those of the city. The rights of the municipality to assess the property of the school district for special assessments might likewise arise. Having in mind these circumstances, we believe that the positions mentioned are incompatible.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Ely City Attorney.
December 9, 1946. 358-E-3

# 145

**Incompatible—City council member and member public utilities commission.**

**Question**

"May a member of the City Council be appointed to serve on the Public Utilities Commission provided he serves without compensation while other members of the Commission are compensated?"

**Opinion**

This question is answered in the negative. Your Charter, Section 217, subsection 3 provides in substance that the mayor shall appoint the members of the commission and fill vacancies which shall be subject to confirmation by the city council. A member of the city council, if appointed to the commission by the mayor, would vote upon his own confirmation. It is considered to be against public policy for one to hold an office or position to which he has some power in the matter of appointment or selection.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Redwood Falls City Attorney.
July 16, 1946. 358-E-9

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# 146

**Incompatible—County welfare board member and county veterans service officer are incompatible.**

**Facts**

"'A' has recently been appointed veterans service officer in 'Y' county. 'A' also serves as a member of the county welfare board by appointment as a lay member. He is not a member of the board of county commissioners.

"'A' is anxious to continue to serve as a welfare board member as he believes it will help him in his work as a service officer to keep in close contact with the activities of the welfare board."

**Question**

"Are the positions of veterans service officer and member of the welfare board so incompatible as to prevent a person from serving in both positions?"

**Opinion**

A member of the county welfare board participates in making decisions as to granting assistance of the various kinds provided for by law, estab-

lishing policies for the county welfare board and its employes, and determining the extent to which assistance of its employes is to be extended to the county veterans service officer. The latter is the advocate of the war veteran and he is entitled to cooperation from the county welfare board. It appears to us that instances may arise where the problems of the county welfare board and the veterans service officer may create conflicts. If this be true, and it so appears to us, the offices of member of the county welfare board and county veterans service officer are incompatible. Your question is answered in the affirmative.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Division of Social Welfare.
April 27, 1946. 358-A

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## 147

**Incompatible — Court commissioners and assistant county attorneys are —** MS1941, §§ 388.10 and 489.02.

**Question**

Whether the offices of Assistant County Attorney and Court Commissioner are compatible.

**Opinion**

This office has held that the offices of County Attorney and Court Commissioner are incompatible. Report of the Attorney General 1920, Opinion No. 414. Minnesota Statutes 1941, Section 489.02, provides that a court commissioner shall have the powers of a judge of the district court sitting at chambers. Minn. St. 1941, § 388.10, provides for the appointment of an assistant county attorney, who shall have "the same duties" and be subject to the same liabilities as the county attorney. The duties of the court commissioner may require the exercise of judgment and discretion in a proceeding in which the county attorney is obliged to appear as an interested or proper party.

It is, therefore, my opinion that the two offices are incompatible.

KENT C. van den BERG,
Assistant Attorney General.

Carlton County Court Commissioner.
January 14, 1946. 358-B-1-a

ORDINANCES

## 148

**Dogs—Kennels—Lawful business—If kennel business lawfully carried on in area before zoning ordinance is passed it may continue—If dog kennels are a nuisance, may be abated as such.**

**Facts**

The village of Richfield is endeavoring to get rid of a dog kennel located in a residential district and seeks to do so by means of a dog kennel licensing ordinance.

It is proposed to pass a village ordinance providing thus:

> "It shall be unlawful, after thirty days from the passage of this ordinance, for any person to operate any kennel in any district in the village zoned as a residence district or multiple dwelling district by the zoning ordinance of the village adopted ....., or within 500 feet of any of the boundaries of such district."

The proposed ordinance would itself provide a license for kennels at prescribed license fee.

**Question**

Whether such a provision in the ordinance would be valid.

**Opinion**

I am not advised as to the provisions of the zoning ordinance of the village or when the same was passed.

> "By the weight of authority it is held that a zoning ordinance may not operate to suppress or remove from a residence district an otherwise lawful business already established therein." 86 A.L.R. 688 and cases cited.

So that if the kennel business was being lawfully operated at the time the zoning ordinance was passed, it could not by the zoning ordinance or by any amendment of such ordinance be required to move or discontinue.

The provision of the proposed ordinance that a kennel must remove from the residence district within 30 days after the passage of the licensing ordinance is invalid if the kennel business was being lawfully operated before the zoning ordinance was passed. If it was not then in existence, the zoning ordinance would make it unlawful to open and operate such kennel.

The proposed ordinance which you sent me recognizes that the kennel business is a lawful business and provides a license fee therefor.

The operating of a dog kennel may be a non-conforming use, but if lawfully carried on before the ordinance was enacted, it cannot now be

removed or destroyed by virtue of an ordinance which in effect is an amendment to the zoning ordinance and which attempts to prevent such nonconforming use.

One way in which the kennels could be compelled to move would be by declaring the same to be a public nuisance and commencing an action in the district court to compel the abatement thereof. In such case the argument could be made that "a nuisance may be a perfectly legitimate and proper business in the wrong place." Gunderson vs. Anderson, 190 Minn. 245, 250.

RALPH A. STONE,
Assistant Attorney General.

Richfield Village Attorney.
September 6, 1945. 477-B-7

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## 149

**Dogs — Kennels — Prohibiting keeping of more than two dogs over three months of age in residential section invalid—Villages may license kennels; license fee should not exceed reasonable expense of issuing license and enforcing ordinance.**

**Facts**

Two proposed ordinances of the Village of Richfield, provide as follows:

"16. No person shall keep more than two dogs over three months of age in any residential district in the Village of Richfield.

"17. No person, firm or corporation shall maintain in the Village of Richfield a kennel where dogs are kept for sale, boarding, breeding, showing or for treatment without first securing a license therefor from the Village Clerk. The license fee shall be $25.00 per year for kennels where the number of dogs over three months of age does not exceed 15, and $100 per year where the number of dogs over three months of age exceeds 15. But in no event shall the number of dogs kept in any kennel exceed 50 dogs over three months of age."

The council has in mind the possibility of having the license fee provision of Section 17 read as follows:

"The license fee shall be $100.00 per year, provided that no kennel shall contain more than 35 dogs."

**Question**

Relative to the validity of these proposed ordinance provisions.

**Opinion**

In order to determine the validity of these ordinances, we must look to the statute granting powers to village councils—Minnesota Statutes 1941, Section 412.19. The only portion referring specifically to dogs is Subdivision 11, which authorizes the council to "prevent the running at large of dogs, and authorize the destruction, in a summary manner, of such as are unlawfully at large."

However, Subdivision 19 gives the council the power "to define nuisances, and prevent or abate the same"; and Subdivision 24 grants the power "to provide for the government and good order of the village, the suppression of vice and immorality, the prevention of crime, the protection of public and private property, the benefit of trade and commerce, and the promotion of health by such ordinances, rules, and by-laws not inconsistent with the constitution and laws of the United States or of this state as it shall deem expedient."

We must be guided by these statutory provisions and by the general rule of law embodied in Subdivision 24 that, "A municipal corporation under its authorized police power, may regulate any trade, or occupation, or business, the unrestrained pursuit of which might affect injuriously the public health, morals, safety, or comfort, and in the exercise of this power, particular occupations may be excluded from certain parts of the city, or may be required to be conducted within designated limits." **(City of St. Paul v. Kessler,** 146 Minn. 124, 128, citing 19 R. C. L. p. 818.)

**Proposed Section 16**

In its present form, I am satisfied that the proposed section would be invalid. It does not declare the acts referred to to constitute a nuisance. If appropriate language were supplied to remedy this defect, the validity of a proposed section would still be doubtful. It must be kept in mind that, while dogs and their keeping are subject to reasonable regulation, "an ordinance absolutely prohibiting the keeping or impounding of them without reference to conditions, in the absence of which the keeping or impounding cannot be a nuisance in fact, would be void because plainly arbitrary and unreasonable." **(Claesgens v. Animal Rescue League, Inc.,** 173 Minn. 61, 64.) It was held in that case that an ordinance of the Village of Golden Valley, prohibiting the maintenance within its limits except by a regularly appointed poundmaster of "any pound or other enclosure for the boarding or care of dogs for hire, or wherein dogs are kept for sale," and making such keeping or impounding a nuisance, was invalid because it had no reference to the comfort or convenience of those who might be disturbed and was not limited to cases where inconvenience, discomfort, annoyance, or interference with the use of property were present.

The rule with reference to the municipal power to declare and define nuisances is quite clearly set forth in the following quotation from McQuillin on Municipal Corporations, 2nd Edition, Volume 3, Section 956, at p. 145:

"Relating to municipal power to declare and define nuisances, the following classification suggested in Illinois cases will aid in harmonizing the decisions: First, those which in their nature are nuisances per se, or are so denounced by the common law or by statute; second, those which in their nature are not nuisances but may become so by reason of their locality, surroundings, or the manner in which they may be conducted, managed, etc.; third, those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds. The power granted by the law to the governing bodies of municipal corporations to declare what shall be nuisances and to abate the same, etc., is usually held sufficient to authorize such bodies to denounce conclusively those things falling within the first and third of these classes to be nuisances, but as to those things falling within the second class, the prevailing judicial view is, the power possessed is only to declare such of them to be nuisances as are in fact so."

While it is possible that the keeping of three dogs in a residence district might be a nuisance in fact, it is also possible that three, or even more, dogs might be kept on residence premises without in any manner annoying anyone. I am, therefore, of the opinion that, even though the language were modified to declare the keeping of more than two dogs over three months of age in any residential district to be a nuisance, the proposed section would be invalid.

I believe, however, that, if the maintaining of a kennel where dogs are kept for sale, boarding, breeding, showing, or for treatment were to be declared a nuisance if done within a residential district, such an ordinance would be valid.

Of course, even in the absence of an ordinance, in a proper case an action for injunction to restrain a private nuisance would lie. On the general subject of dogs as a nuisance, see **Krebs v. Hermann et al** (Colo.), 6 P. 2d 907, 79 A. L. R. 1054, and Annotation commencing at p. 1060.

**Proposed Section 17**

I am of the opinion that, under the general police power of the village, the maintaining of a kennel where dogs are kept for sale, boarding, breeding, showing, or for treatment is properly a subject of regulation by ordinance. **Claesgens v. Animal Rescue League, Inc., supra; City of Faribault v. Wilson**, 34 Minn. 254; **City of St. Paul v. Kessler, supra; Prinz v. Borough of Parimus**, 120 N. J. L. 72, 198 A. 284. (The last case specifically upheld an ordinance regulating dog kennels under a statute similar to Minnesota Statutes 1941, Section 412.19, Subdivision 24.)

The only question which is disturbing is as to the amount of the license fee. Under the proposed amendment to the ordinance there is no provision for policing, regulating, or inspecting licensed kennels, which would impose a duty upon village officials which might be considered as an expense to the village. In the absence of a specific statutory provision authorizing

licensing for revenue purposes, it would seem that, under **Barron v. City of Minneapolis,** 212 Minn. 566-571, the proposed section might be considered a revenue measure unless it is so amended as to provide for such policing, regulation, and inspection that the fee to be charged could properly be said to "cover the expense of issuing it (the license), the services of officers, and other expenses directly or indirectly imposed" by the ordinance.

WM. C. GREEN,
Assistant Attorney General.

Richfield Village Attorney.
October 15, 1945. 477-B-7

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## 150

**Enforcement—Building permits**—Minn. Const. Art. 1, § 13.

### Facts

The village of Bovey has adopted a building permit ordinance which you state follows the usual lines and contains minimum requirements for foundations, sewer and water connections and other items. You quote Sections 8 and 10 of the ordinance. You further state that the council has rejected an application for a building permit for a certain warehouse not because of any details or defects in the proposed structure but on the general ground that the location of such business would constitute a traffic hazard.

### Questions

1. "Should the rejected applicant proceed to build, and how far can the village go under this ordinance?

2. "Is the penalty clause invalid as going too far, or can the village invoke it?"

### Opinion

From the information furnished, it is apparent that the application for the proposed improvement will not offend the provisions of your building ordinance. Consequently the reasonableness of the ordinance is not before us for consideration. If the proposed improvement meets the requirements of the village ordinance, the applicant would be entitled to a permit from the council to proceed with the improvement.

However, you state that the application was rejected on the ground that the proposed location would constitute a traffic hazard. You do not advise as to the facts and we are not, therefore, advised as to the manner that such building might constitute a traffic hazard. We presume that the building will be constructed upon the premises either owned or under the control of the applicant. While the village has general power to supervise

public streets, we are not advised of a legal premise upon which the village might control or regulate buildings upon private property upon the theory that such buildings might constitute a traffic hazard. If the village attempted to do so, it might violate our constitutional provision that "Private property shall not be taken, destroyed or damaged for public use, without just compensation therefor first paid or secured." Minnesota Constitution, Article 1, § 13; also the due process clause § 7.

Even though we do not have before us all of the facts upon which the council contends that the proposed building would constitute a traffic hazard, we doubt very much that the council has authority to prevent an owner from erecting or improving a building upon his property where the same meets all of the requirements of the village building ordinance.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Bovey Village Attorney.
August 19, 1946. 477-B-3

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## 151

**Handbills—Leaflets of a religious nature—Distribution.**

**Facts**

"Ordinance No. 76, which we generally speak of as a Green River Ordinance, although I do not know if it is an exact copy of that ordinance, generally prohibits the distribution of hand bills, literature, advertising, etc. It is my understanding that the ordinance was originally passed by the City Council for the general welfare of the people of the City of Alexandria, principally, I believe, to prevent the excessive accumulation of hand bills, dodgers, etc., upon the city streets and the property in Alexandria, caused by the haphazard throwing of these advertising sheets upon the front porches or front yards of many homes, the throwing of them in cars from which they were pushed on to the street by the owners when they returned, but also for the reason that many people were complaining of having some of their possessions taken from their cars during the time or times these distributions were being made, and therefore this ordinance was passed partly as an exercise of the police power of the city. The ordinance permits the distribution of all of these items by either handing the same to the persons on the street, in the cars, or by going to the place of business or residence and handing the same to the individual owner or occupant. The prohibition therefore set forth in the ordinance is merely against the placing of these items in vacant cars, or leaving them loose upon the porches or insecurely fastened in some screen or storm door.

"There recently arrived in Alexandria, a new pastor of the..... ..... Church of Alexandria, Minnesota. As a part of his pastorate

he claims that it is his duty, his desire, and his right, to distribute booklets, pamphlets, hand bills, dodgers or any printed matter pertaining to religion or pertaining to services to be conducted in his church. He also claims that the ordinance above indicated, is unconstitutional, in that it prohibits or prevents him from carrying out his duty, desire, and right. He states that the limitations of the ordinance, are such that he cannot carry out his work as a pastor of this church. That the limitation on placing these items in vacant cars, of leaving them on the front porch or otherwise placing or throwing them on the private property of residents of Alexandria or of carrying on the permitted work of handing them to individuals on the street, in cars, in places of business, and in residences only within the hours during which this work is permitted, is such as to impair or infringe upon, or suppress or tends to suppress the free exercise of religion, and impairs the freedom of press within the meaning of the guarantees of the first amendment to the Constitution of the United States.

"He has not been arrested, he has not been interfered with by the police, and no one had requested him to stop the distribution of these items in the manner then being carried out by himself. He presented himself first to the Mayor, then to myself as City Attorney, and then upon my suggestion, to the City Council, claiming that the ordinance was unconstitutional yet claiming that as long as the ordinance was on the books he was violating the law in carrying on this work, because he felt he must leave these hand bills or dodgers in vacant cars, on vacant porches of houses if no one was home, and that he must distribute them later than the hours permitted by the Ordinance. That he had never violated any law previous to this, did not want to violate any law, but would violate this one as long as it was on the books. He also stated that he wanted it either repealed, or amended so as to permit the distribution of his material. He has challenged the City Council to enforce the ordinance. The City Council feels that the ordinance is a good ordinance, is necessary to the welfare of the City of Alexandria, and is a proper exercise of the police power. They will of course repeal the ordinance if I advise them that the same is unconstitutional, they will amend the ordinance to permit the distribution of religious material if by so doing they do not open the gates to the distribution of any advertising material or printed matter. They have requested me to obtain from the Attorney General an opinion as to the following questions:

**Questions**

"1. Is the Ordinance as written unconstitutional because of the provisions of the First Amendment of the United States Constitution?

"2. Will the addition of an amendment to said ordinance, which provides 'that said ordinance shall not apply to the distribution of religious matter or literature or of any item touching upon or affecting religious matters' or words of similar import, be such an amendment

as would permit the attacking of the ordinance upon the grounds that it was discriminatory?"

**Opinion**

**As to Section 2 of the ordinance:**

This section of the ordinance prohibits the depositing or throwing of handbills in or on any public thoroughfare, park, ground or other public place. The city cannot prohibit the distribution of handbills of a religious nature to persons on the streets, but I do think that the city can prohibit the willful littering of the streets with handbills by the distributor who deliberately throws the same down on the public sidewalk. I think the city has authority to prohibit the scattering of handbills broadcast in a manner that will litter up the streets and parks and cause expense in collecting and disposing of the same. I think the city can go this far, even though it is not permissible to prohibit a person from distributing such literature as described by you in your statement to those who are willing to receive the same.

**As to Section 3 of the ordinance:**

Placing of handbills in vehicles. I think it is contrary to the first amendment of the United States Constitution (which the 14th amendment makes applicable to the state) to prohibit a member of a religious sect from distributing pamphlets or literature by placing the same in cars parked along the street.

See **Martin v. Struthers,** 319 U. S. 141

**Schneider v. State,** 308 U. S. 147.

**As to Section 4 of the ordinance:**

This section makes it unlawful to distribute handbills in or upon any private yard, grounds, walk, church steps, etc., of any house, residence, building or any other private property.

I think this is void as to the distribution of religious literature. Such distribution is one way which the colporteur has of reaching those for whom the message is intended.

One of the samples of literature which is submitted with your letter is a printed copy of the Gospel of St. John. It is certainly not a very criminal act in spite of the ordinance to place a copy of this Gospel on the front porch of a dwelling house where it will be seen and picked up by the owner or occupant.

**As to Section 5 of the ordinance:**

This section makes it unlawful to distribute handbills upon premises upon which the owner has posted a conspicuous notice to the effect that no handbills are desired. This is a valid provision.

See **Martin v. Struthers,** 319 U. S. 141.

In that case the Supreme Court of the United States said:

"The National Institute of Municipal Law Officers has proposed a form of legislation to its member cities which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed. This or any similar regulation leaves the decision as to whether the distributors of literature may lawfully call at a home where it belongs—with the home owner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant."

**As to Section 6 of the ordinance:**

This section attempts to limit the hours when handbills may be distributed. I think the municipality has the authority to fix hours when it shall be improper to distribute handbills at private residences. In the concurring opinion of Judge Murphy in the case of **Martin v. Struthers, supra,** he states that the time for the distribution of such literature may be regulated.

I do not believe that in the exercise of the right of free speech or religious freedom the person has the right to wake up the householder in the middle of the night to give him his literature.

On the other hand, I do not know of any reason why the right to distribute handbills on the streets or place the same in cars should be limited to hours before eight o'clock P. M. I think the ordinance is void as to such places in so far as it prohibits the distribution of such matter after eight o'clock P. M.

**As to Section 8 of the ordinance:**

It is proper for the ordinance to provide that the person distributing handbills shall not interfere with the traffic on the street or molest or annoy people.

**As to Section 9 of the ordinance:**

This section prohibits the posting of handbills on any bridge, fence, sidewalk, building, monument, board or post. It further provides that handbills may be posted upon private buildings or billboards if the consent of the owner shall have first been obtained.

In so far as this section applies to public buildings, public fences, public bridges and other public property, it is valid.

In so far as it prohibits the posting of handbills on private property it is not valid any more than it would be lawful for the municipality to prohibit a person when not forbidden to enter upon private property for the purpose of personally handing out his tracts.

(The foregoing statement is subject to some qualification—as in the case of billboards and signs which create a driving hazard and perhaps also as to signs which are unsightly and incongruous and destroy the beauty of streets or highways.)

In what I have said I have been speaking of literature of a religious nature such as you describe in your letter. The foregoing does not have reference to handbills of a commercial nature.

As to your second question, the courts have held that the municipalities can prohibit the use of the streets for the distribution of purely commercial leaflets even though such leaflets have a civic appeal or moral platitude printed thereon.

**Jamieson v. Texas,** 318 U. S. 413

Amending the ordinance in the manner inquired about would, of course, relieve the pastor from any charge of violating the law. But the right of free speech is just as inviolable as the right of religious freedom. And there might be many other kinds of literature which a person might wish to distribute in the exercise of that right. As to such other kinds of literature which enjoy the same status as religious literature, the same defects would apply as I have mentioned in respect to religious literature.

If you amend the ordinance so that it would apply to the distribution of purely commercial leaflets (**Jamieson v. Texas,** 318 U. S. 413), it would be valid in all respects.

RALPH A. STONE,
Assistant Attorney General.

Alexandria City Attorney.
January 22, 1945. 62-B

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## 152

**Taxi cabs—Licenses.**

**Facts**

There is but one taxi cab company doing business in Stillwater, which company has been giving good service. There are two applications for license before the council and it is expected that there may be several more. The Council feels that there is a limited opportunity for a taxi cab business to survive in a small town like Stillwater, and that adequate service to the public requires a sufficient volume of business to bring sufficient income to pay proper maintenance and capital charges and other necessary expenses. If the business is split up among too many licensees, none of them will get sufficient income to do this and service to the public naturally will deteriorate and possibly become unsafe.

**Question**

Whether the council in acting upon an application for license may consider the above situation and limit the number of licenses accordingly.

**Opinion**

Article II, Section 6, of the Charter of the City of Stillwater provides that the city council shall have the power "to define, license, regulate and restrain * * * draymen, cartmen, cabmen, hackmen, omnibus drivers and chauffeurs, vehicles of all kinds whatsoever and the use of the streets, public thoroughfares, highways and public places by such vehicles and, also, the carrying and hauling of persons and property for hire."

On January 5, 1937, the city council passed an ordinance for licensing and regulating the operation of taxi cabs. Section I defines a taxi cab; section II provides that no person shall operate a taxi cab without a license, and provides information to be contained in the application for license; section III provides that the council may in its discretion grant such application upon the deposit by the applicant of certain insurance policies provided; section IV fixes the license fee and the date for termination of licenses; section V prohibits the granting of licenses to a minor; section VI requires as a condition precedent to the issuance of a license that the applicant must carry a specified amount of liability insurance; section VII requires the filing of schedule of maximum rates which will be approved by the council; section VIII provides that the taxi cab shall be kept in a clean, safe, and comfortable condition, and shall be subject to examination and tests; section IX requires the drivers to be authorized under the Laws of the State of Minnesota; sections X, XI, and XII regulate the displaying of the licenses, the service to be rendered, and reserve exclusive parking space for licensed taxis; section XIII provides penalties for violation of the ordinance.

While it is true that a city has broad discretion in controlling the use of public streets for private enterprises (see Schultz v. City of Duluth, 163 Minn. 65, 203 N. W. 449), it is my opinion that under the authority granted by the charter and ordinance here, the council may **not** grant an exclusive franchise or license (3 Am. Jur. Municipal Corporations, Section 332, 540), nor may the council arbitrarily refuse a license in a proper case. Its refusal must be based on reason which is pertinent to the licensing ordinance. State of Minnesota ex rel Minces v. Schoenig, 72 Minn. 528, 75 N. W. 711, State v. Taubert, 126 Minn. 371, 148 N. W. 281.

The ordinance does not specifically provide the council with authority to give an exclusive franchise, nor to consider public necessity or need in the granting or denial of a license.

Under the ordinance the council has authority to protect the public from deterioration of service when and if that deterioration actually exists. If a taxi cab operator fails to maintain adequate liability insurance his license is automatically revoked. If he fails to maintain his cab in a clean, comfortable and thoroughly safe condition, or if he fails to give 24 hour service to the public, the council may revoke his license. Standard Oil Company v. City of Minneapolis, 163 Minn. 418, 204 N. W. 65. This is not to say that the council may conclude a priori that service will deteriorate because of competition. In McQueen v. Williams, 173 Minn. 47, 216 N. W.

323, the Industrial Commission refused an application for a license to conduct an employment agency. The statute provided that a license might be refused for good and sufficient reason within the meaning and purpose of the act. After adopting the rule that the business being legitimate and beneficial, a license could not be refused to one who is within the requirements of the statute and has fully complied therewith the court on page 50 says:

> " * * * The only ground assigned for rejecting the application which finds any support in the facts is that there is now a sufficient number of such agencies in that locality and therefore no public necessity exists for any more. Whether the legislature can limit the number of such agencies it is not necessary to determine, for the act contains nothing indicating any intention to do so, or any intention to confer the power to do so upon the commission. The commission plainly assumed to exercise a power which it did not possess. It cannot reject an application merely because, in its opinion, it has already licensed a sufficient number of such agencies to serve the public needs. This is not a business which may be prohibited as harmful, and the commission cannot discriminate by granting a license to one and refusing a license to another equally entitled to it. It is only authorized to reject an application for reasons intended by the statute as grounds for rejection."

I do not believe the ordinance authorizes the council to refuse an application for license merely on the theory that competition may result in deterioration of service.

KENT C. van den BERG,
Assistant Attorney General.

Stillwater City Attorney.
February 4, 1946. 62-C

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## 153

**Zoning—Abandonment of non-conforming use by person in armed forces.**

**Facts**

"The zoning law of the City of Rochester provides that all lawful use of buildings existing at the time of the adoption of the ordinance might be continued. It further provides 'if such non-conforming use carried on in a substantial building is discontinued for two years or more, any future use thereafter of the building must be determined by the Common Council after hearing the appellant.'

" * * * Many of these (oil) stations were discontinued for the duration and a good many of them are in residential areas and were

operated pursuant to the above cited Section of the ordinance before they ceased operations.

* * *

" * * * The returning veteran takes the position, and I think rightly so, that he was obligated to enter the service of his country, doing the best as he could with his business that he may have had. There are going to be cases, I know, where the adjoining property owners will not consent to the re-classification, whether he be a veteran or not."

**Question**

"Would it be reasonable for me to interpret this ordinance permitting the returning veteran the right to seek a permit to re-open his station without the necessity of re-classification of his property?"

**Opinion**

The zoning ordinance of the City of Rochester is Ordinance No. 500 of the year 1936.

A non-conforming structure is defined in Section 12, Subdivision (p), as follows:

"Non-Conforming: A structure or land whose design or use does not conform to the requirements of the district."

Section 7, Subdivision (f) provides as follows:

"The lawful use of all buildings or premises existing at the time this ordinance takes effect may be continued. Such use may be extended through the building provided no structural alterations are made therein, other than those required by ordinance. If such non-conforming use carried on in a substantial building is discontinued for two years or more, any future use thereafter of the building must be determined by the Common Council after hearing the appellant."

It is the settled law that there may be an abandonment of a non-conforming use of a structure. Whether under all the circumstances the owner's acts constituted a voluntary relinquishment or abandonment of the right to devote the property in question to a non-conforming use depends ordinarily upon all the facts and circumstances involved. State v. Hunt, 291 N. W. (Wis.) 745, 752. In Rochester this rule is modified by that part of the provision last above quoted relating to discontinuance of use for two years which vests the common council with the authority to determine the future use of the property involved after the expiration of the two-year period. Assuming this provision to be valid, which is not free from doubt, it authorizes the common council to determine the future status of the premises as non-conforming or conforming. If it decides the former, the non-conforming premises retain their status as such. If it decides the latter, the premises must, in the future, conform to the zoning ordinance. In making such determination, it appears to us, in view of the effort of Congress and

the legislature of the State of Minnesota to protect persons in the armed forces from suffering loss through their inability by reason of their war service to comply with many statutory and contractual requirements, that there exists a sound and legal basis for extending the non-conforming character of the property when it is owned by a person in the armed services while at the same time denying an extension of the non-conforming character of the property belonging to persons who were not serving in the armed forces during the two-year period. We believe that such a distinction would be in conformity with the requirements of public policy.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Rochester City Attorney.
September 25, 1945. 59-A-32

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## 154

**Zoning—Amendment of—Affirmative vote of four of five council members required to amend zoning ordinance in Mankato**—MS1945, § 462.01.

### Facts

The city council of Mankato is composed of five members. It is now proposed to amend the zoning ordinance of the city. You call attention to Minnesota Statutes 1945, Section 462.01, which provides that alterations of the regulations of the zoning plan may be "made only by a two-thirds vote of all the members of the governing body of such city."

### Question

Can the council pass an amendment to the zoning ordinance by three affirmative votes as against two negative votes?

### Opinion

The answer to this question is that under the statute referred to, it is required that there be an affirmative vote of four members of the council to alter the regulations of the zoning plan. To adopt such an amendment requires a two-thirds vote of the entire membership of the council. There being five council members, it follows that the affirmative vote of four of them is required.

As bearing to some extent upon this question, I cite **State v. Hoppe**, 194 Minn. 186, and **Van Cleave v. Wallace**, 216 Minn. 500.

RALPH A. STONE,
Assistant Attorney General.

Mankato City Attorney.
October 7, 1946. 59-A-32

# 155

**Zoning—Effect upon restrictive covenants.**

**Facts and Question**

Your inquiry pertains generally to the validity of certain building restrictions contained in a deed of conveyance and the effect thereof upon the authority of the municipality to authorize by ordinance the use of such property for a purpose contrary to and violative of such building restrictions.

A deed is submitted which contains the following restrictions:

"This property is subject to the following restrictions which shall run with the land for a period of 20 years after date hereof: (1) Any permanent dwelling erected on said lot at any time must have at least 500 square feet of floor space and at least four rooms, and shall be on a solid foundation (not pillars) and have wooden or asphalt shingle, drop siding, and painted two good coats of lead and oil, if frame, or may be built of brick, cement, stone or stucco. (2) All dwellings shall be placed at least 25 feet back from the front line of said lot (porches and bay windows excepted), and if a corner lot, all buildings shall be at least ten feet back from the side street line. (3) Any shed, outhouse or out buildings shall be painted twice and have wooden shingle or asphalt shingle roof, and no tin, metal, rubberoid, paper, canvas, or other sheeting shall be left exposed; such buildings may be placed on pillars, but finished lumber, new or second hand may be used, and no such buildings can be made of unsightly material or boxes or similar lumber; on a corner lot any garage or other building shall be not less than 20 feet from the side street line. (4) No building shall be moved onto said lot which does not comply with the provisions of these restrictions, and no sod, earth, sand, gravel, stone, or trees shall be removed from said lot to be sold or to the injury of the value or appearance of the lot. (5) No unused building material, junk or rubbish shall be left exposed on said lot except during actual building operations. (6) Any building shall be completed and painted according to the foregoing requirements within six months after starting the same."

You request our comments upon the validity of these restrictions.

**Opinion**

As between a grantor and a grantee, reasonable building restrictions are considered as covenants running with the land and will be enforced. Any question relative to the reasonableness of such restrictions between a grantor and a grantee would, of course, be a private matter rather than one in which the municipality would be concerned.

The general rule of law followed by our court relative to building restrictions when contained in a deed of conveyance is stated in **Godley v. Weisman,** 133 Minn. 1, on page 5 as follows:

"Where there is a general building plan applicable to a number of adjacent or contiguous lots, and lots are conveyed according to such plan, the grantee of any part of the land subject thereto has the right to enforce the restrictions against his neighbor. (Citing cases)"

In a later case, **Cantieny v. Boze,** 209 Minn. 407, on page 409 the court said:

"Whenever land is developed under a general plan, reasonably restrictive covenants which appear in deeds to all lots sold are enforceable alike by the vendor and by the vendees and by their successors in title. (Citing cases) There is no question here but that the restriction contained in the West deeds was in furtherance of the general plan to develop Pokegama Beach as a strictly residential district, and therefore the restrictions was available to any of the lot owners as against their neighbors in the event of its breach."

In this case the trial court found that the plaintiff had been guilty of laches in seeking to enforce his rights. The decision of the trial court was affirmed on appeal. However, the general rule was stated by the court as appears from the above quotation from the decision.

The supreme court of Virginia has followed the same rule. **Deitrick v. Leadbetter,** 8 S. E. 2d 276, 127 A. L. R. 849. See also **Clark v. McGee** (Ill.), 42 N. E. 965.

As to the authority of the municipality to authorize the use of such premises contrary to the provisions of the restrictive covenant, we will discuss that matter in our answer to your next question.

**Question**

" * * * that if land is platted with residential restrictions and also deeded with building restrictions of residences, would that prevent the Council from placing it in industrial districts?"

**Opinion**

From the decisions hereinbefore referred to, reasonable building restrictions contained in a deed of conveyance will be enforced as covenants. Such restrictions must be considered as property rights. Consequently, they cannot be impaired or taken away without due process of law.

While the municipality might place such property which is restricted for residential use to industrial use, we do not believe that such nonconforming use so authorized by the council would be valid. It seems to us that such action on the part of the council, if carried out against the objections of persons for whose benefit such restricted building conditions exist, would constitute a violation of vested rights which could not be taken away without due process of law.

Where the building restrictions are only contained in a plat and not in deeds of conveyance, then there is some question as to whether or not

the same are enforceable. However, when such restrictions are contained in deeds of conveyance and as covenants, then the question is entirely free from doubt. See cases hereinbefore referred to. However, your question involves building restrictions in the plat as well as in the deeds of conveyance.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Austin City Attorney.
August 28, 1946. 59-A-32

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## 156

**Zoning—Providing that no permit for building shall be granted when determined by village council that such building would materially depreciate the value of adjacent property. Building permit ordinance may not properly require installation of bathroom in dwelling** — MS1941, § 462.01 (MMS1940, Supp. § 1933-42); MS1941, § 412.19 (MMS1944 Supp. § 1186); MS1941, § 462.02 (MMS1940 Supp. § 1933-43).

### Facts

"Due to the great shortage in houses, it is feared by the Village Council that many shacks will be constructed as living quarters by people in this Village as soon as weather and construction permit. It is the desire of the Village Council to pass a zoning ordinance which would as nearly as possible prevent the construction of mere shacks. This desire might at first appear to be based on a strictly aesthetic motive, but I feel it involves the general welfare of the Village as well. If such shacks were constructed, the property of the surrounding owners would be thereby reduced in value."

### Question

Whether a provision in an ordinance allowing the council to determine whether a building would depreciate the value of adjacent property would not be valid under Mason's Supplement 1940, Section 1933-42 (Minnesota Statutes 1941, Section 462.01).

In connection with your question you submit the following proposed provisions of an ordinance:

"Sec. 1. No building shall be constructed in Deer River Village for sale, or rent, or use by the owner thereof without first obtaining a building permit from the Council of the Village of Deer River.

"Sec. 2. No permit for a building to be used as a dwelling shall be granted unless plans for such dwelling include running water, bathroom, and sewage or disposal system.

"Sec. 3. No permit for building to be used as a dwelling shall be granted when it is determined by the Village Council that such building would materially depreciate the value of adjacent property."

**Opinion**

By Minnesota Statutes 1941, Section 412.19 (Mason's Supplement 1944, Section 1186), which was a general amendment of the law with reference to the power of village councils, the following powers, among others, are granted:

"Subdivision 20. The village council shall have the power to provide, and regulate the use of, wells, cisterns, reservoirs, water-works, and other means of water supply.

* * * * *

"Subdivision 24. The village council shall have power to provide for the government and good order of the village, the suppression of vice and immorality, the prevention of crime, the protection of public and private property, the benefit of trade and commerce, and the promotion of health by such ordinances, rules, and by-laws not inconsistent with the constitution and laws of the United States or of this state as it shall deem expedient.

* * * * *

"Subdivision 25. The village council shall have power to regulate the construction of buildings within the village."

By Minnesota Statutes 1941, Section 462.01 (Mason's Supplement 1940, Section 1933-42), any village in this state, for the purpose of promoting health, safety, order, convenience, prosperity, and general welfare, may by ordinance regulate the location, size, use, and height of buildings, the arrangement of buildings on lots, and the density of population within such village. The adoption of any ordinance under this section is subject to approval by the electors upon the filing of a petition signed by a specified number of resident freeholders.

By Section 462.02 (1933-43), the council is authorized to pass ordinances for the enforcement of the provisions of the zoning ordinance.

Your question seems to involve provisions of a zoning ordinance and those of a building ordinance. A zoning ordinance may regulate only the specific matters referred to in Section 462.01. A building ordinance, which may be enacted under the general powers of the village council above quoted, may contain such provisions as are reasonable, in addition to those which may be provided for in a zoning ordinance.

For a very complete discussion of zoning ordinances I refer you to Opinion No. 240 in the 1944 Report of the Attorney General, of which a copy has been sent you.

I am of the opinion that Section 1 of your proposed ordinance is perfectly valid. The right of villages to adopt ordinances requiring building

permits has been upheld by this office several times and is clearly authorized by Subdivision 25 above quoted.

As to Section 2, I am of the opinion that a building permit ordinance could properly require running water and connections with a sewage or other disposal system in a dwelling, but I do not believe it could properly require the installation of a bathroom. However, it could undoubtedly require the installation of inside toilets connected to a sewage or disposal system.

As to Section 3 of the proposed ordinance, concerning which you particularly inquire, I do not believe such a provision would be valid. Clearly it could not properly be included in a zoning ordinance, and, under the principles laid down in the authorities cited and quoted in Attorney General's Reports 1944, No. 240, supra, I am of the opinion that such a provision would not be considered a proper exercise of the police power. I think it would be considered in the same class as the proposed ordinance of the City of Austin referred to in our opinion last cited, where an attempt was made, for the same reasons cited by you, to limit the minimum area of a dwelling house in a residence district. One of the purposes of zoning ordinances is to protect the value of adjoining property, but, where the legislature has enacted a statute specifying the extent of regulation in such an ordinance, I do not believe that the municipal authorities can go beyond the terms of the statute. While a building ordinance may cover matters not properly covered by a zoning ordinance, the general limitations are the same.

WM. C. GREEN,
Assistant Attorney General.

Deer River Village Attorney.
January 31, 1946. 477-B-34

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PUBLIC SAFETY

## 157

**Fire departments—Contracts for fire protection**—L 1943, C 389 and 557; Special Laws 1891, C III, §§ 4 and 5; MS1941, §§ 69.01 and 69.02 (Mason's Supp. 1944, §§ 3723 and 3724); MS1941, § 69.03 (Mason's Stat. 1927, § 3725).

### Facts

Four copies of contracts have been submitted to your department for filing in order to comply with Mason's Supplement 1944, Sections 3723 and 3724 (Minnesota Statutes 1941, Sections 69.01 and 69.02), and Mason's Statutes 1927, Section 3725 (Minnesota Statutes 1941, Section 69.03).

**Questions**

1. Are these contracts legal under the provisions of Laws 1943, Chapter 389?

2. Are these contracts sufficient to enable the commissioner to certify under Section 3724, supra, that these townships have service contracts with the municipality wherein the fire department is located?

The contracts copies of which are submitted are as follows:

(1) Contract between the Edgerton Volunteer Fire Department and the Township of Elmer, Pipestone County, Minnesota, for fire protection, for $75.00 per year, payable in advance.

(2) Contract between the Henderson Fire Department of the City of Henderson, County of Sibley, and State of Minnesota, and "southwest ¼ Blakeley Township of the County of Scott and State of Minnesota." This contract apparently provides for no payment by the township to the Henderson Fire Department.

(3) Contract between the Henderson Fire Department and the Township of Jessenland, County of Sibley, and State of Minnesota. In the case of this contract, the township agrees to pay toward the purchase of a new fire truck by the Henderson Fire Department the sum of $350.00.

(4) Contract between the Henderson Fire Department and the Township of Henderson, Sibley County, Minnesota. This contract recites that the township has paid to the Henderson Fire Department the sum of $350.00, which has been used in the purchase of a new fire truck by that fire department.

**Opinion**

In each of the cases of contracts with the Henderson Fire Department that department agrees to answer calls for aid and assistance in fire control made by residents of the various townships, with certain limitations.

Mason's Minnesota Statutes 1927, Section 1027-1 (Minnesota Statutes 1941, Section 365.15), provides that the electors of each town shall have power at their annual town meeting to authorize the town board to provide for fire protection, or for apparatus therefor, and to determine by ballot the amount of money to be raised for either or both of such purposes.

Mason's Minnesota Statutes 1927, Section 1027-4 (Minnesota Statutes 1941, Section 365.18), as amended by Laws 1943, Chapter 389, provides that, whenever the electors of any town shall have authorized the providing of fire protection and/or for apparatus therefor and determined the amount of money to be raised for that purpose, the town board may levy a tax for the amount so authorized or for such lesser amount as the board may determine to be necessary, and may enter into a contract with the county in which the town is located or with any adjacent city or village for the furnishing

of such fire protection within the limits of town and/or for the care, maintenance and operation of such apparatus, on such terms and conditions as mutually may be agreed upon.

It would be necessary to determine, in the first instance, therefore, whether the electors had at their annual town meeting authorized the town board to provide for fire protection or for apparatus therefor. This does not appear from the copies of the contracts submitted.

It was held in an opinion of this office dated May 10, 1945, that a town and village may, in the manner provided for by Laws 1943, Chapter 557, jointly purchase fire apparatus by agreement through action of the town board and the village council after the electors of the town have authorized the town board to make such a purchase.

I find no statute, however, which authorizes a town to enter into a contract with a fire department. The contract may be with the county in which the town is located or with any adjacent city or village, or, if acting under the provisions of Laws 1943, Chapter 557, in the manner provided for by that statute.

The City of Henderson was organized under Chapter III, Special Laws of Minnesota for 1891. Section 4 of Chapter III of that act provides that all contracts shall be signed by the mayor. Section 5 provides, among other things:

> "Every contract made in behalf of the city shall be void unless attested by the official signature of the city clerk and the corporate seal attached thereto, except as otherwise provided in this act."

While the act provides that the city council shall have power to organize a fire department, I find no provision authorizing the fire department to execute contracts on behalf of the city.

There is certainly no authority for a township to enter into a contract with a volunteer fire department, such as has been done in the case of the Township of Elmer.

I am, therefore, of the opinion that these contracts are not legal contracts under the provisions of Laws 1943, Chapter 389, or sufficient to enable the commissioner to certify that these townships have service contracts with the municipality wherein the fire department is located.

Assuming proper authorization to the town boards involved, in so far as the Henderson contracts are concerned, I am of the opinion that, in order to make these agreements legal, it is necessary that they be executed in the same manner as other city contracts are executed.

In so far as the Township of Elmer contract is concerned, the contract should be executed pursuant either to the provisions of Laws 1943, Chapter 389, or Laws 1943, Chapter 557.

WM. C. GREEN,
Assistant Attorney General.

Commissioner of Insurance.

May 21, 1945. 688-K

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## 158

**Fire department—Volunteer—Council may fix compensation.**

**Facts**

Your village has a volunteer fire department of approximately thirty members who at present are paid on the basis of fire calls and meetings; the fire department has made a request to the council for a flat sum of $1500 to be paid as compensation for the members of the volunteer fire department rather than determining the amount to be paid to each member upon the basis of fire calls and meetings.

**Question**

Whether the council may appropriate $1500 annually to be paid to the members of the fire department in such an amount to each member as the council may determine rather than pay compensation to the members of the department based entirely upon the number of fire calls and meetings.

**Opinion**

Minnesota Statutes 1945, Section 412.19, subdivision 8, grants to the village council the power to establish a fire department, appoint the officers and members thereof, and prescribe their duties. Under former opinions rendered by this office it has been held that under similar statutory provisions to those above referred to the village council may pay a salary to the fire chief and also to the members of the fire department as may seem proper to the council. Consequently, you are advised that your village council has authority to determine the amount of compensation to be paid to the fire chief and members of the fire department, and to pay the amount of such compensation as the village may determine.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Aurora Village Attorney.

December 18, 1946. 688-J

PUBLIC UTILITIES

## 159

**Contracts—Bids—Powers of Commission—Awarding contracts without competitive bidding.**

**Questions**

"a. To what extent, with reference to limitations on amount, may a Public Utilities Commission created pursuant to Chapter XXIV of the said Charter contract and pay for services, supplies, repairs and improvements without calling for bids?

"b. If bids are required does the commission have power to call for bids or must this be done by the City Council?"

**Opinion**

Both of these questions can be conveniently considered together, and likewise answered.

Section 27 of your charter relates to the powers of the city, both legislative and administrative, and provides "unless otherwise delegated by the provisions of this Charter, shall vest in and be exercised by the City Council." The powers of the public utilities commission, to which your attention will be hereafter directed, I believe come within the exceptions specified in Section 27.

Section 139 relates to contracts for improvements in connection with repair, construction, and other work in behalf of the city, all of which is obviously to be carried out and performed under the direction of the city council.

Section 167 relates to the control of finances and provides that the city council shall have full authority over the financial affairs of the city. However, this section must be read in conjunction with Section 59 which relates to the duties of the city treasurer. Subsection 1 of said Section 59 provides:

"He shall receive and safely keep all moneys and funds belonging to or under control of the City or any department thereof, including the moneys and funds of the **Public Utilities Commission** and any other commission or bureau hereafter at any time established."

Subsection 3 provides:

"He shall keep an accurate and detailed record of all moneys and property received by him belonging to the City or any department or commission thereof. He shall keep a separate account for each fund and pay no money out of the treasury except upon an order signed by the Mayor and City Clerk **or by the Proper Officers of the Public Utilities Commission, in the event such a commission be created by the City Council under the power as to do as provided in this Charter.**"

From these quoted provisions of your charter relative to the duties of the treasurer, it seems quite clear that the charter contemplates the vesting of power and authority in the proper officers of the public utilities commission to authorize the disbursement of money under the control of such commission. This becomes even more clear by examining the provisions of your charter which relate specifically to the commission to which attention will be hereafter directed.

Section 193 relates to the manner in which money shall be paid out of the city treasury, and must be considered in conjunction with Section 59 which relates to the duties of the treasurer.

Section 56, which is a part of Chapter IX, and which relates to council procedure, provides:

> "No purchase involving the expenditure of more than Five Hundred Dollars ($500.00) shall be made except upon competitive sealed bids, and in all such cases public notice shall be given and bids invited for the same by notice published in the official paper of the City once in each week for two successive weeks."

The only provisions of your charter that I have found which relate to competitive bidding and the manner of letting contracts therefor are Sections 139 and 56. In determining whether or not these two sections should be construed as applicable to the commission, it is necessary to examine the sections of your charter which relate to the powers and the duties of the members of the public utilities commission.

Section 220, consisting of eleven numbered subsections, relates to the powers and duties of the commission. Subsection 1 authorizes the commission to provide for regular meetings of the commission and to prescribe their own rules of procedure. Subsections 2, 3, and 4 vest in the commission general control and supervision of the utilities and the management thereof, except as stated in subsection 3 "that the Commission shall have no power to make any replacements, extensions, improvements, changes, or additions which require the issuance of bonds of the City to pay for the same, in whole or in part, or which are to be paid for in whole or in part by special assessment upon property benefited thereby," and in those cases this subsection requires the commission to make recommendations to the council in writing in regard thereto.

Subsection 5 vests in the commission the power to fix and determine rates.

Subsection 10 provides:

> "To make, perform and enforce contracts in the name and in behalf of the City, and to do any and all other things that may be necessary or proper to carry out the purposes expressed herein."

The first paragraph, unnumbered, of Section 220 grants to the commission full and exclusive control and power over all moneys, bonds, cer-

tificates of indebtedness, warrants, and other securities of any fund of the commission.

It seems obvious that the framers of the charter intended, by the language used in Section 220, to grant and vest in the commission full and complete power to manage and control any utilities within the city and coming under the jurisdiction of the commission, free from control or domination by the city council except as heretofore noted in subsection 3, and as provided for in subsection 11, as follows:

> "The City Council shall have the power to make and prescribe by ordinance or resolution any further rules and regulations for such public utilities commission and may from time to time change the powers and duties of such commission as said City Council shall deem necessary or expedient for the efficient management of the public utilities under the control of said Commission."

By this section there is reserved in the city council the power to prescribe by ordinance or resolution additional rules and regulations for the commission, and to change the powers and the duties of the commission from time to time.

There are contained in the statutes relating to public utilities commissions for villages, powers which are substantially as broad as those conferred upon your commission by Section 220 of your charter. Our court has had occasion to construe these statutory provisions. In State ex rel Briggs v. McIlraith, 113 Minn. 237, the court held that the commission was granted, under the statutory provisions, full and complete control over water and light plants and free from any control or domination by the governing body of the municipality. We direct attention to this case, and likewise to the provisions of your charter, for the purpose of reaching a conclusion as to whether or not Sections 139 and 56, which relate to competitive bidding, are applicable to your commission.

It is our opinion that these last mentioned sections are not applicable and that the commission is not required to advertise for bids as provided for in Sections 139 and 56, and that these sections are applicable only to the city council.

Several of our district courts have held that the general statutes which require competitive bidding by the governing body of cities and villages, where the contract exceeds a certain amount, are not applicable to water and light commissions. The district court of St. Louis County so held on December 2, 1936, in the case of Wm. Rusch et al v. Village of Mountain Iron, case 8474. The same conclusion was reached by the district court of Norman County on November 28, 1939, in the case of Breiland v. Village of Halstad.

However, we direct attention to Section 220, subsection 11, under which we believe that the city council, by ordinance, could provide for competitive bidding on contracts or supplies or other material to be contracted for or

purchased by the commission when the amount exceeds such a sum as the city council might determine, and that such ordinance would be binding upon the commission.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Redwood Falls City Attorney.

July 16, 1946. 624-A-4

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# 160

**Contract—Bids—Water supply—Must be advertised for bids when cost involved exceeds $100.**

**Facts**

The Village of Winsted has been having trouble in connection with the well from which it secures water supply for village purposes; no emergency exists but the village has been advised that it might become necessary to abandon the present well which would require the expense of digging a new well so as to obtain a water supply for village purposes.

A certain concern within the village has a well and sufficient water is available for this concern and also for village purposes; a proposition has been made to the village by the local concern to supply water at a charge to the village of only the actual cost of electricity used for pumping.

**Questions**

"Whether or not a Village can contract for the supplying of water for village purposes from such a local concern.

"If a Village Council has power to purchase water for village purposes, does such a contract have to be approved by the voters or can the Village Council, after notice for bids, enter into such a contract?"

Your first question is answered in the affirmative. Minnesota Statutes 1941, Section 412.19, subdivision 20, is broad enough so as to confer upon the village council authority to enter into this contract provided, however, that if the amount involved exceeds $100 the city must first advertise for bids as provided for in Minnesota Statutes 1941, Section 412.21.

Answering your second question, you are advised that such contract does not need to be approved by the voters, and that the village council has the authority to enter into such contract. In the event the amount involved exceeds $100 the city must advertise for bids in accordance with said Section 412.21.

See Casey v. Central Electric & Telephone Co. et al, 202 Minn. 510; Chisholm Water Supply Co. v. City of Chisholm, 205 Minn. 245.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Hutchinson Village Attorney.
May 8, 1946. 707-A-15

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# 161

**Equipment—Contract—Payment—Issuing revenue certificates**—MS1941, §§ 412.21 and 453.04.

**Questions**

"1. Has the (water, light, power and building) commission the power and authority to enter into a contract for the purchase of equipment and in payment therefor issue revenue certificates payable solely from the earnings of said plant?

"2. In the purchase of an engine is it necessary that the commission, or the village council advertise for bids?"

**Opinion**

The answer to your first question is in the affirmative. It appears to be well settled that the commission may purchase the equipment and pay for it in the manner contemplated. **Williams v. Village of Kenyon,** 187 Minn. 161; **Davies v. Village of Madelia,** 205 Minn. 527; **Hendricks v. City of Minneapolis,** 207 Minn. 151; **Struble v. Nelson,** 217 Minn. 610.

Your second question involves a consideration of the applicability of the provision requiring bids which is contained in Minnesota Statutes 1941, Section 412.21, and reads as follows:

"All contracts for the purchase of merchandise, materials or equipment or for any kind of construction work undertaken by the village which requires an expenditure of $100.00 or more, if not to be paid from road or poll tax, shall be let to the lowest responsible bidder, after public notice of the time and place of receiving bids."

Minnesota Statutes 1941, Section 453.04, contains, among others, the following provisions:

"The commission shall have full, absolute, and exclusive control * * * of and power over the water, light, and power plants, and municipal heating plants * * * . The commission shall have the power and authority to operate the same, and each thereof, and to extend, add to, change or modify the same, and to do any and all things in and about the same which they may deem necessary for a proper economical operation of the same. * * * The commission shall have authority

to buy all material and employ all help necessary, or it may contract, to extend, add to, change, or modify these plants, buildings, and halls, or any part thereof. The commission shall have authority to buy all fuel and supplies and employ all help necessary to operate the plant."

In the chapter authorizing the creation of the commission and conferring thereon the powers above enumerated, there is no provision requiring advertising for bids in the purchase of or in the making of contracts for purchase of needed materials or equipment for the operation of the plant.

The question, therefore, to be determined in answering your second inquiry is whether the legislature intended to apply to transactions of the commission the above cited general law requiring advertising for bids when the contract for the purchases therein designated will require an expenditure of $100 or more.

An opinion of this office rendered more than twenty years ago held that General Statutes 1913, Section 1279 (now appearing, as amended, in Minnesota Statutes 1941, Section 412.21) applied not only to purchases made by the village council but also to those made by the village water and light commission, and that, therefore, advertising for bids was required where the contract involved an expenditure of $100 or more.

Since the writing of that opinion, this office has rendered other rulings involving villages incorporated under special laws or facts peculiar to the then presented situation where it was held that the statute requiring bids was inapplicable.

On December 2, 1936, the District Court of St. Louis County, Minnesota, in the case of **William Rusch, et al. v. Village of Mountain Iron, et al.**, case No. 8474, decided that the statute in question did not require the Water, Light, Power and Building Commission of that village to call for bids.

In the case of **Breiland v. Village of Halstad, et al.**, decided by the District Court in the County of Norman, Minnesota, on the 28th day of November, 1939, the court said in the portion of its memorandum pertaining to the requirement for bids on the part of the Water, Light, Power and Building Commission of that village:

> "While the supreme court has not passed on it in the thirty years Chapter 412, Laws 1907, has been in force, in several actions in district court, decisions have been that these commissions do not have to advertise for bids in situations like the one in this case. There has been ample opportunity for the legislature to act if these decisions were not in accordance with its intent in passing the act."

In the circumstances it is my opinion that unless such district court decisions are reversed by the supreme court this office should not adopt a

ruling different from that of the district court. Any previous opinion inconsistent herewith is hereby superseded.

J. A. A. BURNQUIST,
Attorney General.

Princeton Village Attorney.
March 4, 1946. 707-A-15

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## 162

**Franchises—Amendment—To provide for a payment of five per cent of the gross income of the company to the city.**

### Facts

" * * * At present the Mississippi Valley Public Service Company is operating under a franchise from the City of Winona which does not preclude the City from acquiring the plant. The company will agree to an amendment of its franchise to provide for the payment of a license, fee or tax to the City of Winona of five per cent of its gross earnings.

### Question

"Whether or not the City Council of the City of Winona could grant a franchise to the Mississippi Valley Public Service Company conditioned upon the payment by the company to the City of a fee of five per cent of the gross earnings of the company.

"The City Charter of the City of Winona, which can be found in Chapter 5 of the Special Laws of Minnesota for the year of 1887 provides in Chapter 4 of said Chapter, Section 1, Subsection 28

" 'That the City Council shall have the right to grant an electric light company authority to set posts and string wires in the streets and alleys of the City and that all such grants shall be subject to such limitations, conditions, restrictions and regulations as the Council may deem necessary or expedient to impose.'

"It would appear from this that the Council could as one of the conditions of the granting of a franchise provide for the payment of a fee to the City based on a portion of the gross earnings of the company."

### Opinion

It is my opinion that the city and the power company may mutually agree to amend the existing franchise so as to provide for a payment of five per cent of the gross income of the company to the city. I believe that the city had the power and the authority to incorporate a like proviso in the franchise at the time when it was granted, and that the power

company, upon acceptance of such franchise with these provisions therein, would be bound thereby.

It appears from Special Laws 1887, Chapter 5, as quoted in your letter, and which relates to the City of Winona, that the city council shall have the right to grant an electric light company authority to use its streets and that such grant shall be subject to such limitations, conditions, restrictions and regulations as the council may deem necessary or expedient to impose. This section of the city charter appears broad enough to impose the conditions suggested in the proposed amendment to the existing franchise.

Our court in considering the powers of the City of Duluth under its charter to impose a wheelage tax for the privilege of using the streets in the case of **Park v. City of Duluth,** 134 Minn. 296, on page 298, said:

> "The imposition of such a tax by a city, if authorized by the legislative power of the state, is reasonable and lawful, and has quite generally been sustained."

And continuing on the same page, the court further stated:

> "We think there is legislative authority for this ordinance. * * * The Constitution and general laws of the state confer upon the people of a city the power to frame and adopt its own charter. The adoption of such a charter is legislation. The authority which it furnishes to city officers is legislative authority. The people of a city in adopting a charter have not power to legislate upon all subjects, but as to matters of municipal concern they have all the legislative power possessed by the legislature of the state, save as such power is **expressly or impliedly withheld.**"

It is stated in Dunnell's Digest, 2nd Edition, Section 6683a as follows:

> "Economic and industrial conditions are not stable. Times change. Many municipal activities, the propriety of which is not now questioned, 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."

A franchise is considered to be a contract, and is, therefore, subject to modification, change or amendment. 23 American Jurisprudence, page 718, Section 6:

> "It is generally conceded that a franchise is the subject of contract between the state and the grantee, and that it does in fact constitute a contract when the requisite element of a consideration is present. Conversely, a franchise granted without consideration is not a contract binding upon the state. It is generally considered that the obligation resting upon the grantee to comply with the terms and conditions of the grant constitutes a sufficient consideration. As expressed by some authorities, the benefit to the community may constitute the sole consideration for the grant of a franchise by a state. A contract thus

created has the same status as any other contract recognized by the law; it is binding mutually upon the grantor and grantee and is enforceable according to its terms and tenor, and is entitled to be protected from impairment by legislative action under the provision of the state and Federal Constitutions prohibiting the passage of any law by which the obligation of existing contracts shall be impaired or lessened. * * * "

23 American Jurisprudence, page 730, Section 19:

"Since a franchise constitutes a contract and, as such, is within the protection of constitutional guaranties, the terms and conditions thereof are not subject to alteration without the consent of the holder, unless the right of alteration has been reserved in the grant or provided for by the general law. Nor may the grantor subsequently, by amendment or independent enactment, impose additional conditions upon the privilege of exercising the franchise or using the right previously granted or destroy or impair other vested property rights incidental to the ownership of the franchise. The power to modify or alter the franchise may, however, be reserved in the grant or provided for by the general law."

McQuillin Municipal Corporations, 2nd Edition, Volume 4, page 968, Section 1778:

"Unless the power to do so is reserved, the municipality cannot modify or amend the franchise after it is granted, where thereby it lessens the rights and privileges of the company or imposes additional burdens on it. And in any event an ordinance comprising the franchise can be modified only by an act of equal dignity, namely, by ordinance.

"In most states, however, the power to alter, amend, or repeal franchises has been reserved, and in others the power has been held to exist because there is no prohibition against its exercise; of course, consent thereto is sufficient to warrant the modification.

"By statute in some states, a street railway franchise may be modified, if done in good faith and for a sufficient consideration, provided the company is not thereby released from some obligation or liability."

The United States supreme court held that a franchise granted by the City of St. Cloud constituted a contract between the municipality and the Public Service Company. In **Public Service Co. v. St. Cloud**, 265 U. S. 352, on page 357, the court said:

"In construing and giving effect to these provisions of the charter we look to the decisions of the Supreme Court of the State. * * * In a suit brought by taxpayers to enjoin the performance of this contract the court said, that there could be 'no doubt but that these charter provisions confer upon the municipality authority to enter into contracts with individuals for the purpose of providing itself and its inhabitants with a supply of water . . . The authorities are very

uniform that contracts of this nature are not within the legislative or governmental prerogatives of the municipality, but rather within its proprietary or business powers. Their purpose is not to govern the inhabitants, but to secure for them and for itself a private benefit. . . . It was so held in . . . **Flynn v. Little Falls E. & W. Co.**, 74 Minn. 180. . . . While this precise point of distinction was not made in that case, it is authority for the proposition that a municipality does not exercise its legislative functions in entering into contracts of this kind, but only its business or proprietary powers, to which the rules and principles of law applicable to contracts and transactions between individuals apply.' * * * In the suit by the City to set aside the contract entered into by the ordinance for failure of the grantees to furnish pure water in the stipulated quantities, the court said 'The obligations of the parties, as set out in the ordinance, constitute a contract. The city was enabled to enter into such obligation by virtue of its charter powers and the general laws of the state, and was endowed with the right to construct, or cause to be constructed, a water system for the benefit of its inhabitants, and had control of its streets, and could contract with reference to their use for the purpose of extending the system. . . . The obligations thus entered into were mutual. Upon the one hand, the grantees, their successors and assigns, would be protected by the courts in the enjoyment of their rights,—for instance, in the collection of the hydrant rentals; on the other hand, the courts of the state are open to the city to secure the enforcement of its rights. No serious question can arise as to the nature of the contract obligation. . . . '

" * * *

"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."

The city should not waive or forfeit any of its rights under the franchise, the city charter or the laws of this state as a condition or consideration for the proposed mutual amendment to the existing franchise.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Winona City Attorney.
June 1, 1946.

624-C-6

# 163

**Franchise—Municipal light plants—Authority of village to grant.**

**Facts**

"For several years the electric distribution system in the Village of Dodge Center was owned and operated by the Minnesota Utilities Company which purchased its electricity at wholesale from the Northern States Power Company. Last November, the distribution system, together with certain other systems in the state, was purchased by the Northern States Power Company. For several years this system was operated by the Minnesota Utilities Company without a franchise from the Village and is now being so operated by the Northern States Power Company.

"The Northern States Power Company is asking for a twenty year franchise and have submitted an ordinance, the title of which reads as follows: 'An ordinance granting permission to Northern States Power Company, its successors and assigns, to erect, enlarge, operate and maintain, in the Village of Dodge Center, Minnesota, transmission lines and electric distributing system, including necessary pole lines, masts, wires and fixtures, for the furnishing of electric energy to the Village and its inhabitants, and transmitting electric energy into and through the Village, and to use the streets, alleys and public grounds of said Village for such purposes.

"In September, 1945, at a special Village election the following proposition was submitted to the voters and carried: 'Shall the Village of Dodge Center purchase or construct, erect and operate an electric system for the purpose of supplying and distributing light and power for public purposes and for the private use of its inhabitants.'

"The Northern States Power Company, since the first of the year, has made two reductions in their rates. The users of electricity in Dodge Center were given the benefit of the first reduction. The second reduction was to take effect May 1st but the Company declines to put such rates into effect in Dodge Center on the ground that they do not have a franchise from the Village and unless the Village Council grants such a franchise, decline to give the users the benefit of the last reduction in rates.

"Dodge Center is in the Faribault division of the Company and the last reduction of rates had been given to West Concord and Hayfield, nearby towns which are in the same class as Dodge Center.

"The Village Council has endeavored to negotiate with the Northern States Power Company for the purchase of its distribution system and the purchase of electricity at wholesale, but the Company has declined to sell its system or to sell electricity at wholesale. The Village Council finally entered into a contract with its engineers for preliminary

plans for the construction of a generating system and distribution system and in case the Council so decides, for plans and specifications for the construction of a system.

"In case a franchise was granted, the Village would have the right to purchase the system as provided by Section 7434, Mason's Minnesota Statutes, 1927."

This section, being Minn. St. 1941, § 300.05, provides in part as follows:

"The council of any city or village, at the end of any period of five years from the granting of a franchise for the operation of any * * * electric light, heat, or power works, when authorized so to do by a two-thirds majority of the votes cast upon the question, may acquire and thereafter operate the same, upon paying to the corporation or person owning the franchise the value of such property, to be ascertained in the manner provided by law for acquiring property under the right of eminent domain, upon petition of its governing body. Such vote shall be taken at a special election called for that purpose and held within three months next preceding the expiration of the five-year period."

The statute quoted requires that the question of the acquisition of such plant shall be voted upon at a special election to be held within **three months next preceding the expiration of the five-year period.** In view of this statutory provision it would be my opinion that in the event a franchise is granted as provided in the proposed ordinance another special election should be held if the village desires to acquire the electric light plant and system in conformity with § 300.05, supra.

**Question**

"First: Does the Village Council have the right to grant a twenty year franchise as the Village has voted for municipal ownership and operation of a system?"

**Opinion**

This question is answered in the affirmative.

The franchise proposed by the ordinance is not an exclusive franchise and the granting thereof would not preclude the village from establishing a municipal plant provided that the village has funds available for such purpose. You do not advise as to whether or not the village has the necessary funds with which to "purchase and construct," etc., an electric system as was voted upon at the special election in September 1945. Until such funds have been made available the village would not have authority to construct and proceed in accordance with the proposal so adopted at the September 1945 special election. In the event that the proposed ordinance is adopted and the village desires to proceed so as to acquire the electric system, it would be necessary, as previously pointed out herein, to hold a

special election and comply strictly with § 300.05, supra. However, the village would not, by granting such franchise, be foreclosed from entering the field itself and conducting and operating its own electric light and power system if it desires to proceed in conformity with Minn. St. 1941, § 457.01.

As previously stated, the proposed ordinance is not an exclusive franchise which would bar the village from entering into the same field. See **Long v. City of Duluth**, 49 Minn. 280; **Milwaukee Electric Railway and Light Company v. Railroad Commission of Wisconsin**, 238 U. S. 174, 59 L. Ed. 1254, and cases cited therein.

**Question**

"Second: Will the adoption of an ordinance granting a franchise to the Northern States Power Company annul the right of the Village to proceed with the purchase or construction, erection and operation of an electric system in accordance with the vote at the special election?"

**Opinion**

What has been stated in answer to your first question disposes of and answers your second question.

**Question**

"Third: Can the Northern States Power Company be required to furnish electricity at wholesale to the Village if the Village had its own distribution system?"

**Opinion**

This question is answered in the negative. It involves the right of contract and I find no provision in the law whereby the village can compel, in the absence of a contract, the power company to furnish electricity at wholesale to the village. The village does, however, have authority to enter into a contract therefor. Minn. St. 1941, §§ 455.12 and 455.13.

**Question**

"Fourth: Does the Northern States Power Company have the right to discriminate in rates against the users of electricity in the Village of Dodge Center by not granting the same rates as to the other towns in the same class?"

**Opinion**

It is not possible to conclude from the facts stated that because different rates prevail in different communities discrimination exists. Many factors must be considered, such as the relative geographical location of the community served to the point of manufacture or distribution, and the

existence or non-existence of a franchise from which could be determined the probable future duration of electric service by the company to the particular community involved. Consequently, a comparison of rate charges for electric service to the public in different communities would not of itself be sufficient to conclude that the rates charged are discriminatory. Other factors, as previously indicated, must be taken into consideration.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Dodge Center Village Attorney.
May 23, 1946. 624-C-6

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## 164

**Franchise—Perpetual or exclusive franchise may not be granted—Five-year limitation—Section 23 of Chapter VII of city charter not applicable to franchises—Installing gas mains and selling gas to the consumers of the city.**

**Facts**

The City of International Falls contemplates granting a franchise to a company for the purpose of installing gas mains and selling gas to the consumers of the city.

**Question**

Whether the city may grant a franchise for the purposes stated to such company for a period of 25 years, pursuant to Chapter VII, §§ 25 and 29 of your charter.

**Opinion**

We believe that your question should be answered in the affirmative. Section 29 of Chapter VII of your charter is a limitation upon the powers of the city council in granting franchises. Section 23 of Chapter VII of your city charter is a limitation upon the power of the city council to make contracts for water, electric or gas light services to the city and contains a limitation of five years. We do not believe that the five-year limitation contained in this section of your charter should be construed to be a limitation upon the powers of the council in granting a franchise.

While the courts recognize that a franchise is in the nature of a contract and that certain contractual obligations result therefrom, we do not believe that the word "contract" as used in Section 23 is to be construed to mean a franchise.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

International Falls City Attorney.
September 5, 1946. 624-B-1

# 165

**Mains—Water and sewer—Extension of to benefit new plant—Matter for the exercise of discretion of the council.**

**Facts**

It is proposed that the city sewer and water mains be extended from Mill Street a distance of a block or more, to the end of Second Avenue. This will afford access to the sewer and water mains by a manufacturing concern which proposes to build a plant within the city limits. The site of the proposed plant is not now reached by either sewer or water mains.

The new plant would be the one chiefly benefited by this new installation, although it would be of benefit to the property on both sides of Second Avenue when this property which is now vacant is improved. It is proposed to pay for the extension out of the general funds of the city. The abutting property is not of such value that it would sustain an assessment for the cost of this improvement. The city will, of course, benefit generally by the location of this new plant within the city limits, and it will be of benefit to the inhabitants generally.

**Question**

Has the city the right to pay out of the general fund of the city for the extension of the water and sewer mains so as to make the same available for use by a manufacturing concern which is about to locate in the city, and which would be the one primarily benefited by the extension?

**Opinion**

The city charter contains express authority for the payment by the city of the cost or part of the cost of the extension of water mains and sewers out of the general funds of the city. See Charter, Sections 121, 130 and 144.

The question therefore resolves itself into a question not of the existence of the power to make the extension and pay for it from the general fund, but as to whether the facts present a situation where that should be done.

It is the function of the city council to determine whether the necessity exists for the extension of mains to a particular territory, what size of mains is needed, and whether the municipal treasury will warrant the expenditure. The city fathers in these matters act in a legislative and governmental capacity for the city, and their discretion, fairly exercised, cannot be controlled by the courts.

**Browne v. Bentonville,** 94 Ark. 80, 126 S. W. 93.

The city is not bound to furnish the supply of water or sewage to every one of its inhabitants who requests it, regardless of the expense involved and the returns which will result from so doing.

**Lawrence v. Richards,** 111 Me. 95, 88 Atl. 92.

See also **City of Greenwood v. Provine,** 45 A. L. R. 824.

A municipality is not under the duty to establish an extensive system of distributing lines to reach isolated inhabitants or to supply one or two persons living in places remote from well settled districts.

In the case of **State ex rel. Vanderwall v. Phillips,** 134 Wis. 437, 114 N. W. 802, the court held that the duty of providing for and constructing sewers is a quasi judicial or legislative power involving judgment and discretion. The exercise of that power cannot be compelled by mandamus.

Therefore you have a case where the responsibility for determining what action should be taken rests upon and must be assumed by the city council. The council has the power. Whether this is a case in which that power should be used to extend the water and sewer mains to the new plant requires the exercise of the judgment and discretion of the council. They would be protected in the fair exercise of that judgment. Their determination of that matter honestly and for what they believe to be for the best interests of the public and of the city will not be interfered with by the courts.

Where power is granted to a municipal council, the courts will not interfere unless there has been a manifest abuse of that discretion so that the action taken is arbitrary and capricious. In such a case the city council members would not render themselves personally liable if they act honestly and in good faith.

In this case the city council would have the right to consider the fact that the extension of the water and sewer mains will benefit not only the corporation installing the new plant, but will also benefit and be a convenience to every employe in that new plant and will tend to promote the health, well-being and convenience of the employes at the plant as well as the fact that the extension of the mains may attract new residents to the vicinity. The council may consider any other feature that may tend to make it advisable to extend the mains.

The city council also has the right to consider the revenue that may be derived from the use of these facilities by the new plant under nondiscriminatory rates which the council would have the right to prescribe.

In short, the case is one for the exercise of good business judgment by the city council, and when that judgment has been fairly exercised, the courts have no right to interfere or to condemn the action of the council so fairly taken.

This opinion is applicable only in cases where charter provisions are the same as those in Mankato.

RALPH A. STONE,
Assistant Attorney General.

Mankato City Attorney.
November 9, 1945. 624-D-11

# 166

**Water—Rates—Powers of Water and Light Commission created pursuant to Laws 1907, Chapter 412—MS1941, §§ 453.01 to 453.07, inclusive.**

**Facts**

The Village of Proctor created a Water and Light Commission in June 1941, pursuant to Laws 1907, Chapter 412; in July 1942 an ordinance was passed by the village council regulating the rates to be charged for power and water which rates so fixed have remained unchanged until recently. A question has arisen as to whether the water and light commission so created or the village council has authority to fix and prescribe the rates to be charged for water and light.

**Question**

"1. Under the existing ordinances is it proper and legal for the Commission to set the rates of water and power?"

**Opinion**

The water and light commission created by your village council pursuant to Laws 1907, Chapter 412, being Minnesota Statutes 1941, Sections 453.01 to 453.07, has the exclusive power and authority to fix the rates to be charged for water and light. Such authority is legislative in nature and was granted to the commission and not to the village council by section 453.04.

The question as to whether the commission or the council is the proper body to control and regulate rates as well as to have general supervision and control of water, light and power plants pursuant to the statutes hereinbefore referred to has been considered on several occasions by the Supreme Court. **State ex rel Briggs v. McIlraith,** 113 Minn. 237, **State ex rel Finlayson v. Gorman,** 117 Minn. 323, 136 N. W. 402, **State ex rel Village of Chisholm v. Bergeron,** 156 Minn. 276, 194 N. W. 624. In the last case referred to the court in considering the powers of the commission, and on page 279 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. It is given the power to appoint a secretary, and to it, and not to the village council, is given express authority to remove such officer. 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. This must necessarily lodge in the commission, and not in the village council, the power to hire or appoint and discharge persons in carrying on such enterprises. It may fix rates, it shall audit all claims, and the

secretary shall draw warrants therefor on the village treasurer. The present Chief Justice well states the legislative purpose in State v. McIlraith, 113 Minn. 237, 129 N. W. 377: 'The purpose was to create a water and light commission in the class of cities and villages named in the act, and to clothe it with exclusive authority, acting by itself, and independently of the common council, or mayor, to operate, control and manage a city water and light plant. This authority is expressed in clear and unambiguous language, and effectually creates a department of village or city government responsible only to the people. No revisory control is vested in the council or mayor,' etc."

From the decisions above referred to and the absolute power granted by the legislature to the commission under Section 453.04, it seems clear that the commission is vested with power to fix rates and not the village council.

**Question**

"2. Under the existing ordinances may the Village Council set power and water rates?"

**Opinion**

What has been stated in answer to your first question disposes of this question. It seems clear from the law and the decisions that any ordinance passed by the village council attempting to fix rates for water and power service within your village is of no effect, and that the commission may entirely disregard any action taken by the council whether such action is by ordinance or otherwise, whereby the village council attempts to fix rates for water or light service.

**Question**

"3. Under the existing ordinances may the Village Council without the request and in opposition to the Commission set power and water rates?"

**Opinion**

We believe what has been heretofore stated answers this question.

**Question**

"4. Should the present ordinances applying water and power rates as passed by the Village be rescinded and rates set by the Commission alone, or should the present practice continue?"

**Opinion**

Whether the present ordinances are rescinded or remain unchanged, I do not believe that such ordinances in any way hinder or prevent the commission from proceeding to determine and fix rates under the legislative authority and power granted under Sections 453.04.

**Question**

"5. If the public is dissatisfied with the present rates and requests a hearing, is the railroad and Warehouse Commission a proper body to pass upon the propriety of rates."

**Opinion**

The matter of fixing rates is purely legislative. The legislature having delegated the same to the commission it is proper for the commission to determine and fix the rates pursuant to the statutes hereinbefore mentioned. The Railroad and Warehouse Commission has no power or authority, and none has been given to it by law, to determine or fix water and light rates within your community. That is a legislative function delegated to your water and light commission under the statutes above referred to.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Proctor Village Attorney.
June 27, 1946. 624-D

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## 167

**Water—Rates—Regulation—Fixing or changing rate—Power of water commissioners.**

**Facts**

"The Village of Ulen is a village in Clay county, incorporated under the general laws affecting villages. It has its own water supply and provides water for the citizens of the community. It has no water commission, but the village council acts in the capacity of water commissioners. Some time ago, the council decided that the rates being charged were unreasonable, and did not provide sufficient funds to pay for the operation of the system, and passed a resolution increasing water rates within the village. The resolution was duly published and the new rates put into effect. Some users of water had paid their rentals a year in advance on the old basis."

**Question**

"Whether the council was within its rights to raise water rates within the village, assuming that no published notice was given of the meeting at which the resolution was passed, raising the rates."

**Opinion**

There are several decisions which bear upon the powers of water commissioners and which distinguish between the authority of the council to

control the activities of the water commissioners under the laws relating thereto. See State ex rel Briggs v. McIlraith, 113 Minn. 237; State ex rel Finlayson v. Gorman, 117 Minn. 323; State ex rel Village of Chisholm v. Bergeron, 156 Minn. 276.

We assume that the village has authority to operate and maintain its municipal water plant. The fixing of water rates is a legislative function and the village council may change such rates from time to time providing that such changes in rates are reasonable and are not discriminatory between the various consumers. We do not believe that it is necessary for the council, before changing the water rates, to hold a public hearing thereon, nor is it necessary for the council to publish notice of its intention to change the water rates. The council must act upon information as to the cost of furnishing the water to its citizens, and any other material facts which, in the judgment of the council, would justify a change in the rates.

As bearing upon the matter of fixing rates or changing the same, your attention is directed to the following cases: Reed v. City of Anoka, 85 Minn. 294; City of East Grand Forks v. Luck, 97 Minn. 373; Powell v. City of Duluth, 91 Minn. 53; State ex rel Latshaw v. Board of Water and Light Commissioners of City of Duluth, 105 Minn. 472.

**Question**

"Does the council have the right to charge the difference between the new and old rates to customers who have paid a year in advance?"

**Opinion**

While the court has held in the cases above referred to that a municipality acts in a proprietary capacity when it engages in the business of supplying light, gas or water to its inhabitants, yet the matter of fixing rates for such services is considered to be a legislative function. In the City of Duluth case, supra, the court stated in substance that when a municipality furnishes water to one of its citizens, an implied contract arises to pay for such service. However, I do not believe that a municipality can bind itself by contract to furnish water to a consumer in the future if at such future date, and within the period covered by such contract, it becomes necessary to change the rates for such service. Certainly if it should be determined during the existence of such contract that the rates should be less than those contemplated, the consumer should be entitled, despite any contract, to a reduction. On the other hand, if it becomes necessary to increase the rates and such increase is not the result of unreasonable or arbitrary action on the part of the council, then the consumer would be obliged to pay for such increased rates even though he had paid in advance for water service. The advance payment, it seems to me, should be considered in the nature of a deposit for future water services rather than in the nature of a contract between the village and such consumer.

Your second question is answered in the affirmative. In reaching this

conclusion we have assumed that the action of the council in fixing new rates was neither unreasonable nor arbitrary.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Clay County Attorney.
July 23, 1946. 624-D

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# 168

**Water—Softening equipment—City of New Ulm has power to furnish equipment to individual users upon monthly rental basis.**

**Facts**

"Under the Home Rule Charter of the City of New Ulm a 'Public Utilities Commission' was created and granted sole and exclusive management of the water works system, electric light plant, and steam heating system then owned by the City, as well as of any other utility at any time owned or operated by the City, and determined to be a 'Public Utility' by the City Council.

"Because of the hardness of the water in this community and the desirability of softening the same by some proper process, the Commission has long considered the advisability of acquiring a water softening equipment to operate in connection with our water works system. Because of the excessive cost of such equipment at this time, the Commission has decided to delay acquisition thereof. However, the Commission is now considering the purchase of water softening equipment, each separate unit to be installed in homes and business places desiring such service, a monthly rental and service charge to be made for the use thereof."

**Question 1**

"Is the acquisition, installation in separate homes and places of business, on a rental basis as to each such water softening equipment, and of the servicing thereof, such a public utility or public service as the City of New Ulm, or the Public Utilities Commission may engage in?"

**Opinion**

In my opinion the Public Utilities Commission of the city of New Ulm is authorized to acquire and install in separate homes and places of business on rental basis water softening equipment for the purpose of furnishing suitable water to the residents of the city. The purpose of the water works system is to supply usable water to the inhabitants. It has the right to adopt such means as in its judgment are reasonable and proper to provide

the most efficient water service for the people of the city. Such authority is conferred by the charter which provides in Section 222 (2) that the Utilities Commission is authorized "to do any and all things necessary for the economical management, control, and operation thereof."

The Utilities Commission has the right to furnish to the city's inhabitants a suitable water supply. This includes the right to furnish them with soft water. If this can best be accomplished by furnishing and renting to the user water softening equipment, the Commission has the power to do so.

Courts generally favor the exercise of the fullest discretion in the enjoyment and administration of the power to operate public utilities consistent with the general grant of such powers and the best interests of all of the inhabitants.

McQuillin Municipal Corporations, 2d ed. Rev. Vol. 5, § 1938, p. 55, reads:

> "In the management and operation of its plant, a 'city is not exercising its governmental or legislative powers, but its business powers, and may conduct it in the manner which promises the greatest benefit to the city and its inhabitants in the judgment of the city council; and it is not within the province of the court to interfere with the reasonable discretion of the council in such matters'."

And again the same author and in the same volume, § 1943, p. 72, writes:

> "A municipality which has its own water or light plant, or a street railway or the like, may make all contracts and engage in any undertakings, as an incident to the municipal ownership of such plant, which is necessary to render the system efficient and beneficial to the public."

Finally, in support of my opinion I refer to the case of Leighton Supply Co. v. City Council of Fort Dodge, 292 N. W. 848 (Ia.).

The facts in this case may be stated by quoting from the opinion as follows:

> "The water supply of the city of Fort Dodge comes from deep wells and is heavily charged with iron, hydrogen sulphide, lime and magnesium. The city constructed an iron removal plant at the waterworks station which eliminated the hydrogen sulphide and much of the iron. Because of the lime and magnesium content of the water it is 'thirty grain water, nearly six hundred parts per million.' Water having this amount of lime and magnesium is excessively hard, it appearing that it is desirable to soften over ten-grain water. About twenty per cent of the water consumed in Fort Dodge is used for purposes that require it to be softened. The cost of the equipment necessary to soften all of the water used in the city is about $50,000 and the estimated annual operating charge is $25,000. Because of the cost of a central softener at the plant, which was considered prohibitive, and the fact that eighty per cent of the water was used for purposes that did not require it to be softened, the council decided to purchase individual water soften-

ers and install them on application. The price of each softener is $19.65.

"To provide a method of furnishing water that was not excessively hard, the city council adopted Ordinance No. 869 which provides that, on application of a customer, the city will install the softener at the residence or place of business of the applicant who is required to pay $5 to cover the cost of installation by the water department, a rental charge of fifty cents a month and a maintenance charge of fifty cents for each regeneration of the softener."

The court held that the city had the right to purchase individual water softeners and to supply them to individual consumers on a rental basis as a part of the process of furnishing water to the inhabitants, and that such undertaking would not be a commercial enterprise or independent business in unlawful competition with private business.

The court further held that the city had implied authority to purchase individual water softeners and supply them to individual consumers on a rental basis as an implied power and duty to provide water under the city's express power to establish and operate the water works plant. The court further held that this was true even in the absence of express authority under the statute to purchase and use filters in operating the plant.

The question which you propound has never been presented to this office so far as I am able to find. A somewhat related question was answered on March 26, 1934, in an opinion to the city attorney of Rochester (file 59a-36, Attorney General's Report for 1934, Opinion 88). In that opinion it was held that under the Rochester charter the city had authority to buy electric stoves and electric appliances and sell them to the inhabitants of the city and allow the purchasers to pay for the same in monthly installments.

If as a service to the inhabitants and in the performance of its duty to furnish a suitable water supply the city should furnish water softeners to the individual owners and thereby render the service supplied by the city more beneficial and efficient and worth more to the user, it would be justified in doing so.

It seems to me that the question of whether the city should furnish water softener on a rental basis to water users is a question of business management and well within the discretion of the Utilities Commission.

**Question 2**

"Must the City Council under the language in our Charter provision 'and determined to be a Public Utility by the City Council' first declare such service to be a Public Utility, or must this water softening equipment and service be considered as merely a part of our Water Works System, which has heretofore been declared to be a public utility?"

**Opinion**

This question has in substance been answered by what was said in answer to Question No. 1. It is unnecessary that the council adopt a resolution declaring such water softener service to be a public utility. It would be, in fact, a part of the city's water works system.

RALPH A. STONE,
Assistant Attorney General.

New Ulm City Attorney.
April 24, 1946. 59-A-36

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## 169

**Wells—Contract—Bid—Cost of well furnishing water supply to be paid out of earnings from water system. Williams v. Village of Kenyon, 187 Minn. 161, applied.**

**Facts**

The village has advertised for and received bids for the construction of a new well and the lowest responsible bid exceeds the amount of funds available for the payment of this improvement, or the amount available from taxes heretofore levied but not collected.

**Question**

"May the Village Council accept this bid and sign a contract with such bidder paying what funds are available and paying the balance from revenue received from water funds as they are collected?"

**Opinion**

The village may accept the bid and enter into a contract with the successful bidder by the terms of which the village agrees to pay the amount of money now available for such purpose, in cash, and the balance of the contract price to be paid out of the net earnings from the village water system at such times and amounts as may be agreed upon between the village and the contractor. See **Williams v. Village of Kenyon,** 187 Minn. 161.

The village when undertaking to supply water for municipal purposes and for the use of the inhabitants of the village acts in a proprietary and not governmental capacity. See **Sloan v. City of Duluth,** 194 Minn. 48.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Sherburn Village Attorney.
December 10, 1946. 624-D-19

# 170

**Wells—Contracts—Bids—Installation—Wells to secure water supply for inhabitants**—MS1945, § 412.19, Subd. 20; MS1945, § 412.21.

**Facts**

"The Village of Sherburn is operating under the 1905 act. The Village well from which the present supply of water for the Village is taken has recently had to have extensive repairs. The Village Council deems it necessary to have another well and pumping apparatus to supplement the one we now have.

"The Village of Sherburn has more than 1000 population by the last census. It has a complete water system and sewer system. Thus this proposed new well and pump would be an extension to the water system to insure that the supply of water would not be shut off for failure of the existing well and pump which did happen a short time ago."

**Question**

"Can this be done by the Council without an election by the citizens? What is the proper legal procedure to be taken by the council in such case? If vote by the electorate is necessary, what legal procedure must be taken before such vote; in case a vote is taken what is the necessary majority?"

**Opinion**

This work may be undertaken by the village council without submitting the matter to a vote of the electors.

Minnesota Statutes 1945, Section 412.19, subdivision 20, is broad enough to give the village council power to install or otherwise acquire wells or water works for the needs of the municipality.

In the event that the cost of the improvement will exceed the sum of $100 the village council must advertise for bids for the making of such improvement as provided for in Minnesota Statutes 1945, Section 412.21.

It is assumed that there are sufficient funds on hand available to pay the cost of the improvement. It is a well settled principle of law that a municipality may not enter into a contract unless there are on hand sufficient funds in the village treasury with which to pay the amount incurred under the terms and provisions of such a contract. This rule is subject to modification that there may be considered in addition to the money in the treasury available for the payment of the obligation incurred, the taxes that have actually been levied and are in the process of collection and available for the payment of the cost of such improvement.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Sherburn Village Attorney.
May 9, 1946. 624-D-19

REAL ESTATE

# 171

**Deeds—Reversion—Use for airport purposes is use for park purposes—** L 1945, C 303, § 17, Subd. 4.

### Facts

"Pursuant to our telephone conversation of March 23rd, I am quoting a restriction that appears on the state deed running to the City of Duluth covering the property on Park Point which the SKYHARBOR organization wishes to lease from the City for the purpose of using as a main sea and land plane base and sky park:

" 'Said conveyance shall be made upon the condition that the City of Duluth shall use said land for purposes of public recreation and health and that the facilities provided on said land shall be open upon equal terms to all persons whether residents of the City of Duluth or elsewhere, and that title to said land shall revert to the state and the state shall be entitled to take possession thereof upon breach of the aforesaid conditions.' Deed No. 697, Page 181."

### Question

Whether the City of Duluth may lease the property in question to the SKYHARBOR organization for the above purpose without causing a reversion of the property to the state.

### Opinion

The first question which we must decide is whether the use of the land in question is a use of it for purposes of public recreation and health. It requires no citation of authorities to establish that the use of lands for park purposes is approved by the courts because it is a use for public recreation and health. It is pertinent then to ascertain if the use of land for an airport is a use for park purposes.

This question has not been answered categorically by our Supreme Court, but it has been so answered in the affirmative by the Supreme Courts of other states. The Supreme Court of Kansas in City of Wichita v. Clapp, 125 Kan. 100, 263 Pac. 12, held:

"The devotion of a reasonable portion of a public park to an airport (aviation field), for recreation and other attendant purposes comes within the proper and legitimate uses for which public parks are created."

In Schmoldt v. City of Oklahoma City, 144 Okla. 208, 210, 291 Pac. 119, the court held:

"Under the authorities from our sister states passing upon this question, it seems to be settled by the courts of last resort in the states

that have passed upon this proposition that a city may use a portion of its park as an airport or aviation field."

While the Supreme Court of Minnesota has not passed upon the precise question, its language in cases involving other phases of airport use is persuasive of the conclusion that it reach the same conclusion. The operation of parks is a governmental function as distinguished from a proprietary function. Our Supreme Court held in Erickson v. King, 218 Minn. 98, 15 N. W. (2d) 201, that the operation of an airport by an airports commission is a governmental function. It is our conclusion that the use of the land for airport purposes is a use for park purposes.

We hold that the use of land is for public recreational and health purposes and will not effect a reversion to the state unless there is some other element present in the particular use proposed which will compel that result. The only other question which presents itself to us is whether the leasing of the land for use as an airport at which a charge will be made will effect a reversion.

The city cannot, by lease, grant the use and control of the land to others so as to deprive the public continuously of its enjoyment. See annotation 18 A. L. R., page 1246. Here, as we understand it, the proposal is to lease a part of the land so that the remainder will be available for uses other than as an airport. Under these circumstances, it appears to us that there is not such an exclusion of the public from enjoyment of the land conveyed by the state as will destroy its use upon equal terms by all persons whether residents of the City of Duluth or elsewhere. There is not before us, and we do not pass upon, the question whether a reversion will take place if the city attempts to lease a greater part or all of the land conveyed by the state. In making the lease, there is impressed thereon as a condition thereof the provision found in Laws 1945, Chapter 303, Section 17, Subdivision 4, that "in so doing the public is not deprived of its rightful, equal, and uniform use thereof." This combined with the other circumstances hereinabove discussed is, in our opinion, sufficient to safeguard compliance with the condition that the "land shall be open upon equal terms to all persons whether residents of the City of Duluth or elsewhere."

If the land in question is set apart for airport purposes, the authority to lease it and the conditions of the lease are contained in Subdivision 4, supra, and should be complied with by the city.

We hold that the leasing of the land in question will not effect a reversion to the state provided that it complies with the conditions discussed above in this opinion.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Duluth City Attorney.
April 8, 1946. 59-A-40

# 172

**Lease—Municipal liquor store—Power to provide additional space in municipal liquor store building and rent the same until needed for public purpose.**

**Facts**

"The Village of Richfield, Hennepin County, Minnesota, is contemplating the immediate construction of a commercial building to house its municipal liquor store. It further contemplates building the same of such size that a portion of it may rent to some commercial business until such time as the Village requires the space for municipal purposes.

"There is further in contemplation the construction of a second story which might possibly be so arranged as to furnish office space or put to some other use which the Village could rent out until and unless required for village purposes."

**Question**

"Has the Village of Richfield authority to construct a commercial building and rent out a portion or portions of the main building and also the second floor? It being understood of course, that the building or part thereof is to be used for a municipal purpose."

**Opinion**

The question submitted is not capable of a categorical answer. All that can be done is to state the principles of law which would be recognized under the circumstances. The subject has had consideration from this office in different opinions. See opinion of August 19, 1943, April 10, 1929, June 7, 1946, March 9, 1939, and October 16, 1945, file 469a-12.

The question has had much consideration by the courts. See

Anderson v. Montevideo, 137 Minn. 179

Nerlien v. Brooten, 94 Minn. 361

Penn-O-Tex Oil Co. v. Minneapolis, 207 Minn. 307

The authorities are collected in 63 A. L. R. pages 614, 617, and 133 A. L. R. 1241.

In the Montevideo case our court said:

"The inquiry is one of power. Had the city the right to lease the auditorium as it did? True it would have no right to erect buildings primarily to rent, but if, in erecting a building for its municipal affairs, an auditorium was included in the structure, intended and designed for public gatherings, and subsequently conditions became such that the same was no longer needed for the purposes or use of the municipality, and that by leasing the same a better income would be derived and

the burden of taxation lightened, we see no sound reason why it may not legally do so."

If the council cannot reasonably foresee the need of the proposed office space for the purposes of the village government, it would have no right to erect a building containing such space. Whether the building was constructed for a public or private purpose would be a judicial question to be determined according to the preponderance of evidence. See Burns v. Essling, 156 Minn. 171.

If the real and concealed purpose of the erection of the building containing such additional space is to derive revenue from the rental thereof, it would be beyond the power of the village to so act. The village cannot engage in a private enterprise under the ostensible but untrue claim that the additional space might be needed in the reasonable future for municipal purposes.

The village has the right to build larger than is immediately necessary if the council honestly and in good faith believes that such excess space will be needed for municipal purposes by the village within a reasonable time. But the village has no right under the pretense of exercising the power aforesaid, to build excess space merely for the purpose of deriving revenue therefrom, knowing that to be the real purpose of so overbuilding, and knowing that the expression of the belief that the space will be needed within a reasonable time for municipal purposes is mere subterfuge.

The limitations of the power are stated. Basically the question is one of the exercise of honesty and good faith on the part of the council.

If the village now has a village hall and office space sufficient for the needs of the village, the council should inquire what possible use the village could have in the reasonably near future for the space above the municipal liquor store for municipal purposes. If no such use can be reasonably foreseen, then the larger building should not be built even though it might be a profitable venture for the village. Villages do not exist for the purpose of making money by the employment of public funds in private enterprises. They exist simply to exercise the functions conferred upon them by law.

RALPH A. STONE,
Assistant Attorney General.

Attorney for Village of Richfield.
July 24, 1946. 469-A-12

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## 173

**Lease—Parks—Playgrounds: Lease of park to baseball team on percentage basis with provision that the lessee may later be reimbursed from percentage paid city to cover losses.**

**Facts**

A proposition has been made that a baseball field be rented for certain days, to be determined, at an annual rental of $1.00, plus the actual costs incurred by the park board for setting up additional bleachers, labor and equipment, mowing and watering the field, ticket takers, cashiers, etc.; that the park board is to provide the field with dugouts, bases, bleacher seats, ticket office, etc. It is contemplated that a certain percentage of the net profit shall be set aside and earmarked for the use of the park board; this to be placed directly into the hands and under the supervision of the park board, for the purpose of improving the field, as such improvements can be made.

The further suggestion has been made that, while the fund is so earmarked, the lessee may have the right to take back such necessary monies out of this fund as would be sufficient to reimburse him should he suffer a loss for any particular season.

**Question**

As to the legality of the park board's refunding to the lessee any part of the money which has been placed on deposit to its credit for the purpose of absorbing any loss for any particular season.

**Opinion**

It has several times been held by this office that a city may, within certain limitations, grant individuals the privilege of using a playing field in a park, provided there are no restrictions or limitations contained in the conveyance or deed whereby the property was granted to the city which prohibit the granting of such privileges, and provided that, aside from the specified reasonable times when the field is rented, it will be open to public use, and provided further that the power of supervision and control of the park at all times remains in the public authority.

Further, I can see no objection to the park board's receiving a percentage of profits as a portion of the rental for the premises. However, I do not believe the park board may lawfully enter into an arrangement which would be in the nature of a partnership with private individuals or that it would have authority, once a percentage of the net profit had been placed in its hands, to return any of the funds so received to the lessee to reimburse him, or it, for losses. Perhaps the problem could be solved by providing that at the end of each year the lessee should pay a percentage of his, or its, net profit for that year to the park board as additional rental. This would at least put the matter on a yearly basis.

In any lease which is prepared you would be careful to insert a provision that the lease may be terminated at any time when the property is required for exclusive use by the park board.

WM. C. GREEN,
Assistant Attorney General.

Rochester City Attorney.
February 21, 1946. 59-B-11

# 174

**Lease—Public funds—Village may not use to erect building on real estate owned by village and enter into an agreement to lease or sell to a private firm.**

**Facts**

The Village of Cohasset, Itasca County, Minnesota, owns real estate upon which they desire to build a building for a manufacturer. The manufacturer agrees if they construct the building at a cost of approximately Five Thousand Dollars ($5,000.00), he will enter into a rental agreement with them whereby he will rent the building on a lease rent of Twenty-five Dollars ($25.00) a month. In addition, he agrees to have a weekly pay roll whereby he agrees to have a pay roll of at least One Thousand Dollars ($1,000.00) a week for a period of three (3) years. At the end of three years they agree that they will purchase the building or continue on a rent basis.

**Question**

Does the Village of Cohasset have legal authority to construct such a building and to enter into such an agreement?

**Answer**

Your question is answered in the negative.

The courts are unanimous in holding that public funds may not be used for a private enterprise. It is apparent from the statement of facts which you have submitted that the proposed plan is one which, if carried out, would result in the use of public funds for the establishment and operation of a private manufacturing enterprise. The courts are unanimous in holding that such use of public funds is not permissible.

In Burns v. Essling, 156 Minn. 171, on page 174 the court said:

"The wisdom or expediency of a proposed expenditure of the taxpayers' money for such purposes is to be determined solely by the legislature or by the local authorities to whom legislative powers have been delegated. But public funds can only be expended for public purposes and the courts must determine whether a given expenditure is for such a purpose, and will enjoin it at the suit of a taxpayer if it is not. Castner v. City of Minneapolis, 92 Minn. 84, 99 N. W. 361, 1 Ann. Cas. 934. It is well settled that, if the primary object of an expenditure of municipal funds is to subserve a public purpose, the expenditure is legal, although it may also involve as an incident an expenditure which, standing alone, would not be lawful. It is equally well settled that, if the primary object is to promote some private end, the expenditure is

illegal, although it may incidentally serve some public purpose also." Citing cases.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Grand Rapids Village Attorney.
August 2, 1946. 469-A-15

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# 175

**Lease—Term—May be leased for such time as not needed by the city—Long term lease is not favored—Lease for 66 years might be attacked—Duty of council to secure best deal possible for the city.**

### Facts

The city of Alexandria owns a certain piece of real estate. Situated on this land at the present time is a building erected with funds supplied by the American Legion Post. It is proposed to tear down this building and to erect a new building with Legion funds, these funds to be in part funds on hand in the Legion treasury and in part funds raised by the issuance of bonds secured by a mortgage upon the leasehold interest of the Legion Post hereinafter mentioned.

It is proposed that the city lease the ground to the Legion for the period of 66 years at a rental of $1.00 per year. At the end of the term the property will become the property of the city.

### Question

As to the power of the city to make such a lease.

### Opinion

I assume there is nothing in the city charter requiring an advertisement for bids. It has been held that a city may lease a portion of a public building no longer needed for municipal purposes. In **Anderson v. City of Montevideo**, 137 Minn. 179, the court said:

> "True it would have no right to erect buildings primarily to rent, but if, in erecting a building for its municipal affairs, an auditorium was included in the structure, intended and designed for public gatherings, and subsequently conditions became such that the same was no longer needed for the purposes or use of the municipality, and that by leasing the same a better income would be derived and the burden of taxation lightened, we see no sound reason why it may not legally do so."

We see no reason why the same rule should not apply in the case of real property no longer needed by the city. Cf. Penn-O-Tex Oil Co. v. City of

Minneapolis, 207 Minn. 307. Consequently, if the land in question is no longer needed for municipal purposes, it is my opinion that the council may lease the land.

The question arises as to whether or not the duration of the proposed lease and the amount of the proposed rental is such as to invalidate the lease, were it executed. These are matters to be determined in the first instance by the city council; they are largely within the discretion of the city council and as long as the council acts in good faith and not arbitrarily, their determination will not be disturbed unless manifestly unreasonable. Cf. 4 Dunnell's Municipal Corporations, 6697, 6700.

As you have noted in your opinion to the Mayor, the term of the lease is longer than those which have been considered by the Supreme Court of this state. Municipal leases are not favored by the courts. The apparent reason is that it is impossible for the council to tell in advance for how long a period in the future the property will not be needed by the city. We do not believe it could be said that as a matter of law a lease for 66 years would be invalid, at least upon the basis of the facts that have been submitted. However, it could be said with greater confidence that the lease for 66 years would be valid if it contained a provision for the termination thereof by the city in the event the land in question was needed for municipal purposes.

In determining the amount of annual rent, the council may, in our opinion, take into consideration the following facts:

The city has never put any money into the property. The building which the Legion will erect thereon will be built entirely with Legion funds, and occupied and used for the purposes of the Post. The city will acquire title to the building upon the termination of the lease. The premises will go on the tax list when leased for private use. Any lease which may be made should provide for payment of taxes by the lessee.

In an opinion from the attorney general to the City of Winona, dated September 28, 1939, file 59-A-40, it was said:

> "In fixing the amount of rent, the Council may consider the nature of the organization leasing the property, the purposes for which it is leased, and the extent to which the general public welfare will be advanced by virtue of the occupancy of the property by the organization in question. The fact that the American Legion is not a profit making organization and that it is a patriotic service group may well argue for a lower rental. However, a municipality is not authorized to give away its property or expend money for purposes other than corporate ones. Agnew vs. Brall, 124 Ill. 312, 16 N. E. 230. And it has been held that if a lease of municipal property is for a grossly inadequate sum, relief will be granted to the taxpayer on the grounds of fraud. Perkins vs. Reservoir Park Fishing & Boating Club, 130 Ill. App. 126. It is the duty of the City Council to determine the amount of rent. Their judgment in that respect will not be disturbed if it is appar-

ent that they exercised good judgment in the light of all of the facts and circumstances."

In view of the above considerations, if the council should deem that it was in the best interests of the city, under the circumstances, to execute a lease requiring an annual rental of one dollar, it is our opinion that the nominal rental would not as a matter of law invalidate the lease.

KENT C. van den BERG,
Assistant Attorney General.

Alexandria City Attorney.
November 25, 1946. 59-A-40

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## 176

**Sale—Bids—Not necessary for village to advertise for bids in disposing of unneeded part of lot.**

**Facts**

"About four years ago there was an old red barn, which had previously been used as a livery stable on a side street next to the Root River in Lanesboro, which had become a fire hazard, taxes were delinquent, the local bank held a $1000.00 mortgage on the building and the officers of the bank approached the Village Council and offered to sell the building to the Village for half of the mortgage, or $500.00. The Council acted favorably on this offer and bought the property, the intention being to temporarily store Village property in the building. A couple of years later, when lumber became scarce, the Council received a $300.00 offer for the lumber in the building and the building was sold to a buyer who tore it down and moved the lumber away. The Village leveled off the lot, made a parking lot on the front of it and built a two-car Village garage on the rear of the lot to house the Village street cleaning equipment.

"The lot is so far from the business district that it has never been used for parking purposes, the original intention. The Village does use the two-car garage on the lot all the time, and the Council now wants to dispose of the front three-fourths of the lot by sale to a private party.

" * * * The Village of course intends to retain the rear one-fourth of the lot upon which the two-car street department garage is located. * * * "

**Question**

May the village sell the unneeded portion of the lot without advertising for bids?

**Opinion**

I have found no requirement of the law that imposes upon the village council the duty of advertising for bids before disposing of unneeded village property.

See opinions April 21, 1941, 254 1942 Report; and April 26, 1934 (file 469a-15).

RALPH A. STONE,
Assistant Attorney General.

Fillmore County Attorney.
January 18, 1945. 469-A-15

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# 177

**Sale—Conveyed to city and accepted for park purposes.**

**Facts**

The City of Anoka desires to sell certain property formerly used by it as park property, which property is not being used at the present time for park purposes; the city acquired this property by warranty deed which was recorded in the year 1914, and which deed contains in the granting clause the following words: "for park purposes." The conveyance to the city was accepted by action taken by the city council on December 6, 1911, as follows:

> "Moved by Ald. Green and seconded by Ald. Bean that the proposition of the civic committee of the Philolectian Society in regard to the piece of land at junction of Main Str. west and Park Ave., for park purposes be accepted with thanks and that the City clerk be authorized to sign the contract for deed on part of the City of Anoka. Motion carried."

**Question**

Whether the city can sell this property and what action might be necessary to give authority to sell it.

**Opinion**

Upon the basis of the information submitted it seems clear that the city did not acquire the fee title to this property. The interest of the city in such property is in the nature of a trust holding the same for the benefit of the public for park purposes.

While the instrument conveying the property to the city does not contain a reversionary clause, it seems obvious that the grant to the city and the acceptance thereof by the city was in the nature of a dedication by the grantor to the city for park purposes.

See Dunnell's Digest, Second Edition, Volume 2, Sections 2622-2624.

The general rule of law as to the authority of a municipality to sell

and dispose of property which has been dedicated for a specific public purpose when such property is not longer needed or used for such public purpose is stated in McQuillin Municipal Corporations, Second Edition, Revised Vol. 3, Section 1243 as follows:

> "Municipal corporations hold all property in which the public is interested, such as streets, alleys, public squares, commons, parks and wharves, in trust for the use of the public, and on principle, such trust property can no more be disposed of by the municipality than can any other trust property held by an individual."

The author further states as follows, Section 1732:

> "Furthermore, if land is dedicated for a particular purpose but is subsequently rendered unsuitable for such purpose, it has been held that a municipality cannot sell the property nor can a court of equity execute the trust cy pres by transferring it to the proceeds of the sale."

Section 1733:

> "The general rule undoubtedly is that the legislature itself does not possess the power to authorize property dedicated for a particular purpose to be used for a purpose inconsistent with the purpose for which it was dedicated, unless in the exercise of the power of eminent domain, and that it has no authority, in such a case, to authorize a sale of the property."

The case of Flaten v. City of Moorhead, 51 Minn. 518, involved a question similar to the one herein discussed, the only difference being that in the case just referred to the instrument of conveyance to the city of Moorhead contained the following clause: "Said tract of land hereby conveyed to be forever held and used as a public park." In the matter under consideration the conveyance to the City of Anoka contained the clause "for park purposes." These words, together with the action taken by the council, make it clear that the conveyance was in the nature of a dedication for park purposes and did not vest the fee title to such premises in the City of Anoka.

Having reached the conclusion herein expressed it is not necessary to consider the action to be taken by the city in the event the city desires to sell this property. Should the city acquire the fee title to these premises then in order to effect a sale and transfer of this property by the city it would be necessary for your commission to authorize a sale thereof upon such terms and conditions as the governing body might determine, and the instrument conveying the same should be executed by the mayor and the clerk. See Anoka City Charter with Amendments as Passed in 1929, Chapter I, Section 1, and Chapter VIII, Section 1.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Anoka City Attorney.
May 8, 1946. 59-A-40

# 178

**Sale—Poor farm—Procedure to be followed—Sale of real estate and personal property.**

**Question**

As to the procedure to be followed by the county board in disposing of the county poor farm, and whether or not it can be sold at auction.

**Opinion**

The procedure which the county board must follow in disposing of county real estate is prescribed by Minnesota Statutes 1941, Section 373.01 (3), Mason's Statutes 1927, Section 638, which reads as follows:

> "(3) To sell, lease, and convey any real or personal estate owned by the county, and to give contracts or options to sell, lease or convey any such real or personal estate, and make such order respecting the same as may be deemed conducive to the interests of its inhabitants; provided, no sale, lease or conveyance of any such real estate, nor any contract or option therefor, shall be valid, unless a resolution fixing a time for considering same and setting out the terms and conditions thereof shall be published in the official proceedings of the county commissioners at least 30, and not more than 60, days prior to the time it shall have been voted upon; provided, further, before causing the publication of any such resolution, the commissioners may require a satisfactory bond, to be furnished by the person or persons desiring such sale, a lease, conveyance, contract or option, conditioned to abide by the terms thereof, if granted to him or them; provided, further, if at the time so fixed any more favorable proposition or propositions shall have been filed with the auditor affecting the same property and accompanied by like satisfactory bond, all propositions may be at that time considered, and the one most favorable to the county accepted; provided, further, that in no case shall any such lands be disposed of without there being reserved to the county any and all iron ore and other valuable minerals in and upon the same, with right to explore for, mine, and remove the same, nor shall such minerals and mineral rights be disposed of, either before or after disposition of the surface rights, otherwise than by mining lease, in similar general form to that provided by section 93.20 for mining leases affecting state lands, such lease to be for a term not exceeding 50 years, and to be issued on a royalty basis, royalty to be not less than 25 cents per ton of 2,240 pounds, and to fix a minimum amount of royalty payable during each year, whether mineral is removed or not; provided, further, prospecting options for such mining leases may be granted for periods not exceeding one year, such options to require, among other things, periodical showings to the county board of the results of exploration work done."

Therefore, to sell the county farm this section must be strictly followed. The board should adopt a resolution fixing the time and place when the

matter of the sale of the county farm will be considered, and setting forth the terms and conditions of the sale. This resolution must be published in the minutes of the board at least 30 days, and not more than 60 days, prior to the time the matter of sale is to be considered. It would not be improper for the county board also to publish an additional notice in one or more papers stating the time and place when and where the matter of sale is to be considered, stating the terms of the sale according to the resolution, and that the highest bid will be accepted.

According to the statute the resolution can be in more detail and require written offers accompanied by a satisfactory bond. In effect, the county board is required to sell to the highest bidder whose bid complies with the terms of the resolution.

The statute provides the only method by which the county real estate can be disposed of. You will note the provision for reservation of mineral rights.

As to the personal property in and upon the farm, the county board has the right to sell the same. It could sell this personal property at auction provided the county board retained the right to determine in each instance, and as to each piece of property, who is the best bidder, and that the auctioneer was employed merely as a means of obtaining offers.

RALPH A. STONE,
Assistant Attorney General.

Murray County Attorney.
July 9, 1946. 125-A-36

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## 179

**Sale—Warranty deed—City may convey by.**

**Opinion**

I find nothing in the charter of the City of Stillwater limiting the class of deed by which city property may be conveyed. **McQuillin Municipal Corporations**, 2nd Ed., Vol. 3, § 1249, at page 769, states:

> "A municipality may include in its deeds covenants of general warranty; and a resolution authorizing the mayor to execute a deed authorizes him to insert such covenant."

The same general statement may be found in 3 **Dillon Municipal Corporations**, 5th Ed., p. 1596, § 998. The statement in both texts, however, is based upon the single case of **Abbott v. Galveston**, 97 Tex. 474.

The supreme court of this state has never passed upon the question. If it should follow the statements in **McQuillin** and **Dillon**, there would be no reason why a city might not give a warranty deed if the council should

see fit to undertake the obligations of such a deed. However, it must be kept in mind that, where officers acting in a representative capacity make a warranty which is not authorized by law, the warranty will bind the officers who make it without binding the owners of the estate represented by such officers. I feel it only proper to point out to you this possible danger to the city officers executing a warranty deed, in case the supreme court should hold contrary to the holding in the Texas case.

WM. C. GREEN,
Assistant Attorney General.

Stillwater City Attorney.
April 22, 1946. 59-A-40

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## 180

**Tax-forfeited land—Adjoining owner defined—Reappraisal after granting discussed—Grading—Platting—L 1945 C 93.**

### Facts

"Laws 1945, Chapter 93, permits the county board having tax forfeited land located in urban areas upon application of an adjoining land owner to grade the same where the physical condition of the forfeited lands is such that a reasonable grade thereof is necessary for the protection and preservation of his property."

### Question

The definition of "adjoining owner" as used in this law.

### Opinion

Tax moneys may be expended for public purposes only. Minnesota Constitution, Article IX, Section 1. It must be assumed that in enacting Laws 1945, Chapter 93, the legislature intended to authorize the discharge of some obligations of the state, legal or moral, arising from its ownership of tax-forfeited lands, or to enhance the value of such lands. We find the duty of adjoining landowners each to the other stated in Braun v. Hamack, 206 Minn. 572, 573, 289 N. W. 553.

> "Every landowner has a right to have his land supported in its natural state by the land adjoining, and one who excavates or improves the adjoining land is under a correlative duty so to use his land that his adjacent neighbor's soil will not crumble or cave in of its own weight."

"What is 'adjoining' must touch in some part. Baxter v. York Realty Co., 112 N. Y. S. 455, 456, 128 App. Div. 79, quoting and adopting the definition in Crabb's English Synonyms." 2 Words and Phrases 398. Cf. Booth v. City

of Minneapolis, 163 Minn. 223, 224, 203 N. W. 625. It appears clear, in our opinion, that "adjoining owner" as used in L. 1945, C. 93, must mean owner of property which is contiguous to or touching the tax-forfeited land which it is asked that the state shall grade.

**Question**

(1) "Is a person owning property across the street from a block consisting entirely of tax forfeited lands an adjoining owner?"

**Opinion**

Your first question is answered in the negative.

**Question**

(2) "Is a person owning property separated from the tax forfeited lands by an alley an adjoining owner?"

**Opinion**

Your second question is answered in the negative.

**Question**

(3) "Is a person owning a lot contiguous to a series of tax forfeited lots an adjoining owner within the meaning of this law if the grading work is not performed on the particular lot contiguous to the owner but on the other lots in the series?"

**Opinion**

The authority to grade in c. 93 refers to a particular parcel or parcels of tax-forfeited land whose "physical condition * * * is such that a reasonable grading thereof is necessary for the protection and preservation of the property of any adjoining owner." It follows that property of the adjoining owner must be contiguous to or touching the parcel of tax-forfeited land which it is desired to have graded. Your third question is answered in the negative.

**Further Facts**

"Before the application for grading can be granted under this law the county board must believe that such grading will 'enhance the value of such forfeited lands commensurate with the cost involved'."

**Question**

(4) "Does this provision mean that on re-appraisal the cost of the grading should be added to the original appraised value of the particular

tax-forfeited land if the original value was the correct value before the grading work was commenced?"

**Opinion**

In our opinion the law does not prescribe a mathematical formula of original appraised value plus cost of grading as the reappraised value of the graded parcel of tax-forfeited land. The statutes relating to the sale of tax-forfeited land leave the determination of the appraised value of a parcel of tax-forfeited land to the county board in the exercise of sound discretion. Chapter 93 imposes the additional requirement that the county board must believe that "such grading will enhance the value of such forfeited lands commensurate with the cost involved." This simply means that before ordering grading of a parcel of tax-forfeited land the county board, exercising honest and sound discretion, must believe that the grading will result in an increase in value corresponding to the cost of the grading.

Your fourth question is answered in the negative.

**Question**

(5) "Does it mean that the re-appraised value of the graded lots should not in any event be less than the cost of the grading?"

**Opinion**

While it is difficult to conceive of a case in which, if the county board exercises sound discretion, the reappraised value of a parcel of land would not be more than the cost of grading, we cannot, in our opinion, say as a matter of law that such must always be the case. The question must be determined on the facts in each particular instance. Your fifth question is answered in the negative.

**Question**

(6) "Will you kindly inform me if the county board has any authority to plat tax-forfeited lands for the purpose of sale?"

**Opinion**

The answer to your sixth question is found in the following provision quoted from Minnesota Statutes 1945, Section 282.01, Subdivision 3:

> "In classifying, appraising, and selling such lands, the county board may designate the tracts as assessed and acquired, or may by resolution provide for the subdivision of such tracts into smaller units or for the grouping of several such tracts into one tract when such subdivisions or grouping is deemed advantageous for the purpose of sale, but each such smaller tract or larger tract must be classified and appraised as such before being offered for sale. If any such lands have once been classified, the board of county commissioners, in its discretion, may, by

resolution, authorize the sale of such smaller tract or larger tract without reclassification."

GEO. B. SJOSELIUS,
Deputy Attorney General.

Public Examiner.
October 17, 1946. 525

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RELIEF ASSOCIATIONS

## 181

**Firemen—Applicants—Association not entitled to arbitrarily decide in advance to reject applicants for admission receiving pensions from U. S. or other sources—L 1943, C 170.**

### Facts

"The Fire Department of the City of Austin is under Civil Service. For many years the Firemen have had a Relief Association duly incorporated under the laws of the State of Minnesota and this Relief Association is now functioning.

"The Relief Association through their duly elected officers have recently notified the civil service commission of the Fire Department that they will reject any applicant for admission to the Relief Association who is already receiving a pension from some other source.

"Some of these men who have recently been hired on our local Fire Department are ex-servicemen who are receiving pensions from the Government for various disabilities but nevertheless were able to pass the examination, both mentally and physically, that is conducted by the Fire Commission and have been duly appointed as members of the Fire Department."

### Question

"Does a Relief Association duly organized in a city of the third class, such as Austin, have the inherent power to reject from its membership any duly appointed member of the Fire Department by virtue of the fact that he is already receiving a Government pension on disability?"

### Opinion

In Minn. Stat. 1941, provisions with reference to fire department relief associations appear in chapters 69 and 424. Because of the fact that a number of these statutes have been passed, very similar in provision but referring to different classes of municipalities, the statutory arrangement is confusing unless one checks back to the session laws to determine the origin

of each section. For instance, §§ 69.25-69.53 of Minn. Stat. 1941 refer entirely to cities of the first class, and §§ 424.01-424.29 refer entirely to cities of the second class.

It is my understanding that the firemen's relief association in Austin was established pursuant to the provisions of L. 1943, c. 170, which includes any city in this state having a population of not less than 18,000 inhabitants according to the most recent national census and not more than 20,000 inhabitants. This opinion will, therefore, be given on that basis.

Generally, it should be noted that the act contains very detailed provisions as to the organization and operation of the association; provides that annual reports must be filed with the clerk of the city and the state auditor; provides for payment by the state auditor direct to the treasurer of the relief association of the fire insurance premium taxes paid by fire insurance companies upon premiums received by the various companies upon properties insured within the corporate limits of the city in which the association is located; provides for a tax levy of three-tenths of a mill by the city until the special fund reaches or exceeds $50,000, after which it shall be one-tenth of a mill until it goes below $50,000, when the levy again becomes three-tenths of a mill, this tax money to be paid to the treasurer of the relief association; limits the disposition of funds; provides for disability payments and pensions and for death benefits to widows and children; requires that a board of examiners be established to make thorough investigations of and reports on all applications for membership and pensions, to include a competent physician; provides for examination of the records of the association by the public examiner and makes all payments made by any relief association exempt from garnishment, execution, or other legal process.

Section 2 of the act provides:

"Such relief associations shall be organized, operated and maintained in accordance with their own articles of incorporation and by-laws, by firemen, as herein defined, who are members of said fire department. Each such association shall have power to regulate its own management and its own affairs, and all additional corporate powers which may be necessary or useful; subject, however, to the regulations and restrictions of this Act, and other laws of this state pertaining to corporations, not inconsistent herewith."

The following sections are pertinent on the question of membership:

"Sec. 4. Every fireman as herein defined shall be eligible to apply for membership in the relief association in the city in which he is employed within the time and in the manner hereinafter set forth. Any such fireman desiring to become such member shall, not later than 90 days from the time when he is regularly entered on the payrolls of such fire department, make written application for membership in such relief association on forms supplied by such association, accompanied by one or more physician's certificate as required by the by-laws of said

association. After such application has been filed the board of examiners of the association shall make a thorough investigation thereof and file their report with the secretary of the association. Such application must be acted upon by the association within six months from the date applicant was entered on the payroll of the fire department. Provided, however, that no fireman who is more than 35 years of age when his application is filed can become a member of the relief association, except that such age limitation shall not apply on application for reinstatement in such association.

"Sec. 5. Each such firemen's relief association shall have the right to exclude all applicants for membership who are not physically and mentally sound, so as to prevent unwarranted risks for the association; and additional requirements for the entrance fees and annual dues for membership in the association may from time to time be prescribed in the by-laws of such association."

In the first instance, the answer to your question is in the negative.

These relief associations are not of the same character as ordinary mutual benefit societies, which have the absolute right to determine who shall become members. In several states when laws of this character were first passed they were held to be unconstitutional. While the question has never been raised in Minnesota, such laws have been upheld in a number of states, including New York, upon the ground that these relief associations were in reality public corporations. That they are such is clear from the preceding summary of the provisions of the act under which the association in question was organized. As public corporations, they must implicitly observe not only the letter but the spirit of the law which creates them. The general purpose of this and similar acts was to provide funds for relief and pensions to be paid, not to any small, self-selected group, but to men rendering public service as firemen. The only purpose of § 5, **supra**, was, as the statute says, "to prevent unwarranted risks for the association."

While it is true that § 4 of the act, instead of stating, as does Minn. Stat. 1941, § 69.22, with reference to relief associations of cities of over 50,000 inhabitants, that all employees in the service of the fire department shall be entitled to membership in a relief association that receives municipal or state aid, simply provides that every fireman shall be entitled to apply for membership in a relief association, the remaining provisions of the act clearly contemplate that each application shall be thoroughly investigated by the board of examiners provided for by the act and that there must be action by the association upon the application of each individual fireman. It would be absurd to contend that an association could make a blanket rule in advance predetermining action on every case falling within a general class. Furthermore, I am clearly of the opinion that the action to be taken in each case must be reasonable and not arbitrary, because of the public character of the association and the purposes of the act.

To say that simply because a man has been rated as disabled by the Veterans Administration under the acts relating to veterans makes him

disqualified from membership in a firemen's relief association is, to my mind, against public policy. It is a matter of common knowledge that many disabilities of veterans entitling them to some form of pension do not at all disqualify those veterans from carrying on many of the ordinary occupations of life. Disabilities are rated on an average of all occupations.

In my opinion, the relief association must pass upon each application individually, and, if an applicant is to be rejected, it must be on the basis that his physical or mental condition is such that his election to membership will present an unwarranted risk for the association. Thus only can the obvious purpose of the law and public policy be served. If an association could pass such a by-law or adopt such a rule as is here suggested, there is no reason why a small group could not pass such by-laws and rules as would permit a small body of men to enjoy all the benefits of taxes collected for the benefit of all those rendering the public service which justifies the imposition of the tax.

WM. C. GREEN,
Assistant Attorney General.

Austin City Attorney.
July 25, 1946. 688-M

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## 182

**Firemen—Membership—(1) Deductions should be made from probationer's salary—(2) Deductions should be made from the beginning of employment—(3) Fireman on probation may apply for membership**—L 1943, C 170.

**Facts**

"The above named association has amended its Articles of Incorporation so as to obtain the benefits of Chapter 170 of the Laws of 1943.

"The rule in Austin has been for many years that a fireman after he is employed is on probation for a period of six months during which time he can be let go at any time at the discretion of the Chief of the Fire Department. At the termination of the six month probation period the Chief indicates whether or not the fireman shall become 'regular' on the force.

"The city clerk takes the position that the fireman during his six month period of probation is not 'regularly entered on the payroll,' and consequently refuses to make payroll deductions for the relief fund from the wages paid to the said fireman during that period of six months."

**Question 1**

"In the light of Sections 3 and 4 of Chapter 170, Minnesota Laws for 1943, is a fireman 'regularly entered on the payroll' during his six

month probation period so as to require payroll deductions by the City Clerk?"

**Opinion**

Under Section 3 of the law cited, a fireman is one who is (1) regularly entered on the payroll, (2) serving on active duty (or having charge of one or more of the companies), and (3) engaged in the business of fire fighting. It does not include substitutes and persons employed irregularly from time to time.

A fireman on probation is regularly on the payroll. I think there is a distinction between "being regularly on the payroll" and "being a regular fireman." The term "regular fireman" is used to differentiate between a fireman who is past the probationary period and one who is not. The term "regularly on the payroll" refers to whether the fireman's name is on the payroll list so that the city clerk issues to him a warrant at the end of each month as a matter of course. If at the end of the month he would in the usual course of events receive a check (without any further proceedings or action on his part) for his monthly salary, he is regularly on the payroll and deductions should be made from his salary if his application for membership in the Relief Association has been granted. If the probationer is required to file a claim for his salary at the end of each month, I would say that he was not regularly on the payroll.

**Question 2**

"If payroll deductions should be made during the period of probation shall they be made regularly commencing with the employment of the fireman, even before he has made application for membership in the Association, and shall they be made from his wages even though he may never apply for membership in the Association?"

**Opinion**

Whether deductions should be made depends on whether the fireman's name, be he a probationer or a regular fireman, is regularly on the payroll and whether he is a member of the Relief Association.

**Question 3**

"May a fireman while on probation, apply for membership in the Association and is the Association required to act upon his application while he is still on probation?"

**Opinion**

I think that a fireman on probation could apply for membership in the Firemen's Relief Association within 90 days from the time when he is regularly entered on the payrolls, and that the Association should act upon his application within six months from the date he was entered on the payroll.

It would be inconsistent to hold that deductions could be made from a fireman's salary before he became a member of the Relief Association. But just as soon as he does become a member of the Relief Association, deductions should begin, if he is regularly on the payroll. A probationer, desiring the benefits of the Relief Association, should promptly file his application for membership therein and it should be promptly acted upon by the association so that deductions can begin.

RALPH A. STONE,
Assistant Attorney General.

Attorney for Austin's Firemen's Relief Association.
October 8, 1945. 688-M

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## 183

**Firemen — Pension — Eligibility of members for pension in certain cities — Sick leave**—MS1945, § 69.07, et seq.

### Facts

An employee of the Virginia Fire Department entered the department and started active duty therein on September 1, 1926. At that time he was 40 years of age. On January 3, 1929, he was granted a leave of absence because of illness and from then on until January 1, 1930, spent most of his time in hospitals. During this period he did not receive compensation from the city but paid his regular contributions to the association. On January 1 of 1930 the employee returned to work for the department.

### Question

Whether or not, upon the facts so recited, the period from January 3, 1929, to January 1, 1930, should be included in calculating the employee's eligibility for pension rights.

### Opinion

In your letter you refer to the Police and Fire Commission of the City of Virginia and in order that there may be no confusion in regard to our opinion we want to have it strictly understood that our opinion is limited to the pension rights of the employee in the Virginia Fire Department and as a member of the Virginia Fire Department Relief Association.

The Virginia Police Relief Association and the Virginia Fire Department Relief Association are two separate and distinct corporations created and operating under separate and distinct statutes. Both of these associations likewise have adopted separate and distinct constitutions and by-laws.

Minnesota Statutes 1945, Section 69.07, in so far as the same is pertinent to your inquiry, provides as follows:

> " * * * a basic pension of $75.00 per month to each of its members who has heretofore retired or may hereafter retire, who has reached or shall hereafter reach the age of 50 years, and who has done or hereafter **shall do active duty for 20 years** or more as a member of a volunteer, paid or partially paid and partially volunteer, fire department in the municipality where the association exists, * * * ."

Language containing the same import as the quoted portion of the statute appears in Article IX, Section 1, of the by-laws of the Virginia Fire Department Relief Association and is as follows:

> "Any member of this Association who has served or is serving in the Virginia Fire Department shall be placed on the service pension roll, upon his making application for the same, when he has complied with the following conditions:
>
> "He shall have **done active duty for a period of twenty (20) years** or more, and shall have arrived at the age of fifty (50) years or more, and shall have been or shall be entitled to be retired from the service in the Fire Department; * * * ."

The question arises as to whether or not the employee referred to in your letter was in "active duty" from January 3, 1929, to January 1, 1930, when, as you state, he spent most of his time in hospitals and during such time did not receive any compensation from the city. Black's Law Dictionary, 3rd Edition, defines "active," that is in action; that demands action; the opposite of passive, and in Funk & Wagnalls New Standard Dictionary "active" is defined as abounding in, exhibiting, or expressing action, as opposed to lacking in action, or sluggish.

We do not believe that the employee mentioned was engaged in active duty from January 3, 1929, to January 1, 1930, so that this period of time should be included in calculating the employee's eligibility for pension rights. We recognize that the matter of determination of a member's pension rights is a matter for determination by the Board of Trustees of the Virginia Fire Department Relief Association and such determination must be made upon all of the existing facts and circumstances. However, it seems clear to us upon the facts submitted and the obvious meaning of the words "active duty" that a member who, as stated in your letter, spent most of the time from January 3, 1929, to January 1, 1930, in hospitals and did not receive compensation from the city should not be entitled to have such period of time included in determining his eligibility for pension rights.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Virginia City Attorney.
July 29, 1946. 688-M

# 184

**Firemen — Pension — Payment in larger amount permitted only so long as special fund exceeds $65,000—MS1945, §§ 69.07, 69.08.**

**Facts**

The city of Virginia is a third class city. Its assessed valuation is in excess of $12,000,000. It has an organized fire department and a Firemen's Relief Association. The Relief Association is authorized to pay pensions.

I gather from your letter of the 4th that at one time the special fund of the Firemen's Relief Association exceeded $65,000; that when it did exceed $65,000, the by-laws of the association provided for payment of pensions of $75 per month and in excess of that amount; that accordingly the Relief Association has been paying pensions in excess of $75 per month. At the present time the Relief Association fund has been reduced to approximately $59,000.

**Question**

May the Relief Association continue to pay the $75 per month, or any sum above that up to the maximum of $96 per month to qualified pensioners?

**Opinion**

The applicable statute is Minnesota Statutes 1945, Sections 69.07, 69.08 (Laws 1935, Chapter 153, as amended by Laws 1939, Chapter 434, Mason's Supplement 1940, Sections 3728-1-2). That statute provides that in such a city as yours the Fire Department Relief Association when its special fund shall have reached the sum of $65,000, may pay a basic pension of $75 a month, and certain increases above $75 per month not exceeding $96 per month.

The question for consideration is what is meant by these words "when its special fund * * * shall have reached the sum of $65,000"?

I construe these words to mean that when the fund has reached the sum of $65,000, the city may then begin to pay the increased pensions, and that when the fund falls below that figure it may no longer pay the increased pensions.

This matter should be taken care of by by-law adopted by the association so as to provide for the automatic reduction of the pension to the legal level when the fund falls below $65,000.

RALPH A. STONE,
Assistant Attorney General.

Virginia City Attorney.
October 5, 1945. 688-M

# 185

**Firemen — Pension — Payment of in a lump sum — Fixing maximum for — Amendment of by-laws—L 1945, C 560.**

**Facts**

The request for an opinion comes from the Grand Rapids Fire Department Relief Association. The by-laws of that association provide for the payment of a monthly pension to a member who complies with the statute and the conditions requisite to retirement upon a pension. These conditions are set up in the statute and in the by-laws. It is the present intention to amend the by-laws so as to provide for the payment of a lump sum pension, pursuant to the amendment adopted in 1945. See Laws 1945, Chapter 560.

**Question 1**

"If the by-laws are amended to provide for a lump sum payment could the amendment to the by-laws provide that there be deducted from such lump sum payment the amount any individual has heretofore received by reason of monthly pension payments?"

**Opinion**

The answer is in the negative. By completing the requirements for retirement on pension, the pensioner has completed his part of the contract with the association, which contractual relationship exists between the association and the pensioner. The pensioner has earned and is entitled to be paid his pension in accordance with the by-laws in existence during his term of service. That contract cannot be altered by a subsequent amendment of the by-laws without the consent of the pensioner.

**Question 2**

"Would it be possible to include in the amendment to the by-laws a provision limiting to a maximum number of years of service for which a pension would be paid?"

**Opinion**

The amendatory language of the statute follows:

"Any such fire department relief association where the majority of its members are volunteer firemen may provide in its certificate of incorporation or by-laws for a service pension in an amount not exceeding $100.00 per year of service to be paid in a lump sum where the retiring member qualifies for a service pension under the provisions hereinbefore set forth." Laws 1945, Chapter 560.

There must be provided some formula for determining the amount of the lump sum payment in each case. The amount to be paid cannot be left

to the discretion of the trustees. The board of trustees could not pay more to one man than to another under like conditions. Therefore I construe the statute that the by-laws may provide for the payment of a lump sum pension to be determined and arrived at by multiplying a stated amount for each year of service by the number of years of such service.

If the members wish to fix a maximum for the lump sum payment, I think it would be proper to add a provision to the effect that the lump sum paid shall never in any case exceed a certain amount of money.

For example, the by-laws could provide that a retiring member be paid in a lump sum a pension of $20.00 for each year of service, provided, however, that the total amount to be paid should never in any case exceed the sum of $500.00. The figures used are by way of illustration only.

RALPH A. STONE,
Assistant Attorney General.

Grand Rapids Village Attorney.
September 13, 1945. 198-B-6-a

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## 186

**Policemen—Fund—General fund may be expended as provided for in articles of association, by-laws, or by action of members at appropriate meetings**—L 1943, C 521, §§ 2 and 10.

### Facts

The Police Department of South St. Paul maintains a policemen's relief association pursuant to Laws 1943, Chapter 521. Attention is called to the provisions of Section 10 of that chapter, providing for an association special fund and its general fund. As to the general fund, the section in question provides:

> "All money received from other sources shall be deposited in the general fund, and may be expended for any purpose deemed proper by such association."

### Question

Whether it would be permissible to appropriate moneys from the general fund and distribute the same among the members of the association as a clothing allowance or other personal benefits of the members.

### Opinion

Section 2 of Chapter 521 provides:

> "Each such relief association shall be organized, operated, and maintained in accordance with its own articles of incorporation and by-

laws, by policemen, as hereinafter defined, who are members of said police department. Each association shall have the power to regulate its own management and its own affairs, and all additional corporate powers which may be necessary or useful; subject, however, to the regulations and restrictions of this act, and other laws of this state pertaining to corporations, not inconsistent herewith."

Section 9 of the act provides, among other things, that each relief association shall have full and permanent charge of, and the responsibility for the proper management and control of, all funds that may come into its possession.

While there are definite restrictions in the act upon the expenditure of moneys in the special fund, there are, as you state, no restrictions upon the expenditure of funds properly deposited in the general fund, except that they may be expended for any purpose deemed proper by the association.

Similar provisions have been present in firemen's relief association acts for a number of years, but there appear to have been no opinions given as to any limitations upon the use of the general fund.

I am of the opinion that moneys in the general fund can be expended for any purposes provided for in the articles of association or by-laws or for any purpose that may be authorized by the association at an appropriate meeting of the membership. The legislature saw fit to restrict the use of the special fund, which is derived from taxation and compulsory deductions from salary, and its failure to make any restrictions with reference to the use of the general fund indicates that the expenditure of that fund is entirely within the discretion of the association. This does not mean that the officers can make such expenditures as they may see fit. The disposition of the fund should be a matter of action of the membership and evidenced as above indicated.

WM. C. GREEN,
Assistant Attorney General.

South St. Paul City Attorney.
October 16, 1945. 785-M

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## 187

**Policemen—Membership—Refunds—Organized under General Statutes 1927, Ch. 58, and reincorporated under L. 1931, Ch. 48, M.M.S. 1940, Secs. 1264-6 to 1264-13, inclusive, not authorized to refund members voluntary payments made upon termination of membership.**

**Facts**

"The Police Department of the Village of Hibbing have incorporated a Policemen's Relief Association pursuant to Chapter 48, Laws of 1931 and acts amendatory thereto. For the purposes of creating a Pension

Fund, each member of the Policemen's Relief Association contributes 2% of his monthly pay. The Village Council appropriates from the police relief levy the sum of $7,000 per annum to the Police Pension Fund. In the event of separation from the Police Force, there is no provision in the Act creating a Policemen's Relief Association for refunding the amount of contributions made by the members which results from the 2% payroll deductions."

**Question**

"In view of the foregoing, is a member of the Policemen's Relief Association who severs his employment before becoming eligible for a pension entitled to a refund to the extent of contributions made by him to the Pension Fund?"

"I assume your answer to the foregoing question will also answer the question whether a returning serviceman who contributes to the Pension Fund, a lump sum equal to the aggregate payments for the months that he failed to contribute because of military service, becomes entitled to a refund of such payment in the event he permanently separates from the Police Department."

**Opinion**

Before answering your questions it is deemed necessary, in view of the conflict that appears in letters heretofore written for opinions to this office and answers thereto by this office concerning the rights of the Policemen's Relief Association of your village, and the particular laws under which such association was incorporated and has functioned, to determine the laws that are applicable.

It now appears that your association was originally incorporated under General Statutes 1923, Chapter 58, and that subsequent thereto your association amended its articles of incorporation and thereupon adopted Laws 1931, Chapter 48. This last mentioned law was amended by Laws 1933, Chapter 122, and by Laws 1939, Chapter 304. This law, as amended, constitutes sections 1264-6 to 1264-13, Mason's Minnesota Statutes, 1940 Supplement. The last mentioned statute is applicable and governs your association. You have submitted the Articles of Incorporation and the By-Laws of your association.

In some of the correspondence transpiring between your office and this office, reference has been made to M. M. S. 1940 Supplement, §§ 1264-13½ to 1264-13½j as being applicable to your association. In order that this matter may be made clear you are now advised that the last mentioned statute does not apply to your association. This statute, § 1264-13½ is applicable to any village having a population in excess of 5,000 and a valuation in excess of $8,000,000, exclusive of monies and credits, and having a Fire Department Relief Association organized under the laws of this state and authorized to pay pensions under Mason's Minnesota Statutes of 1927,

Sections **1919** and **1920** and sections **3723-3728**, inclusive, or any amendments thereof. Your association having been reorganized under Laws 1931, Chapter 48, as amended, does not come within the sections above mentioned and underscored in section 1264-13½, supra. That section, 1264-13½ and following sections to 1264-13½j constitute Laws 1935, Chapter 192.

Returning now to the first question that you have asked, I find no provision in the statute nor in your by-laws which would authorize your association to refund to a member, who has severed his membership, the contributions made by such member to the pension fund.

An examination of the by-laws of your association shows that Article VI, provides for two funds, a general and a special fund. Section 2, which pertains to the special fund, provides as follows:

> "This fund shall be expended only for the purpose of paying pensions and benefits under and pursuant to the laws of the State of Minnesota, the Articles of Incorporation of this Association and the By-Laws thereof, and also the expenses of the Association incident thereto. Upon the dissolution of this Association all moneys in the special fund shall be turned over to the Village of Hibbing to be used only in the manner provided by law."

The proviso, and also the expenses of the association incident thereto, could not be construed so as to permit a refundment of the contributions made by one while a member of the association.

Section 3 of said Article VI relates to the general fund and provides in part as follows:

> "This fund may be expended in paying the expenses of the Association and for all other purposes other than the payment of relief, service and disability pensions as provided by law and the expenses of the Association incident thereto."

This quoted portion, I believe, is broad enough so as to permit refundment of benefits paid by one while a member of the association who thereafter severs his membership, if it were not for the provisions contained in Article XI, Section 4. This section provides in part as follows:

> "Any member * * * who severs his connection with the Police Department of the Village of Hibbing for any reason, shall hereby forfeit his membership in this Association."

It seems to me that when forfeiture occurs by reason of the quoted portion from Section 4 or for other reasons as therein provided, it is not contemplated by this section that such member is entitled to a refundment of the contributions made during his membership.

For the reasons heretofore stated your first question is answered in the negative.

Answering your second question, I am unable to find any provision which would place a returning serviceman in any different position than

other members, and for that season your second question is likewise answered in the negative.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Hibbing Village Attorney.
June 11, 1946. 785-M

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TOWNS

## 188

**Dissolution—Disposition of town property**—MS1941, §§ 365.10, Sd. 8, 365.45.

**Facts**

In a certain town within Lake county, at its annual March meeting, the electors thereof voted to dissolve such town and a certified copy of the resolution of dissolution has been presented to the county board as provided by Minnesota Statutes 1941, Section 365.45, but the county board has not adopted the resolution dissolving such town. The town officers are still functioning, apparently to wind up the undisposed of town affairs, and the town is the owner in fee of certain lands, the title thereto being in the town in fee simple; this particular tract of land is wild and unimproved and was established as a public park at an annual town meeting of the electors.

**Question**

"(a) By their vote dissolving said Town, did the electors authorize the abandonment of said Park?"

**Opinion**

I do not believe that the electors by voting to dissolve the town thereby abandoned the use of the park for public purposes. I think that the title to these premises is in the town, and upon dissolution the title thereto passes to the state and not to the county. The town is a creation of the state and not the county, and when the town ceases to exist as an agency the title to its property thereupon vests in the principal or in the state. 43 C. J. 175; Meriwether v. Garrett, 102 U. S. 472, 501, 26 L. Ed. 197.

**Question**

"(b) Can the Town officers now sell said Park land?"

**Opinion**

This question is answered in the negative. The town officers do not have authority to sell and dispose of real or personal property without

first being authorized to do so by the electors. Minnesota Statutes 1941, Section 365.10, subdivision 8.

**Question**

"(c) Will the County Board be able to sell same under Sections 373.01-3 and 375.18-12, after the formal dissolution of the Town, and when the Town becomes a part of unorganized territory in the County?"

**Opinion**

Our answer to your first question disposes of this question. The county board does not become vested with the title to this property upon the dissolution of the town and therefore the county may not sell the same.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Lake County Attorney.
June 10, 1946. 441-B

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## 189

**Property—Disposition—Dissolution**—MS1941, §§ 365.45 to 365.49.

**Facts**

The electors of a certain town in Lake county, at the annual March meeting, voted to dissolve such town pursuant to Minnesota Statutes 1941, Section 365.45, and a certified copy of the resolution of dissolution has been presented to the county board but the county board has not adopted a resolution dissolving such town. The town officers of such town are still functioning, apparently for the purpose of winding up the undisposed of town affairs, and the town is the owner in fee of certain land described, which tract of land is wild and unimproved but the same was established as a public park at an annual meeting of the town electors; at the annual town meeting held in March of this year the electors authorized the town officers to sell certain land which, as recited, was designated by the electors as a public park but has never been used for such purpose.

**Question**

"(a) Did said vote at the Town Meeting constitute an abandonment of said Park?"

**Opinion**

It is apparent from the facts stated that the particular tract of land under consideration was never used for a public park. This land apparently

still remains in a wild state of nature; the town owns the fee title to this land and it is not held by the town in trust for park or other public purposes.

On the basis of these facts I believe that the action of the electors in authorizing a sale of this property withdrew from the public the use of the property for park purposes. There being no need for the use of this land for such purposes it was entirely within the power of the electors to authorize its sale.

In McQuillin Municipal Corporations, Second Edition, Revised Vol. 3, page 1026, Section 1242, it is stated:

> "All property held by the city in fee simple, without limitation or restriction as to its alienation, may be disposed of by the city at any time before it is dedicated to a public use. In other words, the city has the right to sell or dispose of property, real or personal, to which it has the absolute title and which is not affected by a public trust, in substantially the same manner as an individual unless restrained by statute or charter; and this power is an incidental power inherent in all corporations, public or private. Thus, land held by the city in full use and ownership—e. g., commons acquired by confirmation under Act of Congress—may be sold when no longer needed for public use. So land bought for a public purpose, if not actually so used, cannot be said to be affected by a public trust, and hence may be sold."

**Question**

"(b) Can the Town officers now sell said Park land?"

Section 365.45 provides in part as follows:

**Opinion**

> "Upon the adoption of the resolution by the county board such town shall be dissolved and no longer entitled to exercise any of the powers or functions of an organized town."

From your letter it appears that the county board has not as yet adopted a resolution dissolving the town, and consequently, until the county board has so acted I believe that the town officers may still function as such. The electors having granted authority to sell and dispose of the tract of land involved, I believe that the town officers may sell the same. Of course, the town officers may not give away township property. The town officers should obtain the best price obtainable for this land.

**Question**

"(c) Will the County Board be able to sell same under Sections 373.01-3 and 375.18-12, after the formal dissolution of the Town, and when the Town becomes a part of unorganized territory in the County?"

**Opinion**

There are seveal statutes which relate to the dissolution of towns. Minnesota Statutes 1941, Sections 368.44 to 368.46, being Laws 1925, Chapter 183, relate to the dissolution of a town, but this law contains no provision relative to the disposition of real estate owned by such town.

Sections 368.47 to 368.49 constitute Laws 1925, Chapter 40, as amended by Laws 1933, Chapter 377, Laws 1935, Chapter 342, and Laws 1937, Chapter 419, which acts provide that the county upon the dissolution of a town shall acquire any telephone company or other business that was conducted by such town. There is no specific provision in this law which relates to the disposition of real estate owned by the town.

The general rule of law is that where there is no statutory provision relative to the disposition of town property upon dissolution, the title thereto vests in the state. See 43 C. J. 175; Meriwether v. Garrett, 102 U. S. 472, 501, 26 L. Ed. 197.

However, the action to dissolve the town involved in your inquiry was taken pursuant to Section 365.45, supra. This section is a part of Laws 1931, Chapter 96, as amended by Laws 1933, Chapter 235. Section 365.49 provides:

> "Any property, real or personal, of such town which is needed for county purposes shall become the property of the county but the reasonable value thereof, as determined by the county board, shall be credited to such town and used for the purpose of paying off outstanding bonds, warrants, or judgments. Any other property of such town shall become the property of the county without any allowance being made therefor. Any surplus funds of the town, after all obligations have been paid, shall be credited to the general fund of the county."

From the quoted section it seems clear that any real or personal property of such town which is needed for county purposes shall become the property of such county, but the reasonable value thereof to be determined by the county board shall be credited to such town and used for the purpose of paying outstanding bonds, warrants, or judgments. No doubt if the county board passed a resolution reciting that any real or personal property of the town was needed for county purposes, then the county would become possessed of the title thereto under the sections last referred to. This section further provides that "Any other property of such town shall become the property of the county without any allowance being made therefor." It seems clear that any other town property not otherwise disposed of would pass to the county under the quoted portion of the last mentioned section.

Section 373.01, subdivision 3, empowers the county to sell, lease or convey any real or personal estate owned by the county, and it is my opinion that if the town officers do not sell and dispose of this property before the county board adopts a resolution of dissolution, then the title thereto would pass to the county under Section 365.49 and thereupon the county would be

authorized to sell and dispose of the same pursuant to Sections 373.01 and 375.18.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Lake County Attorney.
June 17, 1946. 441-B

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# SOCIAL WELFARE

## CHILDREN

## 190

**Aid—Father—Parental care includes care other than financial support—** MS1941, § 256.12, Subd. 14.

**Facts**

"Pennington County now has an able-bodied man whose wife recently passed away and left him with six small children applying for this aid. While the wife was alive there was no need for this assistance. She supplied all of the care for the children in the way of cooking, mending, etc., while the husband supplied the necessary support. Now that the wife has passed away, his wages which are normal wages are insufficient to provide for the additional cost of a housekeeper. * * * "

**Question**

Whether the father, assuming all other eligibility factors are met, qualifies for A. D. C.

**Opinion**

In order to qualify for A. D. C. the child must have been deprived of "support or care" and must satisfy other conditions not pertinent to your inquiry. Minnesota Statutes 1941, Section 256.12, Subdivision 14. In my opinion "care," as used by this statute, includes parental care as distinguished from financial support. Consequently, if a child is deprived of that care by reason of the death of the mother, and if the other eligibility requirements are satisfied, a grant of A. D. C. may properly be allowed. Whether a child is so deprived is a question of fact to be determined by the proper administrative authorities.

KENT C. van den BERG,
Assistant Attorney General.

Pennington County Attorney.
March 1, 1946. 840-A-6

# 191

**Illegitimacy proceedings—May be instituted after death of illegitimate child or where child is stillborn**—MS1945, §§ 257.18, 257.21, 257.23, 257.24.

**Question**

Can illegitimacy proceedings be instituted where the child is stillborn?

**Opinion**

It appears from the facts stated that the expenses involved in connecnection with the birth of the child had been paid by relatives of the mother except an item of $10 incurred by the county welfare board. Whether the $10 item incurred by the county welfare board is an item chargeable against the putative father of the child does not appear from your letter. However, even though it were a proper item of charge the interest of the county or state would apparently be limited to the $10 expense item incurred by the county welfare board.

Minnesota Statutes 1945, Section 257.18, provides in part that "If a woman is delivered of an illegitimate child" the county board of the county where she resides, or a member thereof, or the division of social welfare, or certain other persons may apply by complaint to a justice of the peace to inquire into the facts and circumstances of the case. Such a complaint shall be filed and further proceedings had either in the county where the mother resides or in the county of the alleged father, or in any county where the child may be found, if it is likely to become a public charge therein. The next section relates to the complaint being made by the mother and in part states:

> "On complaint being made to a justice of the peace or a municipal court by any woman who is delivered of an illegitimate child, or pregnant with a child which, if born alive, might be illegitimate."

Neither of these sections specifically refer to an illegitimate child born alive or stillborn. The purpose of these statutes is to charge the putative father with the support of such child, as well as certain other expenses incurred in connection therewith when such alleged father has been adjudged to be the father of such illegitimate child. Section 257.21 provides for furnishing a bond by the person alleged to be the father of such illegitimate child.

Section 257.24 makes provision whereby the mother can recover in a civil action against the adjudged father of the child certain expenses incurred by her, together with maintenance for not more than eight weeks next prior and not more than eight weeks thereafter, and for the burial of the child. However, the statute last mentioned provides that such civil action may be maintained by the mother in the event of judgment of paternity as provided in Section 257.23. The action brought by the mother is a civil action. This is likewise true of the proceedings instituted to have

paternity determined, although such proceedings are somewhat quasi criminal in nature.

We have found no decision which bears specifically upon the question which you have submitted. However, the general rule which follows the decision of courts in states having statutes similar to our own is to the effect that where the proceedings have been instituted and are pending, the death of the child does not abate such proceedings. See 30 L. R. A. (New Series), 1166. In Hanisky v. Kennedy (Neb.), 56 N. W. 208, the court held that the death of the child did not abate the proceedings instituted to prosecute the father of a bastard child under the statutes of Nebraska. In that case the court said:

> "The complainant was, if successful, entitled to recover the costs expended by her, and the reasonable costs of maintaining the child during its life. But we think this statute should be liberally construed, and in such a case as this the term 'maintenance' is broad enough to include the necessary expense incident to the birth of the child, such as the employment of nurse, midwife, and physician, and a decent burial of the infant."

By analogy it would seem to us that under our statutes the death of the child or a child if stillborn, would not preclude the institution of proceedings under our statutes to have the paternity of such child established. When such paternity has been established, then the mother would be entitled to bring a civil action to recover expenses and other items, including the cost of the burial of the child, as provided in Section 257.24, supra.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Anoka County Attorney.
November 5, 1946. 840-C-2

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COUNTY BOARD

## 192

**Executive Secretary—Salary to be fixed by county welfare board in accordance with compensation plan adopted by director of social welfare—** MS1941, §§ 393.04, 393.07, Subd. 5.

### Question

Whether there is any limitation in the amount of salary which the county board can fix for the executive secretary of the welfare board.

### Opinion

Minnesota Statutes 1941, Section 393.04 provides:

> "The 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 the executive secretary shall be made in accordance with rules and regulations to be adopted by the director of social welfare** * * * . His salary shall be fixed by the county welfare board, * * * ."

Section 393.07, Subdivision 5, provides:

"The director of social welfare shall have authority to require such methods of administration as are **necessary for compliance with requirements of the federal social security act, as amended, and for the proper and efficient operation of all welfare programs.** This authority to require methods of administration includes methods relating to the establishment and maintenance of personnel standards on a merit basis as concerns all employees of county welfare boards * * * . The director of social welfare shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods."

The Federal Social Security Act, U.S.C.A. Title 42, § 302, relating to state old age assistance plans, provides that:

"A State plan for old-age assistance must * * * (5) **provide such** methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Board shall exercise no authority with respect to the selection, tenure of office, and compensation of any **individual** employed in accordance with such methods) as are found by the Board to be necessary for the proper and efficient operation of the plan; * * * ." (Boldface type supplied.)

Sub-chapter III of the Social Security Act, Section 503, relative to grants to states for unemployment compensation administration, contains substantially the same language as Section 302.

Sections 602 and 703, respectively dealing with state plans for aid to dependent children, and for maternal and child health services, contain the same language.

The Standards for a merit system of personnel administration in state employment security and state public assistance agencies embodying the rules and regulations adopted by the federal social security board, contain among other regulations a plan of compensation for all classes of positions in the state agency. Under this federal regulation such plan will include salary schedules for the various classes in which the salary of a class is adjusted to the responsibility and difficulty of the work. The plan provides for a salary range for each class to consist of minimum, intervening and maximum rates of pay, to provide for salary adjustments within the range. The plan will further provide that consideration will be given to prevailing rates for comparable positions in other state departments; for salary increases based upon quality and length of service, and that salary laws and

regulations uniformly applicable to departments of state government will be given consideration in the formulation of the compensation plan.

The Attorney General has previously approved rules and regulations adopted by the director of social welfare pursuant to Laws 1945, Chapter 452, which rules have been filed with the Secretary of State and include a compensation plan and have now the force and effect of law.

While I believe the director of social welfare has no authority to determine what compensation any one individual person may be paid under the compensation plan and that the county welfare board may fix the salary of the individual, I believe that the pay of such individual must be confined within the limits of the compensation plan heretofore filed and approved. In my opinion there is sufficient authority in Section 393.07, Subdivision 5, for the director of social welfare to adopt such a compensation plan in compliance with the requirements of the federal social security act and, with respect to your first question, the answer is that the salary of the executive secretary may be fixed by the county welfare board, but must be within the limitations of the salary range for his classification, as established by the merit plan and the compensation plan heretofore adopted by the director as required by the federal act and rules and regulations pursuant thereto.

As to the authority of the county welfare board to pay the executive secretary for accounting work necessary to be performed by him in addition to his compensation for the duties performed as executive secretary, my answer must be in the negative.

An examination of the specifications for the position of executive secretary I, II and III, adopted by the director of social security, reveals that under the examples of work prescribed for the position, all three classifications provide for the preparation of the annual budget requests for presentation to the county welfare boards, the preparation of statistical and financial reports for interested county, state and federal authorities, etc., and executive secretary IV directs the preparation of financial statements and assists the county welfare board in interpreting financial needs of the board of county commissioners, analyzes budget statements and makes regular and periodical reports and prepares an annual report of the expenditures and activities of the county welfare board.

It would seem to me, therefore, that the accounting work necessary to the proper running of the welfare agency is incident to the duties to be performed by the executive secretary in all four classifications, and I do not believe that the county welfare board could on that basis alone authorize and pay additional compensation to the executive secretary.

SAM W. CAMPBELL,
Special Assistant Attorney General.

Nobles County Attorney.
February 13, 1946. 125-A-64

OLD AGE ASSISTANCE

# 193

**Claim—County has claim against estate of deceased recipient—Funds which came to deceased recipient by inheritance are not exempt from the payment of debts of deceased.**

**Facts**

"One M. C., an old age recipient of Martin County died intestate on the 23rd day of June, 1944. She was a resident of Martin County at the time of her death and had received old age assistance in the total amount of $1,387.00. She had received $835.00 between November of 1936 and January 1st of 1940 and the balance of $552.00 between January 1, 1940, and December 31, 1941.

"A petition was filed in Probate Court for Martin County, Minnesota, for a special administration pursuant to which a special administrator was appointed and an Inventory and Appraisement was thereafter filed. In this inventory her property was inventoried and appraised as follows:

| | |
|---|---|
| "Miscellaneous household goods and furniture | $ 250.00 |
| U. S. Government bonds | 75.25 |
| Checking account in Sherburn National Bank of Sherburn, Minnesota | 276.10 |
| Checking account in Emmett County State Bank of Estherville, Iowa | 2,000.00 |
| Total | $2,601.35 |

"Later a petition was filed for a general administration and she has but one heir, namely, a son who lives in Easton, Minnesota. No inventory has as yet been filed in the general administration although the appointment of a general administrator was made on December 21, 1944.

"The County has filed a claim for its full amount of $1,387.00.

"The contention of the administrator now is that the $2,000.00 shown in the inventory constitutes an inheritance and that the distribution to M. C. was made in July of 1941; that the County would have no lien for any moneys received by the old age recipient which can be collected from this inheritance.

"The old age recipient, who is also the decedent in this case, did not notify the Martin County Welfare Board of this inheritance but the Welfare Board learned about it at the end of the year 1941 and when it knew that she had this money they discontinued her old age assistance.

"Nothing is stated in the inventory in the special administration that this so-called inheritance is such. It is merely set forth as so much cash in the bank at Estherville, Iowa."

**Questions**

"Does Martin County have the right to collect its claim in full against the estate of M. C. irrespective of the fact that a part of the property inventoried did come from an inheritance? Does the fact that this money is intermingled with her other property make any difference so that it has lost its identity as an inheritance?"

**Opinion**

Laws Extra Session 1936, Chapter 95, Section 15, as amended by Laws 1939, Chapter 315, Section 1, Mason's Supplement 1940, Section 3199-25, Minnesota Statutes 1941, Section 256.26, makes the amount paid for old age assistance under the present or any previous law a claim against the estate of the recipient of old age assistance. I know of no reason why the fact that a deceased recipient came into possession of a part of his estate by inheritance would render that part of the estate immune from the payment of the debts of the decedent. There is nothing in your letter that would enable me to hold that any part of the estate of the deceased recipient is exempt property.

Specifically answering your questions, I would say that in my opinion the county claim should be allowed, and that the fact that the moneys belonging to the estate have been commingled into one common fund does not render any part of the estate for that reason exempt from the payment of this claim.

RALPH A. STONE,
Assistant Attorney General.

Martin County Attorney.
December 3, 1945. 521-G

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## 194

**Lien—Foreclosure—When may be foreclosed—Choice of remedy in suit to foreclose lien, state should be named plaintiff** — MS1945, §§ 256.26, 525.145, 525.63, 540.02.

**Facts**

The county has an old age assistance lien on real estate which constituted the homestead of a deceased person whose estate is now being administered in the probate court. The surviving wife has abandoned the home. She has means and resides in an old people's home where she pays her way.

The taxes for four years are delinquent. The building which constituted the home is not insured. In 1947, the real estate will go on the forfeited tax list.

**Questions**

1. Would the county be justified in foreclosing the lien at this time?

2. Would it be better to have the representatives sell the homestead under license from the probate court?

3. If suit to foreclose is the proper thing, then who is the plaintiff, the county of Grant or the welfare board?

4. Has there been a supreme court decision on the question of the foreclosure of an old age assistance lien where the surviving spouse is still living?

**Opinion**

M. S. 1945, Sec. 256.26, Subd. 8, provides that such lien shall not be enforced against the homestead of the lienor **while occupied** by his surviving spouse, or minor children. The facts stated show not only that the homestead is not so occupied but they also show that the homestead is abandoned by the widow. Relying upon that fact, it is my opinion that there is no prohibition against the foreclosure of the lien.

Whether it is better that the lien should be foreclosed or that proceeding should be taken in the probate court for the sale of the homestead appears to be merely a choice of procedure. But the homestead is not an asset of the estate. M. S. 1945, Sec. 525.145. The homestead is exempt from the payment of the debt of the deceased. Gowan v. Fountain, 50 Minn. 264, 267. So, it appears to me that as an asset of the estate, the homestead could not be sold through proceedings in the probate court. It is provided in M. S. 1945, Sec. 525.63, that the homestead of a decedent when the spouse takes any interest therein * * * shall not be sold * * * unless the written consent of the spouse has been filed. If the written consent of the spouse to the sale through the probate court must be obtained, it would be as easy to obtain a deed. It would therefore, appear that the way seems a little plainer to proceed by foreclosure of the lien instead of proceeding to sell a non-asset of the estate in the probate court. In a suit to foreclose a lien, the real party in interest should be named plaintiff. M. S. 1945, Sec. 540.02. The lien is given to the state. M. S. 1945, Sec. 256.26, Subd. 3. Therefore, the state must be named the plaintiff in the suit to foreclose the lien.

No supreme court decision has come to my notice bearing on your last question.

CHARLES E. HOUSTON,
Assistant Attorney General.

Grant County Attorney.
August 28, 1946. 521-P-4

# 195

**Liens—Fraudulent conveyances**—MS1945, §513.26.

**Facts**

"Fee title to a certain real property lying within Hennepin County, Minnesota, was in a recipient of old age assistance, a widow, on and after January 1, 1940. She received assistance during all of the times mentioned herein. On March 2, 1943, the recipient deeded said property to a certain Mr. A. who in turn conveyed back to the recipient and her children as joint tenants. The deeds were filed in March, 1943. Apart from the notice given by the recording of the deeds, the Welfare Department had no notice of the transfer. The recipient continued to receive old age assistance thereafter until the date of her death on May 24, 1945. The surviving joint tenants are desirous of satisfying the lien of the state for the amount of the old age assistance granted."

**Question**

"Assuming that no fraud is involved and that there are no grounds on which to compromise the lien, what amount should the surviving joint tenants pay to the state to remove the lien from the property?"

**Opinion**

Although your letter does not so state, I assume the proper certificate was prepared and filed as provided by Minnesota Statutes 1945, Section 256.26, subdivision 5.

I do not believe that on the facts stated in your inquiry one could assume the absence of fraud. A conveyance made with actual intent to hinder or defraud creditors is fraudulent. Minnesota Statutes 1945, Section 513.26. Even in the absence of intent to defraud, if the conveyance is made without fair consideration, and as a result the vendor is rendered insolvent, it is fraudulent to creditors. Section 513.23 ibid. Cf. Thompson v. Schiek, 171 Minn. 284, 213 N. W. 911; State Bank of New London v. Swenson, 197 Minn. 425, 267 N. W. 366; Brennan v. Friedell, 212 Minn. 115, 2 N. W. (2d) 547. If a conveyance is fraudulent to a creditor he may have the conveyance set aside or disregard the conveyance and attach a levy upon the property conveyed. 513.28 ibid.

It is therefore my opinion that the absence of additional facts to the contrary, the facts stated in your letter give rise to an inference that the conveyances to A, and from A to the recipient and child, are fraudulent and consequently the state may claim a lien for the total amount of assistance given.

KENT C. van den BERG,
Assistant Attorney General.

Division of Social Welfare.
April 23, 1946. 521-P-4

# 196

**Liens—Priority—Over mortgage question of fact involved—Excess of foreclosure money over and above mortgaged debt should be paid to subsequent lienor—MS1945, § 580.09.**

**Facts**

Since January 1, 1940, X, an old age assistance recipient, has received $1,005 as such assistance. The old age assistance lien provided for by statute was perfected in the manner which the law requires.

Prior to the old age assistance lien, X had mortgaged said premises to L. This mortgage was superior to the old age assistance lien. This mortgage matured in 1943.

On June 3, 1942, X conveyed the premises to his son, XY, X reserving a life estate.

On maturity of the mortgage above mentioned on August 25, 1943, a new mortgage was executed by X and XY and wife to the same mortgagee, L, and covering the same indebtedness as before.

This second mortgage was foreclosed by sale of the mortgaged premises on August 31, 1945.

The farm was bid in for $4,650. There was an excess of some $2,500 over and above the amount due on the mortgage.

**Questions**

1. Whether the old age assistance lien was superior to the second mortgage above mentioned?

2. Whether the county and state have any claim on the proceeds of the sale over the amount due on the foreclosed mortgage?

**Opinion**

As to the first question: It is a general rule that whether the taking of a new mortgage in place of a prior mortgage amounts to an extinguishment thereof, is a question of fact as to the intention of the parties. The acceptance by the mortgagee of a new mortgage and a cancellation of the old mortgage does not amount to a payment or satisfaction and does not deprive the mortgagee of his right to have the lien of the discharged mortgage continued as against an intervening lien in the absence of an intention to give priority to the intervening lien.

36 Am. Jur. Title Mortgages, pp. 1916, 1917.

It is therefore impossible to give a positive answer to the first question inasmuch as it depends upon the intention of the parties, which is a question of fact. Much would depend upon whether the mortgagee, L, knew of

the existence of the old age assistance lien at the time he took the second mortgage and satisfied the old one.

If it was not the intention of the parties to the new mortgage to give priority to the old age assistance lien, and if L did not know of such lien at the time he took the second mortgage, then I think that the lien of the old or first mortgage would continue and that the second mortgage would not become inferior to the old age assistance lien.

As to your second question: Assuming that the facts show an intention not to discharge the lien of the first mortgage and make the old age assistance lien superior, then I think that the county and state are in the position of a second mortgagee and are entitled to claim and take the proceeds of the mortgage foreclosure sale over and above the amount necessary to discharge the claim of L, the mortgagor, in full.

If this money is still in the sheriff's hands, you should claim it on behalf of the county and state and start action to recover it if the sheriff refuses to pay as demanded.

The excess of the sale price over the first mortgage does not belong to X. It should be applied on the old age assistance lien as required by Minnesota Statutes 1945, Section 580.09, Mason's Statutes 1927, Section 9610. This statute provides that any surplus over the amount of the mortgage debt shall be paid to the subsequent lienors.

RALPH A. STONE,
Assistant Attorney General.

Scott County Attorney.
October 15, 1945. 521-P-4

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## 197

**Liens—Release—Homestead—Claims of children**—L 1945, C 460.

**Facts**

After a recipient has died children will often come in and show that they advanced money to the recipient for various purposes, such as funeral expenses, care, taxes, improvements on the property, medical expenses, and insurance.

**Question**

What personal services may be considered in determining whether the board is justified in releasing the lien.

**Opinion**

Whether the lien is released or not, claims of children for money actually expended by them in permanent improvements on the homestead or in

payment of taxes or encumbrances on the homestead are prior to the lien. M.S. 1941, Sec. 256.26, Subd. 6.

Subdivision 9 of Section 256.26 as amended by Laws 1945, Chapter 460, authorizes the county agency to release the lien subject to the following limitations:

1. The county agency must be satisfied by competent evidence that the major portion of the investment in recipient's homestead was made by the children. Although "investment" here is not limited to money furnished and may include personal services, mere gratuities would not of themselves constitute an investment.

2. The county agency must also find that substantial justice demands the release of the lien.

3. Approval of the state agency must be obtained.

Any competent evidence may be considered by the county agency in determining the ultimate facts prerequisite to the release of the lien. The weight or significance to be given to any item of evidence is a matter solely for the judgment of the county agency. So long as competent evidence is present, the determination of the county agency would be sustained in the event of judicial contest.

KENT C. van den BERG,
Assistant Attorney General.

Sibley County Attorney.
March 26, 1946. 521-P-4

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## 198

**Qualification—Net value of property owned by the recipients.**

**Facts**

"Both husband and wife are old age recipients in Traverse County. Real estate is owned by the husband, that is, the record title is in his name. The Auditor's true and full assessed valuation is the sum of $12,003.21, and the mortgage indebtedness against the same is $5,578.97, leaving a net, so far as mortgage indebtedness is concerned, in the sum of $6,742.07.

"Both husband and wife received pension before the lien act became a law. They continued on after the lien act came in. I am informed that they have received a total of $2,968 jointly since the lien act. Their pensions have been the same, so each received $1,484, for which there is a lien against the real property.

"Mason's 3199-18 states 'No old age assistance shall be paid to a person: * * * (Subsection b) If the net value of his property or the net value of the combined property of husband and wife exceeds $5,000

* * * .' From the above figures submitted, if the amount of the old age assistance lien cannot be deducted in determining the **net value** of the estate, then there is in excess of $5,000, and hence a disqualification. If the amount of the lien can be considered, then the net value is under $5,000 and hence no disqualification."

**Question**

Is old age assistance now allowable under these circumstances?

**Opinion**

I am going to dispose of the question on the assumption that an old age assistance lien certificate was issued and filed as provided in Minnesota Statutes 1941, Section 256.26, Subdivision 5; that after the filing of such certificate each of the parties has received $1,484 in old age assistance.

At the time old age assistance was granted following the giving of the lien certificate, there was a disqualification—this for the reason that at that time the husband and wife together owned property of the net value above encumbrances in excess of $5,000.

The assistance should not have been granted in the first place. But it was granted following the giving of the usual lien certificate.

Now enough assistance has been paid so that the net value of the combined property of the two old people, if the amount of the lien be included as an encumbrance, is less than $5,000.

I think at the present time that the amount of the old age assistance should be taken into account in determining whether these people are qualified for further old age assistance.

The county certainly is not going to take the position that the old age assistance lien is null and void, and that it does not constitute a lien against the property. Neither the county nor the old people are in a position to dispute the validity of the old age assistance lien or the amount thereof.

At the present time, therefore, the net value of the combined property of the two old people being less than $5,000, it is a case where they can and do qualify for old age assistance.

RALPH A. STONE,
Assistant Attorney General.

Traverse County Attorney.

November 28, 1945. 521-P-1

PUBLIC INSTITUTIONS

## 199

**Blind—School for—Admission of non-residents**—MS1941, §§ 246.23, 261.07.

**Question**

Whether you are permitted, assuming you have the facilities, to accept a child whose settlement is in South Dakota at the Braille and Sight Saving School, Faribault, Minnesota.

**Opinion**

It appears that the state will be paid the per capita charge for out-of-state patients which has been fixed at $65 per month. It also appears that the school at Faribault has plenty of room and would be in a position to accommodate the patient

Minnesota Statutes 1941, Section 246.23 provides that no person who has not a settlement as provided in Section 261.07 shall be admitted to the school except that the Director of Public Institutions may authorize admission thereto when residence cannot be ascertained, or when the circumstances in his judgment make it advisable. It is my opinion that the Director of Public Institutions may, in the exercise of his discretion, authorize the admission of this patient.

KENT C. van den BERG,
Assistant Attorney General.

Division of Public Institutions.
March 26, 1946. 482-A

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## 200

**Insane—Settlement—Derivative settlement of a wife lost by virtue of annulment of marriage.**

**Facts**

"A" had a settlement in Minnesota. During August 1945 she married "B" who had a settlement in California, and in September 1945 went with her husband to live in California. It appears that in November 1945 "A" was found to be insane and has since been receiving treatment at a California state hospital. "B" obtained a decree of annulment of the marriage in California.

**Question**

Whether the derivative settlement acquired by "A" was lost by virtue of the annulment.

**Opinion**

The distinction between annulment and divorce is that whereas divorce recognizes the validity of the marriage and terminates that relationship, an annulment proceeds upon the theory that the parties to the purported marriage were in fact incapable of contracting the marriage, and that therefore no marriage in fact ever existed. A derivative settlement of a wife is predicated upon a valid marriage, and hence it would necessarily follow that if a court of competent jurisdiction were to annul the marriage the wife would not have acquired a derivative settlement.

If the California court had jurisdiction over the parties and over the subject matter, its decree of annulment would, in our opinion, be recognized by the courts of this state.

KENT C. van den BERG,
Assistant Attorney General.

Division of Public Institutions.
September 5, 1946. 248-B-7

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## 201

**Wards—Inmates—Disposal of bodies after death—what constitutes known relatives**—MS1941, § 145.15 (3).

**Facts**

Minnesota Statutes 1941, Section 145.15 (3) provides that no body shall be delivered in accordance with the provisions of § 145.14 ibid "without the consent of all known relatives of the person deceased."

**Questions**

1. Whether the word "known" applies only to those whose names appear in the records of the patient at a state institution.

2. Whether consent of all relatives shall be obtained without regard to where they live.

**Opinion**

Whether one is a "known relative" within the meaning of § 145.15 (3) ibid will depend solely upon the facts and circumstances of the particular case. It is not a matter which can be determined in advance of facts. Frequently the determination may depend upon circumstances that are peculiar and unique to the particular case.

It is clear that consent must be obtained from all relatives whose existence is actually known by the director of the institution even though the names of such relatives do not appear on any record of the institution. It should here be noted that knowledge of a subordinate officer or employe of

the director, which knowledge was obtained in the course of the duties of such subordinate, may be imputed to the director and will be regarded as knowledge of the director.

Nor does absence of actual knowledge, imputed or otherwise, satisfy the statute, for the director may be found to have had constructive knowledge of the existence of relatives. The director is obliged to make reasonable inquiry to determine the existence of relatives. In absence of reasonable inquiry the director will be held to have had constructive knowledge of those relatives actually unknown whose existence could have been known upon reasonable inquiry.

What constitutes reasonable inquiry again will be determined on the basis of the facts relevant to each case. A recent Minnesota case, Sworski v. Simons, 208 Minn. 201, 293 N. W. 309, is illustrative of the type of action that could arise under § 145.15 (3) ibid. In the Sworski case the deceased had become intoxicated, had been arrested, and during confinement in the county jail, committed suicide. After the inquest the coroner directed an undertaker to embalm the body. The parents of the deceased, who lived in another county, brought action against the coroner for wrongful interference with their right to the body of their son and claimed damages for humiliation and mental suffering. Under the applicable statute the coroner was obliged to provide a decent burial "for any person unknown." It was argued that the deceased was an unknown person and hence the coroner committed no wrongful act in having the body prepared for burial. The lower court directed a verdict in favor of the defendant; the Supreme Court in reversing and granting a new trial stated at page 208:

> "The power and duty to provide the burial depended on whether Clifford (the deceased) was a person unknown. The evidence in this case made this a fact question for the jury, even if we adopt the view most favorable to defendants.
>
> "A person is not unknown within the meaning of the statute if his identity can be ascertained by reasonable inquiry. Provisions for the disposition of dead bodies of unknown persons to medical schools for dissection are quite common. **These statutes have been construed, as they should be, that all means of information must be resorted to and reasonable inquiry must be made** to ascertain the identity of the deceased before such a disposition by the possessor or receipt of the body by the person to whom it is delivered is justified. (cases cited)
>
> "The evidence demonstrated that by reasonable inquiry the authorities ascertained the parents and brought them to Chaska within a few hours to claim the body. The evidence available to the defendants—the driver's license, the conditional bill of sale, and the information that could be had from Strauch (companion of deceased)—pointed unerringly to such a result. The claim that Clifford was a person unknown is too flimsy to merit extended consideration. On the contrary, such evidence justified a finding that defendants acted in wanton and callous

disregard of their duty and plaintiff's rights. Such conduct should not be tolerated, much less can it be justified."

In many cases the records of the institution will very probably disclose the relatives and hence no further search need be made. There may, however, be cases in which the records of the institution will be silent as to relatives, but disclose the existence of a former guardian, a commitment, or other probate court proceedings. In such a case reasonable inquiry might require consulting those sources. I do not believe the statute contemplates a protracted investigation for possible relatives. Health and other considerations, which may be properly taken into consideration, dictate a reasonably prompt disposal of the body. It is impossible to list the source of information that must be consulted in all cases other than to say that all relevant facts of any given case must be considered in determining the extensiveness of the search.

It is therefore my opinion that "known relatives" as used in Section 145.15 ibid include all relatives whose names appear on the records of the patient at a state institution, and it may also include relatives whose names do not appear upon such records.

In answer to your second inquiry I refer you to an opinion of the Attorney General addressed to you dated May 13, 1942, wherein it is stated:

> "If it is known that the person has relatives, those in charge of the institution should inquire of such relatives, if they can be found, concerning their wishes relative to the disposition of the body. If such relatives are indifferent and assert no claim, then the body may be disposed of in the manner provided by statutes."

Inquiry should be made of all the known relatives regardless of their place of residence. If the inquiry clearly states the proposal to use the body for anatomical studies by a medical college of the state, and if it clearly appears from the inquiry that a response is expected, then in my opinion any relative who did not respond within a reasonable time could not complain if the body were disposed of as provided in Section 145.15 ibid.

KENT C. van den BERG,
Assistant Attorney General.

Division of Public Institutions.
February 8, 1946. 88-A-27

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**RELIEF**

## 202

**Cash relief—Funds—Amount—Town system—Powers delegated to County Welfare Board—Cannot be paid.**

**Facts**

"X County has the township system of poor relief. The county welfare board of X County by authorization delegated to it by the several

townships and municipalities is administering maintenance relief for the entire county. Funds are provided through county-wide levy. The townships retain the responsibility of authorizing and paying for local hospital care and poor relief burials."

**Question**

Whether X County may legally adopt the cash relief system under the facts above stated.

**Opinion**

It is my opinion that a cash relief system may not be adopted under the facts stated in your inquiry. Minnesota Statutes 1941, Section 263.01, applicable to counties having the town system, specifically prohibits payment of cash relief. The County Welfare Board acquires by virtue of the delegation to it no greater powers than are vested in the townships of municipalities making the delegation. Consequently the County Welfare Board acting under the delegation is limited by the statute applicable to counties under the township system.

No question is raised as to the legality of the delegation here involved, and no opinion is expressed on that matter.

KENT C. van den BERG,
Assistant Attorney General.

Department of Social Security.
March 19, 1946. 339-i-1

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## 203

**Settlement—Town system—Where determination rests upon factual circumstances, question of liability for support of pauper should be submitted to court for determination under Minnesota Statutes 1945, Section 261.08.**

**Facts**

A certain family, prior to May of this year, consisted of a husband and wife and several minor children. The husband died while en route from Oregon to Minnesota at Beach, North Dakota, in May of this year. This family prior to January, 1942, had a residence in Burnhamville Township, Todd County, for poor relief purposes and was receiving poor relief from the town at that time. In January, 1942, this family moved to the Village of Burtrum, where they resided for a period of approximately eight months during which time the family continued to receive aid in one form or another. In the early fall of 1942 the family moved to Minneapolis where the father secured employment in a war plant, and thereupon the family became self-sustaining for a period of about one year during which time they resided in Minneapolis. During that period of time, however, the household

goods were stored in Todd County, partly in Burnhamville Township but the major part of such household goods was stored in the Village of Burtrum, and the family, while residing in Minneapolis, occupied furnished living quarters there. After living in Minneapolis for approximately one year, or until the fall of 1942, the family moved to the State of Oregon, where they continued to reside until May of this year, when the family, which had been dependent upon Oregon for support by reason of the father's illness, was by Oregon authorities provided with $125 in cash with which to return to Minnesota. It was on their return trip to Minnesota that the father died at Beach, North Dakota. The family returned in May of this year to the Village of Burtrum, where they have since resided, and since August of this year the family has been receiving poor relief from the Village of Burtrum. The State of Oregon denies all responsibility for the family upon the claim that the family did not reside in Oregon for a sufficient length of time so as to acquire a residence under the laws of Oregon.

**Question**

As to the place of residence of this family for poor relief purposes, and whether such residence is in the Village of Burtrum.

**Opinion**

The answer to your question must be made upon the facts. This office is not in a position to express an opinion as to what the facts may be in any particular case. That is a function for the court when the matter has been properly submitted and after all of the material facts have been presented. It is obvious that it would not be possible for this office to assume to express a conclusion as to what the ultimate facts might be if that matter is properly presented to the court.

However, the law which is applicable is stated in Minnesota Statutes 1945, Section 261.07, and provides in part as follows:

> " * * * 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 two years."

This section further provides 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 voluntary and uninterrupted absence from this state for a period of one year with intent to abandon his residence in the state of Minnesota."

The act further provides that the time during which a person has received old age assistance and each month during which he has received relief from the poor fund of any county or municipality shall be excluded in determining his time of residence hereunder. Under the last portion referred to in the statute, it seems clear that the time when the family resided

in the Village of Burtrum after January, 1942, and during which time it was receiving poor relief, should be excluded in determining the place of residence for poor relief purposes. Likewise should the time from August of this year, during which time the family has received poor relief from the Village of Burtrum, be excluded. That leaves then only the months from May to August of this year that the family has been physically within this state during the last two years. Whether their residence in this state was lost by reason of their absence therefrom while in Oregon is a question that can only be determined after all of the facts are known. Whether they intended to abandon their residence in Minnesota and acquire a new one in Oregon is, as previously stated, a question of fact. Then there is for consideration the period of eleven months when they lived in Minneapolis before they went to Oregon and during which time they did not receive any poor relief assistance. However, during that period of time their furniture was stored in two places in Todd County, and this situation has some bearing upon whether they were in Minneapolis on a permanent or a temporary basis.

We believe that your problem can best be determined by submitting the matter to the judge of the district court as provided for in Minnesota Statutes 1945, Section 261.08, and making each place where this family has resided since it received poor relief from the Township of Burnhamville in 1942 a party to the proceeding. See **City of Minneapolis v. Village of Hanover**, 209 Minn. 466. The courts of this state have no jurisdiction over the State of Oregon, and neither that state nor any municipality therein could be bound by any proceedings instituted in this state.

However, it seems clear to us that the only place in Minnesota where this family might have established a residence for poor relief purposes at the present time is in the Village of Burtrum, but, as previously pointed out herein, that question can be presented to the court for determination.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Burtrum Village Attorney.
September 5, 1946. 339-O-2

# STATE

APPROPRIATION

## 204

**University — Power of the Board of Regents to erect housing facilities or dormitories**—L 1945, C 610, § 2, Item 1.

### Facts

Laws 1945, Chapter 610, Section 2, Item 1, appropriates to the University of Minnesota for maintenance and improvements for the year ending June 30, 1946, $3,825,000, and for the year ending June 30, 1947, $4,825,000. One of the provisos contained in the appropriation act and here relevant reads as follows:

> "The foregoing appropriations to the University of Minnesota are based upon the condition that the Board of Regents do not, during the biennium ending June 30, 1947, erect from any funds whatsoever any housing facilities or dormitories in Minneapolis or St. Paul."

### Questions

"1. May the Legislature by the proviso quoted above limit the power of the Board of Regents to erect housing facilities or dormitories in Minneapolis or St. Paul which would be paid for by funds other than those appropriated by the Legislature?

"2. Assuming that question No. 1 is answered in the negative, has the Board of Regents by the acceptance of the appropriation in Laws 1945, Chapter 610, Section 2, Item 1, and the expenditure thereof in part, bound itself to refrain from erecting any housing facilities or dormitories in Minneapolis or St. Paul during the current biennium?

"3. If, during the present biennium, the Board of Regents should erect any housing facilities or dormitories in Minneapolis or St. Paul which would be paid for by funds other than the appropriations hereinafter referred to, will the appropriations made by Laws 1945, Chapter 610, Section 2, Item 1, continue to be available for expenditure for maintenance and improvements as therein provided?"

### Opinion

In answering your first inquiry, attention is called to the fact that in the frequently cited decision of 1928, rendered in the case of **State ex rel. University v. Chase**, 175 Minn. 259, and in other cases since that date, the supreme court of our state has consistently held that:

> "The people by their constitution chose to perpetuate the government of the University which had been created by their territorial legislature in a Board of Regents and the powers they gave are not subject

to legislative or executive control; nor can the courts at the suit of a taxpayer interfere with the board while governing the University in the exercise of its granted powers."

Among the powers so given the Board of Regents by the original University charter in 1851 and perpetuated by the state constitution in 1858 is the expressed authority to construct buildings. In the case of **Fanning v. University of Minnesota,** 183 Minn. 222, it was held that without a legislative appropriation, if the University has other funds available therefor, it may use them for the construction of dormitories. Therefore, it is clear that notwithstanding the proviso in question, the Board of Regents has the authority to erect housing facilities.

Your second question involves primarily the power of the legislature to attach to the legislative item herein considered the proviso that the appropriation is based on the condition that the Board of Regents do not erect during the biennium ending June 30, 1947, from any funds whatsoever any housing facilities or dormitories in Minneapolis or St. Paul. If that condition, which was obviously intended to have the effect of preventing not only the use of the funds appropriated by the legislature but all other University funds for dormitory construction, is invalid as applied to the latter, such invalidity is by itself sufficient to render the acceptance by the Board of Regents of all or a part of the appropriation of no binding effect in preventing the Board from constructing housing facilities or dormitories from other available funds.

The constitutionality of the condition under consideration, in so far as it attempts to make the entire appropriation for maintenance and improvements unavailable if the University uses funds not appropriated by the legislature for dormitory purposes will be passed upon in the answer to your third question. The position therein taken makes it unnecessary to discuss in this connection the power or lack thereof on the part of the Regents to surrender to the legislature any portion of the duties imposed or authority conferred upon them by the constitution in the matter of the expenditure of such University funds as are not acquired through a legislative appropriation but unconditionally held by the University Board and under its exclusive control for the benefit of the people of the state.

Your third inquiry requires a consideration of the question as to whether the University Board's expenditure for dormitory construction by the use of funds which have not been appropriated by the legislature but are otherwise available for that purpose will render the appropriation made by Laws 1945, Chapter 610, Section 2, Item 1, unavailable for expenditure for University maintenance and improvements as therein provided.

That the legislature has the power to place proper conditions on the expenditure of the funds which it appropriates is obvious. However, in the matter under consideration the proviso in question appears to be an attempt to prevent for the construction of housing facilities the use of not only the legislative appropriation but also of any other University funds. If that condition and others similar thereto are to be held valid as applied to funds

not appropriated by the legislature, they may ultimately result in the actual control by the legislature of all University expenditures. Any legislation, the effect of which is to deprive the Board of Regents, directly or indirectly, of their powers to manage the expenditure of funds belonging unconditionally to the University constitutes a violation of the state constitution which, as construed by our supreme court, gives to the Board of Regents the power of exclusive management of the University and its affairs. It is clear that the existence of the University and its functions depend largely upon legislative appropriations. If it should be held by the courts that the legislature can legally make such appropriations unavailable unless the Board of Regents refrains from using other University funds which are under exclusive control of the Board of Regents for purposes opposed by legislators or unless the Board uses such other funds for purposes favored by legislative members, it is apparent that the state legislative department would eventually acquire a control of the University management which, as above stated, the constitutional provisions pertaining to the state University as construed by the supreme court were intended to prevent.

Until the people of the state modify their constitution by adopting an amendment which will transfer the control of the University from the Board of Regents to the state legislature, it would not appear that legislation can be constitutionally enacted for the purpose of imposing in connection with a legislative appropriation to the University a condition intended to prevent the expenditure of funds that the legislature has not appropriated.

It is, therefore, my opinion that the portion of the proviso in question which applies to funds of the University other than those appropriated by the act here involved is null and void.

The question then arises as to whether the invalidity of a portion of the proviso invalidates the entire appropriation.

Minnesota Statutes 1941, Section 645.20, contains the following provision:

> " * * * If any provision of law is found to be unconstitutional and void, the remaining provisions of the law shall remain valid, unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one; * * * "

It is, I believe, the constitutional duty of the legislature to appropriate funds for University maintenance and improvements in such amounts as it deems necessary and proper without directly or indirectly violating the constitution by imposing conditions that the Board of Regents shall expend or refrain from expending funds over which the legislature has no control. The constitution provides that:

> "It shall be the duty of the legislature to establish a general and uniform system of public schools."

In **State ex rel. Smith v. Reed,** 125 Minn. 194, the court said:

"The university * * * has always been recognized as a public institution, forming a part of the educational system of the state * * * ."

With the duty resting upon the legislature to appropriate funds for the University's maintenance and improvements, it is inconceivable that at a time of acute housing shortage the appropriation in question would not have been passed without the unconstitutional proviso intended to discourage the construction from any funds whatsoever of needed University dormitories.

The main purpose of the act was to comply with the constitutional duty to provide the University with sufficient funds to enable it to continue its operations. The provision, having for its obvious purpose the prevention of expending any funds whatsoever for housing construction, must be construed as so incidental to the chief object of the legislation that its elimination would not have resulted in the legislature's failure to enact the necessary appropriation.

To hold that the invalidity of a portion of the proviso invalidates the entire appropriation which is essential for the continuance of University instruction, would, I believe, be legally unsound and not in accordance with the last quoted statutory provision.

For the reasons above stated it is my opinion that the proviso here involved is invalid in so far as it applies to funds not appropriated by the act of which it is a part; that the proviso does not limit the power of the Board of Regents in the construction of housing facilities or dormitories from available funds that are not derived from the appropriation under consideration; that the acceptance by the University of the appropriation made under Laws 1945, Chapter 610, Section 2, Item 1, does not bind the Board of Regents to refrain from using other available funds in the construction of housing facilities or dormitories; and that the sums appropriated by the 1945 legislature for the University's maintenance and improvements, although not available for erecting of housing facilities, are available for expenditures as in the appropriation act provided, notwithstanding the use by the University of other funds for dormitory construction.

J. A. A. BURNQUIST,
Attorney General.

University of Minnesota Board of Regents.
December 11, 1945. 9-A-46

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COMMISSIONS

## 205

**Athletic commission—Licenses to conduct, hold or give boxing and sparring exhibitions are not transferable**—MS1941, C 341.

**Facts**

"G" is licensed to conduct, hold or give boxing and sparring exhibitions within the city of Willmar; the license was issued February 1, 1946, and expires one year from date of issue. "G" now contemplates leaving the state and wishes to transfer his interest in the license.

**Questions**

Whether "G" may dispose of his interest to other individuals, and whether those individuals, after the execution of the new bond, could hold boxing and sparring matches for the unexpired term of the license. What "G" may do to dispose of his interest and be relieved of any responsibility under his bond.

**Opinion**

1. It is my opinion that the license is not transferable. The Athletic Commission is given the authority to issue licenses and to suspend or revoke such licenses. Minnesota Statutes 1941, Section 341.05, subdivision 2. There is no express provision, nor do I find any provision which implicitly grants the commission the power to approve transfer of licenses.

2. Upon notification to the commission by "G" of his abandonment of the privileges under his license, it is my opinion that the commission may revoke the license. This would relieve "G" of any further responsibility under the license.

KENT C. van den BERG,
Assistant Attorney General.

State Athletic Commission.
March 19, 1946. 596-B-2

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**FUNDS**

## 206

**Trust funds—Bonds—Sale of—Profits—Distribution of interest**—L 1945, C 312.

**Questions**

Pertaining to Laws 1945, Chapter 312, Section 1, Subdivisions 3 and 4, "relating to investment of moneys from certain state funds."

**Opinion**

1. It should be stated that there is nothing in Subdivision 3 making it mandatory on the part of the State Board of Investment to sell bonds or securities; but, if the board does sell them and a profit is made thereon, it is mandatory to credit the profit to the principal of the trust fund in which

they are held. It should be noted that this subdivision applies only to profits on sale of securities and not to distribution of prepaid or unearned interest, to which Subdivision 4 applies.

There is nothing in Subdivision 4 making it mandatory to accept prepayment of any bonds or securities by the issuers thereof on the basis therein outlined; but, if the board does so accept such prepayment, it was undoubtedly intended by the legislature that any unearned interest acquired through such transaction shall be distributed as income in the same manner and at such times as interest would have been distributed if the prepayment had not been made.

2. In the purchase of bonds or securities, it appears that heretofore it has been the practice to pay the premium thereon and accrued interest out of income and not out of the principal. This, I believe, has been proper if the total yield in interest has been credited to income from the date of the state's purchase of a security until the date of its payment at maturity, but such payment of premium out of income is no longer authorized. By reason of the enactment of Laws 1945, Chapter 312, Section 1, Subdivision 2, premiums required in the purchase of bonds cannot now be legally paid out of income. They must hereafter be paid out of the permanent funds and returned thereto by proper amortization of the interest yield. However, when a bond is sold at a profit before maturity, if the premium had theretofore been paid out of income, the latter should be reimbursed in accordance with proper amortization procedures for the amount of the unamortized premium, if any, but the profits remaining after such reimbursement should under Subdivision 3 be credited to the permanent fund.

3. The question here considered involves the constitutionality of the following legislation (Laws 1945, Chapter 312, Section 1, Subdivision 4):

> "If the state board of investment shall accept payment of any bonds or other securities, by the issues thereof, prior to maturity, upon payment of their face value and accrued interest, plus the difference in interest between that which the face value of said bonds or securities would have yielded if they had not been paid before maturity and the interest, if less, that will be received on the reinvestment of the principal so prepaid up to the date of its original maturity, the unearned interest so paid in advance shall be distributed in the same manner and at such times as the interest on such bonds or securities would have been distributed if such interest had not been so prepaid."

The State Constitution, Article VIII, Section 2, provides that the principal therein established shall consist of the proceeds of the **lease or sale of school or swamp lands**, and the principal so created shall "forever be preserved inviolate and undiminished." No expressed provision for crediting profits on sale of securities to principal and keeping such gains inviolate and undiminished is contained in the Constitution. Therefore, at the time of its adoption in 1858, it was possible that its framers did not have in mind that the profits from the sales of securities in a permanent fund should be credited to that fund and not to income. What they feared was a waste of

the proceeds of the sales of land granted to the state by the federal government. In connection with the income arising from the "perpetual school fund," they provided that it "shall be distributed to the different townships throughout the State, in proportion to the number of scholars in each township, between the ages of five and twenty-one years." The constitutional provision with reference to the distribution of proceeds from the principal of all funds derived from the sale of swamp lands does not contain the word "income." That provision reads as follows:

> "One-half (½) of the proceeds of said principal shall be appropriated to the common school fund of the State. The remaining one-half (½) shall be appropriated to the educational and charitable institutions of the State in the relative ratio of cost to support said institutions."

What is known as the permanent "University Fund" was first established by statute in Laws 1868, Chapter 50, and was later recognized by the constitutional amendment adopted as Article VIII, Section 6 in 1896. The 1868 statute provided that proceeds from the sale of university lands shall constitute the "University Fund" and appropriated and placed at the disposal of the board of regents the "interest and increase" therefrom.

The internal improvement land fund created by Article IV, Section 32b, consists of all moneys derived from sales of lands donated to the state for the purpose of internal improvement. Article IX, Section 16, provides that the state road and bridge fund "shall include all moneys accruing from the income derived from investments in the internal improvement land fund."

The constitutional provisions under consideration clearly create permanent funds of the proceeds of the sale or lease of school, internal improvement and swamp lands of the state, but the Constitution does not define "income" or "proceeds" thereof. It contains no specific directions as to when income is to be distributed for the designated constitutional purposes, what deductions may properly be made therefrom before so distributing it, or whether profits from the sale of securities in the permanent funds shall be credited to principal or to income.

Your attention is also called to the fact that there appears to be no Minnesota Supreme Court decision defining what the framers of our Constitution meant by the words "income" or "proceeds" in the connection herein considered.

In comparatively recent decisions our Supreme Court has held that in the administration of a private trust "ordinarily, gains in value of investments represent an increase of capital and are to be credited to principal rather than income." This rule was applied in the cases of **In re Trust under Will of Clarke,** 204 Minn. 574, decided in 1939; **In re Trust under Will of Watland,** 211 Minn. 84, decided in 1941; and **In re Trust under Will of Koffend,** 218 Minn. 206, decided in 1944.

It is, therefore, clear that in an ordinary private trust administration profits from the sale of principal assets are to be credited to the principal unless otherwise provided. However, the establishing by the State Constitu-

tion or by statute of permanent funds and providing for the distribution of the "income" or "proceeds" therefrom to state governmental subdivisions or public institutions do not create the ordinary private relationship of trustee and cestui que trust. Therefore, the legal principles usually applied to that relationship are not necessarily applicable here where constitutional provisions and legislative powers in connection with the ownership and distribution of public assets are involved.

The constitutional indefiniteness above referred to and the absence of judicial decisions passing directly upon the meaning of the provisions in question make legislative construction and legislation pursuant thereto necessary. In any event, the constitutional provisions here considered are not self-executing. In such circumstances the legislature has, I believe, broad powers of discretion as to the methods of carrying into effect the constitutional purposes, and any mandate that it enacts in that connection should not be declared unconstitutional unless the unconstitutionality thereof is apparent beyond a reasonable doubt. In the matter under consideration the Constitution imposes duties and confers powers upon the legislature in the following language:

> "Suitable laws shall be enacted by the legislature for the safe investment of the principal of all funds which have heretofore arisen or which may hereafter arise from the sale or other disposition of such lands * * * ." Article VIII, Section 2.
>
> "Suitable laws shall be passed by the legislature for the safe keeping, transfer and disbursements of the State and school funds * * * ." Article IX, Section 12.

Although it is clear that there can be no legal enactment of legislation that will diminish the permanent funds derived from the sale or lease of the state's so-called trust lands, it would appear that under the powers conferred upon the legislature by the last quoted provisions it is given considerable discretion in determining the profits that should be added to the principal, what constitutes proper and reasonable deductions from income before its distribution as the Constitution provides, whether under certain conditions unearned interest shall be credited to income and when the income or proceeds from the permanent funds shall be disbursed.

In the administration of private trust funds, "it is the duty of the trustees to consult the interests of both life tenants and remaindermen impartially so as not to give either an advantage at the expense or to the prejudice of the other * * * ." **Congdon v. Congdon,** 160 Minn. 343. We must assume that the legislature in enacting Laws 1945, Chapter 312 had in mind both the preservation of the state's permanent funds and the rights therein of present and future beneficiaries. It is clear that by directing in the enactment of Subdivision 4 of that chapter that under the conditions and at the times therein stated unearned interest shall be distributed as income the legislature had no other intention than to secure an equitable adjustment of the receipts in connection with the prepayment of bonds

which yield a higher rate of interest than can now be obtained on the funds so prepaid.

For the various reasons hereinabove stated, I am of the opinion that the legislature has the constitutional power to require that unearned interest received under the above mentioned conditions shall be credited to income instead of to principal and that compliance with such a legislative mandate will not result within the meaning of the Constitution in diminishing the permanent funds.

4. You also refer to direct borrowers from the state who may be willing to pay for a right to retire the bonds issued by them an amount which will result in receipts larger than those which will be received under the plan described in Subdivision 4 and inquire whether the amount so paid in excess of the face value of such bonds is to be credited to principal or to income.

The direction of the legislature by enactment of Subdivision 3 requiring the crediting of profits to principal refers only to profits from sale of securities and not to those accruing from negotiations to acquire the privilege of prepayment. The legislative direction in Subdivision 4 as to distribution to income of unearned interest acquired through the state's permitting prepayment of bonds refers only to transactions where prepayment privileges are granted on the basis set out in that subdivision and not to those granted by the state on some other basis. Therefore, if a sum greater than that provided in Subdivision 4 is obtained from direct borrowers from the state for the granting to them of prepayment privileges, it is, I believe, within the power of the State Board of Investment to determine in its sound discretion whether part or all of such increased yield is principal or income and have it credited accordingly.

Certain previous opinions may appear inconsistent with the conclusions herein contained. Such rulings, however, were made prior to enactment of Laws 1945, Chapter 312. To the extent that they may be in conflict with what is herein said, they are hereby superseded.

J. A. A. BURNQUIST,
Attorney General.

State Board of Investment.
August 11, 1945. 454-E

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LEGISLATION

## 207

**Bill—Revenue—Tax bill which reduces the rate of an existing revenue measure should originate in the House of Representatives** — State Const. Art. IV.

**Question**

Whether or not, under Article IV, Section 10 of the State Constitution, a tax bill which reduces the rate of an existing revenue measure, would be classified as a revenue raising measure, which would have to originate in the House.

**Opinion**

We have up to date found only two cases that appear to involve directly the question under consideration. The constitutional provision passed upon in the cases hereinafter cited requires that "all bills for raising a revenue shall originate in the House of Representatives."

In the case of In re Paton's Estate, 168 A. 422, decided in 1933, the Supreme Court of New Jersey held that a 1925 statute originating in the senate of that state and exempting certain transfers from tax imposed by a 1909 act was valid.

The court there said

> "Obviously it is not itself a statute for raising revenue; its purpose and effect is rather somewhat to decrease revenue than to increase it. Apparently in England such an amendment must originate in the House of Commons * * * but no authority has been cited or found which lays down a similar rule in this country. Indeed such of those authorities in this country cited by counsel as touch upon the point tend to indicate a contrary view."

However, six years later, in the State of Alabama, a question was propounded by the senate of that state to the justices of its supreme court as to whether a bill whose purpose was to exempt the proceeds of certain sales from the provisions of an existing sales tax act could be originated in the senate.

The court unanimously held, in answering the inquiry, that such a bill, to be valid, must originate in the house of representatives. The decision is to be found in 190 So. 824. The title of the case is **In Re Opinion of Justices.**

The following are quotations from the opinion concurred in by six justices, with no dissent to the conclusion reached:

> "Any bill, we think, whose chief purpose is to create revenue or to increase or **decrease** revenue as created in another act is one to raise revenue and must originate in the house of representatives."

> "The right of the senate to propose amendments to revenue measures applies to pending bills which originated in the house and not to measures after they have been enacted."

We have found no previous official opinion in our files and no precedent among the Supreme Court decisions of the State of Minnesota directly in point. To ascertain definitely how the Minnesota constitutional provision in question should be construed when an act decreasing the rate of an existing

revenue measure is involved will require a decision of that court. It appears to the writer that the Alabama decision expresses very clearly its position in answer to a question similar to your inquiry. Whether our court will follow that decision, I, of course, am not in a position to state.

In the circumstances, if the Legislature wishes to be certain of the constitutionality under Article IV, Section 10, of any act for increasing or decreasing rates of taxation or for amending or repealing an existing statute in so far as the raising of revenue is directly affected, the safe course to pursue is to have the bill therefor originate in the House of Representatives.

J. A. A. BURNQUIST,
Attorney General.

Senate Tax Committee.
February 8, 1945. 280-B

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LEGISLATURE

## 208

**Member—Incompatible Offices—Holding office of Minneapolis police officer held violative of Constitution, Article IV, Sec. 9.**

**Question**

"May we have your opinion on the question as to whether a member of the police department of the City of Minneapolis may serve as a representative in the State legislature without thereby vacating his position as a policeman?"

**Opinion**

The Constitution of Minnesota, Article IV, Section 9, provides 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."

This constitutional provision prohibits a member of the legislature from holding any other office under authority of the State of Minnesota. The question then arises as to whether or not the position of police officer is an office within the meaning of the constitution.

The attorney general has never passed on this question before. On April 22, 1919, file 280-H, this office advised then County Attorney Nash of Minneapolis that a member of the legislature could not be appointed a Hen-

nepin County deputy sheriff under authority of a law enacted at a session of the legislature at which such member served. But, the question as to whether or not the position of deputy sheriff was an office was not there decided.

On October 7, 1937, opinion No. 278, 1938 report, the then attorney general advised St. Louis County Attorney Naylor that the office of deputy sheriff was an office within the meaning of Article IV, Section 9 of the Constitution, and that accordingly the same person could not hold the offices of member of the legislature and deputy sheriff. The opinion was partially based on M. M. St. 1927, Section 917, which specifically prohibits deputy sheriffs from holding any other lucrative public office.

An examination of the cases reported in Words and Phrases, Volume 29, page 327, indicates that in most instances police officers, marshals, and other peace officers have been held to be officers rather than employes. Each of these cases, however, revolved around the express constitutional, statutory, or charter provisions involved in the particular case.

Our Supreme Court has never passed upon the specific case presented.

In State ex rel Duluth v. District Court of St. Louis County et al, 134 Minn. 26, 158 N. W. 790, our high court held that a policeman was an employe within the meaning of the Workman's Compensation Act. This decision was based on the wording of the act which defined an employe as any person in the service of a city under any appointment or contract of hire except an official of the city who had been elected or appointed for a regular term of office; but the court in that case expressly refrained from determining whether or not a policeman was a city official, and said:

> "The terms 'official' and 'officer' are used broadly and have been held under some statutes to embrace policemen * * * ."

In State v. Gardner, 88 Minn. 130, 92 N. W. 529, our Supreme Court held that a Minneapolis police officer was an executive **officer** of the city and as such was properly charged in an indictment for accepting a bribe to permit confidence men and swindlers to operate in the city of Minneapolis.

The copy of the Minneapolis charter which we have in this office provides in Chapter VI thereof for the creation and operation of a police department. Section 2 of Chapter VI of the charter provides that the city council is to fix the amount of bond required from police officers. Section 4 thereof provides that police officers shall subscribe and file in the office of the city clerk an oath that they will support the Constitution of the United States and the State of Minnesota, and will faithfully perform the duties of his **office.**

The language of the charter above discussed, especially the requirement for the filing of an oath and bond, indicates to me that the charter framers contemplated that police officers of the city were to be "officers" as distinguished from "employes." The requirement for the filing of an oath and

bond is many times considered to be the determining factor as to whether a person is an officer or an employe.

It is therefore my conclusion that a police officer of the city of Minneapolis is an officer as distinguished from an employe, and that as such he holds an "office" within the meaning of the Constitution, Article IV, Section 9.

The question you present is therefore answered in the negative.

EDWARD J. DEVITT,
Assistant Attorney General.

Minneapolis City Attorney.
February 8, 1946. 280-H

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## 209

**Member—Incompatible offices—Member of legislature and county service officer**—Minn. Const., Art. IV, § 9—L 1945, C 96.

**Opinion**

Article IV, Section 9 of the Constitution of Minnesota provides that:

"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 * * * ."

Laws 1945, Chapter 96, authorizes the county board of any county to appoint a veterans service officer and to fix the compensation of such officer. Chapter 96 also provides that he shall be appointed for a term of two years unless removed for cause and except as otherwise prescribed in the act.

The position held by such officer is created by law and is not filled merely by a contract of employment by which the rights of the parties are regulated.

Therefore, it is my opinion that a state senator cannot hold the position of county service officer as the holding of the latter office would be in violation of the constitutional provision above quoted.

J. A. A. BURNQUIST,
Attorney General.

Nobles County Attorney.
March 27, 1946. 280-H

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## 210

**Member—May be employed by city to direct singing in connection with Park Board concerts**—Minn. Const. Art. IV, §9.

**Opinion**

Article IV, Section 9, of the state constitution 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 * * * ."

The constitutional prohibition in question simply forbids a member of the legislature to hold any other office except that of postmaster.

In numerous cases the Attorney General has heretofore held that the constitutional provision above quoted does not prevent a member of the legislature from accepting public employment. In previous opinions it has been held that a member of the legislature may be appointed as local appraiser for the Department of Rural Credit, enter into contracts for architectural service for the state, be employed as truck and bus inspector for the Minnesota Railroad and Warehouse Commission, as field agent for the Agricultural Department, as investigator for the Board of Barber Examiners, and as attorney for passing upon real estate titles for the Highway Department.

If you accept the position of community sing director from the Park Board of the City of Minneapolis, you will not be acting in the capacity of an office holder, but as an employee.

Therefore, it is my opinion that article IV, section 9, of the state constitution does not prohibit you from becoming engaged by the Park Board in directing the singing in connection with Park Board concerts in the City of Minneapolis.

J. A. A. BURNQUIST,
Attorney General.

Representative George E. Murk.
March 30, 1946. 280-H

# TAXATION

ASSESSMENTS

## 211

**Special—Sale of tax-forfeited land—Special assessments do not revive after sale of tax-forfeited land to a purchaser.**

**Facts**

"In Lanesboro, my county, we have a case where the State, thru non-payment of real estate taxes for over six years by the owners, became the owner of many village lots. Included in the taxes for five of those six years, in every case, was a special assessment of $1.65 per front foot, the amount assessed against each lot for a village sewer system installed all over the village, about 6 years ago.

"The members of the County Board have placed new valuations on these lots, and we now have a chance to sell several of the lots, but the prospective buyers hesitate to buy, until they know whether or not the special assessment part of the five years unpaid taxes will revive or not, against the lots they buy."

**Question**

Whether after land has been forfeited to the state for non-payment of taxes and the state has sold and disposed of such land to a third party as purchaser, special assessments for local improvements will revive and again become a lien against such land.

**Opinion**

The answer to your question is found in the case of Fortman v. City of Minneapolis, 212 Minn. 340. By reading this case you will see that the answer to your question is no. The special assessments do not revive.

RALPH A. STONE,
Assistant Attorney General.

Fillmore County Attorney.
May 31, 1945. 408-C

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CERTIFICATE

## 212

**State assignment — Cancellation requested by the holder — Auditor should cancel same even if title had been perfected thereunder**—ESL 1937, C 71, § 1, MS1941, § 280.30, Mason's Supp. 1940, § 2145-1; L 1941, C 399, MS1941, §§ 272.54 to 272.57.

**Question**

"Whether the county auditor may cancel a tax certificate pursuant to the terms of Extra Session Laws 1937, Chapter 71, Section 1, under the following circumstances.

"The certificate was purchased at the tax judgment sale in 1906 for taxes of 1904. Notice of expiration of redemption was issued May 24, 1909. Apparently the service was proper and proper proof was filed in the Auditor's office. The time for redemption expired. No redemption having been made, the certificate was filed in the office of the Register of Deeds, on August 25, 1909. On each transfer of the property thereafter the Auditor has stamped the instrument of conveyance 'Taxes paid by sale of lands and transfer entered.' The present owner of the property and holder of the tax certificate desires to surrender the same and have it cancelled by the Auditor in the language of the statute 'cancelled by surrender of certificate'."

**Statement**

"It is my recollection that after the Absetz case came down, the Legislature passed Laws 1941, Chapter 399, which seems to be a complete method of dealing with tax certificates, assignments and forfeited tax sales certificates and the cancellation of the same. Yet it does not expressly appear that the latter Act was intended to repeal Section 71.

"It has been the opinion of this office in the past that when a tax certificate has ripened into a title, that there is no authority in the County Auditor to cancel the same even upon surrender. Your opinion of March 4, 1942, addressed to the Honorable G. Howard Spaeth reaches the same conclusion but makes no reference to Chapter 71."

**Questions**

"Will you therefore please advise whether under Chapter 71, Section 1, the Auditor may accept for cancellation upon surrender a tax certificate and (2) whether Chapter 71, Section 1, is broad enough to include the case above outlined or whether it must be strictly construed to cover cases where a notice has been issued and served but has not yet ripened into title?"

**Opinion**

Extra Session Laws 1937, Chapter 71, Section 1, Minnesota Statutes 1941, Section 280.30, Mason's Supplement 1940, Section 2145-1, provides as follows:

"Upon request of the holder of a real estate tax judgment sale certificate, state assignment certificate, or forfeited tax sale certificate and surrender of the same, whether notice of expiration of time of redemption has been issued and served or not, the county auditor shall cancel the same, making an entry in the proper copy real estate tax judgment

book, opposite the description of land covered by the certificate, 'canceled by surrender of certificate'."

This authorizes the auditor, on request of the holder and the surrender of the certificate by him, to cancel the tax sale certificate. It makes no difference whether notice of expiration has or has not been given. If the notice has been given, the auditor is equally authorized to cancel the certificate when requested to do so by the holder. This should be the law. The owner and holder of a certificate should have the right to have it cancelled at any time whether it has ripened into title or not and whether or not he holds a government chain of title. If he requests it, neither he nor anyone else can complain.

Laws 1941, Chapter 399, Minnesota Statutes 1941, Sections 272.54 to 272.57, do not expressly repeal this provision of the 1937 law. Section 4 of the 1941 law (Minn. St. 1941, § 272.57) makes it obligatory upon the county auditor to cancel all state assignment certificates on which notice of expiration of time for redemption has not been given and served within the time fixed by that law. There is nothing inconsistent between the provisions of the 1941 law and the 1937 law in the respect in question. They can stand together. It is my opinion that the holder of a state assignment certificate which has been perfected by the giving of notice of expiration of redemption and the recording of a certificate with the register of deeds may, nevertheless, request the cancellation thereof, and that upon such request and upon being satisfied that the request comes from the true owner of the certificate, the auditor should cancel the same and make an entry in the proper copy real estate tax judgment book, opposite the description of land covered by the certificate, "cancelled by surrender of certificate."

RALPH A. STONE,
Assistant Attorney General.

Ramsey County Attorney.
August 6, 1945. 409-A-1

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DELINQUENT

## 213

**Confessed judgment—The unpaid balance of taxes upon any parcel of real estate included in a confessed judgment may be paid in full**—L 1945, C 324.

**Question**

"Where a person has confessed judgment on taxes and has paid a part, can be pay the balance up pursuant to Chapter 324, Laws of 1945?"

**Answer**

Laws 1945, Chapter 324, reads:

> "Delinquent taxes upon any parcel of real estate, which have been bid in for and are held by the state and not assigned by it, may be paid in full without penalty or interest if such payment is made prior to October 1, 1945, as hereinafter provided:
>
> "The party offering to pay such taxes shall present to the county auditor a tax receipt showing that the current taxes due in 1945 have been paid in full. Upon the presentation of such tax receipt the county auditor shall make out a delinquent tax statement and shall set forth therein all delinquent taxes and costs, less penalties and interest, then accrued against said parcel of real estate. The payment to the county treasurer of the sum shown to be due on such statement shall constitute payment in full of all taxes accrued against said parcel of real estate."

There can be no doubt that if judgment had not been entered in the instant matter pursuant to the owner's confession of judgment, the owner of the land involved herein could take advantage of the provisions of the foregoing statute. Notwithstanding the confessed judgment, he can restore the land to its former status as real estate with delinquent taxes but without a confessed judgment therefor by defaulting in the payment of any installment due under the judgment. If an installment becomes due before October 1, 1945, he can fail to pay it and can thus make himself eligible without question for the benefits allowed by the above statute. It is possible that some confessed judgments do not provide for payments which will be due before October 1, 1945. Obviously the legislature did not intend to discriminate against the owners of lands affected by such judgments.

It is plain that the legislative intent was to afford the same opportunity to owners of all lands on which the taxes are delinquent. A confessed judgment does not constitute payment of the taxes incorporated in it. Any amounts collected as taxes under the confessed judgment are applied to the payment of the delinquent taxes in the inverse order to that in which they were levied. The taxpayer who has confessed judgment and wishes to avail himself of Laws 1945, Chapter 324, must pay the amount of the costs and the delinquent taxes as they are shown on the county auditor's books after credit has been given as above stated for payments made under the confession of judgment.

PAUL JAROSCAK,
Special Assistant Attorney General.

Itasca County Attorney.

May 7, 1945. 412-A-10

EQUALIZATION

## 214

**County board meeting—Time for—Time limit of four weeks specified in Minn. Stat. 1941, § 274.14, is directory.**

### Facts

The facts giving rise to the request for this opinion may be quoted as follows from the letter of the County Auditor of Goodhue County, dated July 17, 1945, to-wit:

> "The County Board of Equalization met on the third Monday in July (July 16) and I quote from the minutes of their proceedings.
>
> " 'The Auditor reported that all the assessors had made a return of their assessments except the City of Red Wing. That he had made diligent effort to secure the books, listing sheets and statements from the assessor of the City of Red Wing but to date they had not been returned.
>
> " 'A communication was read from the City Clerk of Red Wing stating that he had been instructed by the City Council of Red Wing to notify the County Board of Equalization that the return of the assessment rolls and records of the City of Red Wing for the year 1945 was being held up at the request of the State Tax Commissioner, and that it would be impossible to comply with the provisions of the Statutes and City Charter relative to the return of said assessment rolls and records until the work has been completed.'
>
> "I, as County Auditor, called the Commissioner of Taxation and talked the matter over with Mr. Stone, the Deputy, and he informed me that the County Board could proceed with their equalization without the City of Red Wing and that when they adjourned they should adjourn 'subject to call'."

### Question 1

Can the County Board of Equalization proceed with the equalization of assessments without the assessment book for the City of Red Wing?

### Opinion

This question is answered in the affirmative. The statute makes it the duty of the County Board of Equalization to "examine and compare the returns of the assessment of property of the several towns or districts." This duty must be performed in so far as it is possible to do so. The board cannot get the books for the City of Red Wing. It should nevertheless proceed with its duty as the Board of Equalization without the Red Wing books. It could be that before the equalization is completed these books may be available.

**Question 2**

"The City of Red Wing informs us it will take six weeks to two months to complete the revaluation. The law provides the County Board of Equalization must adjourn on or before August 13, 1945. Can the County Board of Equalization be in session after that date to equalize the City of Red Wing?"

**Opinion**

This question is also answered in the affirmative. The statute does not provide that the board must adjourn sine die at the end of four weeks. The law reads thus (Minnesota Statutes 1941, Section 274.14, Mason's Statutes 1927, Section 2050):

> "The county board of equalization may continue in session and adjourn from time to time during four weeks, commencing on the third Monday of July; but, after final adjournment, the board shall not change the assessed valuation of the property of any person, or reduce the aggregate amount of the assessed valuation of the taxable property of the county."

The law does not make it mandatory that the work of the Board of Equalization be completed within four consecutive weeks. The provision as to time is directory and for the purpose of expediting the work of equalization. The board can meet and adjourn from time to time; and if the work is not entirely completed within the four consecutive weeks following the third Monday in July, then the board may hold a session or sessions for equalization purposes after the expiration of the four weeks without invalidating the assessment, provided there has been no final adjournment of the board.

Hence it would be proper in my opinion for the board to meet and complete the work of equalization as to the books which they have available, and then adjourn to a definite time later when the Red Wing books will be available. I do not feel that the tax would be invalidated by failure to complete the equalization within the four weeks' time.

Since there must be no sine die adjournment of the board of equalization before the final meeting, adjournment should be taken to a day certain until the work is finally completed when the meeting can adjourn finally.

The case of Faribault Water Works Company vs. County of Rice, 44 Minn. 12, involved a case in which a personal property assessment was raised by the city council of the city of Faribault after July 1. The common council, sitting as a Board of Equalization, was in session on June 29. On that date a recess was taken until July 2. On July 2 notices of intention to raise certain assessments were sent out, including one to this plaintiff, and directing him to appear on July 5. On July 5 the plaintiff did appear and at his request another adjournment was taken until July 8, on which date, the council acting as such board of equalization, raised the plaintiff's assess-

ment $20,000. The court held that this action of the board taken after July 1 was not invalid.

> "It did not invalidate the action of the board, unless it is to be considered that the statute requires the action of the board to be taken without delay, and prior to the time specified when the assessor's return should be made, and that in these things the provisions of the statute are mandatory. Under the principle of construction laid down in Kipp v. Dawson, 31 Minn. 373 (17 N. W. Rep. 961, and 18 N. W. Rep. 96), the provisions of the statute here in question are to be deemed directory rather than mandatory. But, apart from the general principle of construction above referred to, the statute discloses the intention of the legislature to be that strict compliance with these provisions shall not be strictly necessary. Section 40 of the tax-law (Gen. St. 1878, c. 11) declares that the failure to give the prescribed notice of the meeting of the board of review, or to hold such meeting, shall not vitiate the assessment except as to the excess of valuation or tax shown to be unjustly made or levied; and section 60, as amended by chapter 2, Laws 1885, declares that 'no omission of any of the things by law provided in relation to such assessments and levy, or of anything required by any officer or officers to be done prior to the issuance of such citation, (from the district court to show cause why judgment should not be rendered for delinquent personal-property taxes) shall be a defense or objection to such taxes, unless it be also made to appear to the court that such omission has resulted to the prejudice of the party objecting, and that such taxes have been unfairly or unequally assessed.' No prejudice is shown to have resulted from any departure from the letter of the statute in this case."

In the case of State vs. West Duluth Land Company, 75 Minn. 456, defense to a tax was based partly on the ground that it included a levy made by the park board of Duluth. By the terms of the law, the park board was required to certify its tax lexy to the county auditor before October 1. The tax levy was not certified to the auditor until October 14. The court said (page 466):

> " * * * This statutory provision as to the time for certifying is merely intended for the guidance of the park board, and is designed to insure an orderly and prompt performance of a public duty. It is simply directory, and a failure to certify on or before October 1 does not affect the taxpayer, injuriously or otherwise. See Kipp v. Dawson, 31 Minn. 373, 381, 17 N. W. 961, and 18 N. W. 96; Banning v. McManus, 51 Minn. 289, 53 N. W. 635. An omission to certify on or before the last day mentioned cannot be a defense to the proceedings, because it cannot affect the substantial merits, nor could it have resulted to the prejudice of this or any other objector. * * * "

By a parity of reasoning I am inclined to hold that the four weeks' provision in the statute is directory, and that failure to complete the equalization within the four weeks' time would not vitiate the assessment, providing it was regular in all other respects.

I quote from the syllabus in the case of Kipp vs. Dawson, 31 Minn. 373, as follows:

> "Where the provision of a statute as to the time when an act shall be done is intended merely for the guidance of public officers, so as to insure the orderly and prompt performance of public business, a disregard of which cannot injuriously affect the rights of parties interested, it will be deemed merely directory; but where it is intended for the protection of the citizen, and to prevent a sacrifice of his property, and is such that, by a disregard of it, his rights might be injuriously affected, it will be deemed mandatory. * * * "

cf. McMillan v. Board of County Commissioners, 93 Minn. 16.

Even if the court should hold that the words "four weeks" mean "four consecutive weeks" and hence that any changes made after the expiration of that time were improper, such a holding would not necessarily invalidate all the work of the board and the actions taken during the four weeks' period.

RALPH A. STONE,
Assistant Attorney General.

Goodhue County Attorney.
July 30, 1945. 406-B

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**EXEMPTION**

## 215

**Airports—Municipally owned and operated—Established pursuant to Laws 1945, Chapter 303—Exempt from property taxation**—Constitution, Art. IX, § 1, MS1941, § 272.02.

**Facts**

An airport known as Fleming Field, owned and formerly operated by the Navy Department of the United States Government, is located in Dakota County, partly within the incorporated limits of the village of Inver Grove and partly in Inver Grove Township. The Navy Department has continued the use of the field and has granted a permit to the city of South Saint Paul to operate the airport as a municipal airport, with the understanding that as soon as the airport has been declared surplus the city will be permitted to acquire fee title to the airport. In the operation of the airport, the city intends to rent hangar space to owners of private planes, charge a fee to users of the field, and sell gas and oil on the field to operators of privately-owned planes.

**Question**

"May I have your opinion as to whether or not the field acquired and operated by South Saint Paul, as briefly described herein, is tax exempt?"

**Opinion**

We concur in your opinion that the question should be answered in the affirmative, upon compliance by the city with the provisions of Laws 1945, Chapter 303, relating to the acquisition and operation of a municipally owned airport.

Section 1, Subd. 5 of that act defines an airport as any area of land or water except a restricted landing area which is designated for the landing and take-off of aircraft, whether or not facilities are provided for the shelter, servicing or repair of aircraft.

Section 6, Subd. 6, requires that all proposed airports shall first be licensed by the Commissioner of Aeronautics and further requires that any municipality or person acquiring property for the purpose of constructing or establishing an airport shall prior to such acquisition make application to the Commissioner for a certificate of approval.

Section 11, Subd. 1, authorizes the acquisition, establishment and operation of airports by municipalities either within or without the territorial limits of such municipality and within or without this state, and, amongst other things, specifically authorizes such municipality "to construct, install, and maintain airport facilities for the servicing of aircraft and for the comfort and accommodation of air travelers; and to purchase and sell equipment and supplies as an incident to the operation of its airport properties."

Section 12, Subd. 1, declares that the acquisition of lands for the establishment of airports and the construction, maintenance and operation of airports and air navigation facilities, and the exercise of other powers granted municipalities by the act are public, governmental and municipal functions, exercised for a public service and matters of public necessity.

Section 14 provides "Any property acquired or used by a municipality pursuant to the provisions of this act shall be exempt from taxation to the same extent as other property used for public purposes."

Section 17, Subd. 4, in addition to the general powers conferred by the act, authorizes a municipality establishing an airport under the provisions thereof "to lease or assign for a term not exceeding 30 years to private parties, any municipal or state government of the national government, or any department of either thereof, for operation or use consistent with the purposes of this act, space, area, improvements, or equipment on such airports."

The tax exemption provided for in Section 14 is "to the same extent as other property used for public purposes." Article IX, Section 1, of the State Constitution and Minnesota Statutes 1941, Section 272.02, exempt from ad valorem taxation public property used exclusively for any public purpose. Under these general provisions our Supreme Court held, in County of Anoka v. City of St. Paul, 194 Minn. 554, 261 N. W. 588, that rents and charges made by the city for the furnishing of water did not affect the exempt status of the waterworks. We are of the opinion that the leasing

of airport facilities, the charging of fees for the use thereof, and the sale of equipment and supplies incident to the operation of the airport, and within the scope of Chapter 303, will not deprive the property of exemption from general property taxation.

DAVID W. LEWIS,
Assistant Attorney General.

South St. Paul City Attorney.
March 1, 1946. 414-A-11

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## 216

**Cemeteries — Private corporations and associations — Tract of land across from main tract—MS1941, §§ 306.01-306.87.**

### Facts

"The Acacia Park Cemetery Association owns a large tract of land in Dakota County which is platted and used for cemetery purposes. Sometime after the main cemetery tract was purchased, the Acacia Park Cemetery Association purchased a ten acre tract which lies across a county highway from the main tract.

"The ten acre tract is used exclusively to house a caretaker for the cemetery, to store tools for the entire cemetery and also there is a small greenhouse which is used exclusively to raise flowers to beautify the entire cemetery grounds. No flowers produced in the greenhouse are sold at either wholesale or retail and the cemetery association has given some consideration to erecting a mausoleum on said ten acre tract.

"The Association has its own plat of the small tract but has never filed the same with the proper officials of the County though they now intend to do so this year."

### Question

Whether, in view of the decision of the Minnesota Supreme Court in State v. Ritschel, 20 N. W. 2d 673, said ten acre tract of land is exempt as land of a cemetery association under Minnesota Statutes 1941, Sections 306.01-306.87.

### Opinion

The mere fact that an association owning the land is one organized under Section 306.01 et seq. ibid, does not ipso facto render the land exempt. The land must be devoted to a use which the statute recognizes as a basis for exemption. Whether the ten acre tract satisfies this test is a question of fact (State v. Willmar Hospital, Inc., 212 Minn. 38, 42, 2 N. W. 2d 564) which cannot be determined by the Attorney General.

It is my opinion that, assuming the ten acre tract is found to be reasonable in size for the purpose for which it is used, the decision in the Ritschel case does not as a matter of law compel a finding that the ten acre tract is taxable. The court in that case held that under Minnesota Statutes 1941, Section 272.02 (exempting public burying grounds from taxation) the use of the property is essential to constitute it a burying ground, that Section 306.14 ibid did not exempt property merely because it was owned by an association formed under Chapter 306 ibid, but that the ownership and use must concur and the use must be one which the statute recognizes as a basis for exemption. After reviewing Section 306.02 ibid which provides the purposes for which such a corporation may be organized, the court states the rule as follows (20 N. W. 2d 676):

> " * * * a statute providing that the property of a corporation shall be exempt from taxation should be construed as applying only to the property used for the purpose or object for which it was created. The exemption does not apply to property not so used."

In the Ritschel case none of the property owned by the association had been used as a burying ground nor could any of it be so used under the city ordinance then in effect, consequently the court affirmed the decision of the lower court which held that the title to the land was forfeited to the state for delinquent taxes.

The question of whether property used by a cemetery association for the purpose of maintenance and beautification of the cemetery was not presented in the Ritschel case. The court recognizes that uses of land incidental to the operating of a cemetery might sustain an exemption and states (20 N. W. 2d 678):

> "Of course the exemption is not confined to mere graves * * * . Owning and holding land for such future needs (interments), if reasonable in amount and not beyond reasonable anticipation, **are incidental to operating a cemetery.**"

In State v. Lakewood Cemetery Association, 93 Minn. 191, 101 N. W 161 (which the court in the Ritschel case distinguishes) the cemetery association purchased a tract of land for the purpose of enlarging the cemetery. The land had not been platted, but it was the intention of the association to plat it and sell it on the same basis as the other cemetery lots. A greenhouse had been maintained on part of the land and, since the purchase had been used by the cemetery association in growing flowers and plants for the pure purpose of beautifying the cemetery, surplus stock of the greenhouse was sold for the benefit of the association. The court in holding the land to be exempt from taxation ruled that the association had an implied authority to provide for the future needs of the public in the matter of obtaining suitable land for the burial of the dead. As to the greenhouse the court said:

> "The use of a small portion thereof for a greenhouse for the purpose of growing flowers and plants to be used in beautifying the grounds, clearly, in our judgment, falls within the authority conferred

upon appellant. It is a matter of common knowledge that greenhouses are maintained by many of the large cemetery associations throughout the country, and the sale of a small amount of the surplus stock is but an incident to the general management. We are of the opinion the land so acquired is exempt from taxation."

The fact that here the land on which the greenhouse was located was to be used in the future for interments is not in my opinion a prerequisite to the rule applied. See State ex rel. Benson v. Lakewood Cemetery Association, 197 Minn. 501, 267 N. W. 510; Proprietors Rural Cemetery Association v. Commissioners of Worchester County, 152 Mass. 408, 25 N. W. 618, 10 L. R. A. 365; Ewing Cemetery Association v. Township of Ewing, 126 N. J. L. 610, 20 Atl. 2d, 607. Under statutes providing similar exemptions the Minnesota court has sustained the exemption in cases in which the uses of land were incidental to but reasonably necessary to the functions favored by the exemption. Ramsey County v. Macalester College, 51 Minn. 437, 53 N. W. 74, State v. Carleton College, 154 Minn. 280, 191 N. W. 400, State v. H. Longstreet Taylor Foundation, 198 Minn. 263, 269 N. W. 469.

I conclude that State v. Ritschel, (Minn.) 20 N. W. 2d, 673, is not decisive of the question raised in your inquiry. If the ground involved is a part of the greater area which as a whole constitutes one cemetery, and the ground involved is essential thereto, it is exempt from taxation; otherwise not.

KENT C. van den BERG,
Assistant Attorney General.

Dakota County Attorney.
February 5, 1946. 414-D-4

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## 217

**Personal property—Bank building with fixtures leased to United States for postoffice purposes**—MS1941, § 290.361.

### Facts

A state bank within your county owns a building, together with fixtures contained therein. A part of the building is leased by the bank to the United States for postoffice purposes. The bank owns the postoffice fixtures and receives rent from the government for the building space and fixtures in the amount of $115 a month. The fixtures in the postoffice have always been considered personal property and have not been considered as attached to or a part of the building. The rental received by the bank is included within and reported by the bank as a part of bank income. The assessor of the village wherein the bank is located assessed the fixtures in the space used for the purposes of a postoffice, as personal property belonging to the bank and as property not included within the terms of Minnesota Statutes 1941,

Section 290.361. The bank contends that such fixtures are exempt from all personal property taxes by virtue of said statute.

**Question**

"Are the postoffice fixtures referred to exempt from all personal property taxes by reason of the provisions of Minnesota Statutes 1941, Section 290.361?"

**Opinion**

Minnesota Statutes 1941, Section 290.361, imposes an excise tax measured by net income on national and state banks, and provides by the last sentence thereof:

"The tax hereby imposed upon national and state banks shall be in lieu of all taxes upon the capital, surplus, property, assets and shares of these banks except taxes imposed upon real property."

The fixtures contained within the space used as a postoffice are not owned and used for any purpose essential to or connected with the ownership and operation of the banking institution. The question is therefore presented as to whether all property of a bank except real property, and including property which is not devoted to banking purposes, is exempt from ad valorem taxation by virtue of the in lieu provisions of the statute above quoted.

Similar in lieu provisions are found in the sections of the statute relating to the payment of gross earnings taxes upon certain types of businesses and taxpayers. Thus, by the provisions of Minnesota Statutes 1941, Section 295.34, there is imposed upon telephone companies a tax measured by gross earnings "which shall be in lieu of all other taxes" except certain taxes not here material. In the case of State v. Pequot Rural Telephone Company, 188 Minn. 520, 247 N. W. 695, the court was concerned with the question of whether certain real property owned by the defendant was exempt from the general property tax and, in passing upon the in lieu provisions of the gross earnings tax law relating to telephone companies, stated:

"Our statute imposing the gross earnings tax is based upon the assumption that the property will be held and used for telephone purposes. State ex rel Minn. T. Ry. Co. v. District Court, 68 Minn. 272, 71 N. W. 27; State v. Twin City Tel. Co., 104 Minn. 270, 286, 116 N. W. 835. * * * The true rule is that property owned by a telephone company is exempt from an ad valorem tax if it is principally devoted to telephone use and not subordinated to other uses. Such use by the gross earnings taxpayer must be reasonably necessary, ordinary, and usual in the operation of its business. * * * Whether a gross earnings taxpayer must pay an ad valorem tax on real estate which it owns depends upon its main or principal use."

While the court found that the real property in question was used for telephone purposes and was therefore exempt from the ad valorem tax, it rec-

ognized a rule of long standing that the property of a gross earnings taxpayer not devoted to the use for which the company was organized, was subject to ordinary ad valorem taxation, although the statutory exemption read "in lieu of all other taxes."

In an opinion dated July 20, 1943, file 414-A-9, this office held that the livestock, farm machinery and grain of insurance companies paying a gross premiums tax "in lieu of all other taxes," except taxes upon real property imposed under the provisions of Minnesota Statutes 1941, Section 60.63, as amended by Laws 1943, Chapter 73, must pay a personal property tax upon such chattels.

You state your conclusion that the fixtures owned by the bank and used by the postoffice are not exempt from personal property tax. We concur in your opinion. When our legislature adopted the bank excise tax law at its 1941 Session it did so with full knowledge of the interpretation placed upon the gross earnings tax in lieu provisions by our courts in State v. Pequot Rural Telephone Company, supra, and the decisions cited therein. In employing language similar to the wording of the gross earnings tax law, we believe that the legislature clearly intended to impose personal property ad valorem taxes against chattels of a bank which are in no way used by it in the operation of the business of banking.

DAVID W. LEWIS,
Assistant Attorney General.

Jackson County Attorney.
June 8, 1945. 414-A-9

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## 218

**Real property—Vacant lots acquired by church for purpose of erecting new church thereon in near future**—Const., Art. IX, § 1, MS1941, §272.02.

**Facts**

"On July 27th, 1945, the Church of St. Joseph, a religious corporation, purchased the following described real estate, to-wit:

> The North 30 feet of Lot Five, and all of Lots Six, Seven, Eight and Nine, in Block Two, Hodgkins Addition to the Village of Waldorf, Waseca County, Minnesota.

The deed to the church was filed for record in the office of the Register of Deeds on the same day. At the present time the lots are not being used, but it is contemplated that a new church will be erected thereon in the near future."

**Questions**

"1. Must the religious corporation pay the 1945 tax, due and payable in 1946?

"2. Are the lots tax exempt now, under the statute granting exemption to churches and church property?"

**Opinion**

1. The Constitution, Article IX, Section 1, and Minnesota Statutes 1941, Section 272.02, Subd. (5), provide that "all churches, church property, and houses of worship" are exempt from taxation. Minnesota Statutes 1941, Section 273.01, provides that all real property subject to taxation shall be listed and assessed every even numbered year with reference to its value on May 1 preceding the assessment. May 1 is therefore the controlling date. On May 1, 1945, the lots in question were not "church property." The religious corporation did not become owner of the lots until July 27, 1945. It follows that the lots properly remained on the tax rolls for the year 1945 and that the tax assessed for that year legally is due and owing. This assumes, of course, that the lots were in private ownership on May 1, 1945, and did not fall within any of the constitutional or statutory classes of exempt property on that date.

2. Whether the lots are entitled to exemption from ad valorem assessment for the year 1946 and thereafter is a fact question which must be determined in the first instance by the local assessor. In applying the constitutional tax exemption of "all churches, church property, and houses of worship," the Minnesota Supreme Court has held that the test is the use to which the property is devoted or about to be devoted. In the case of State v. Second Church of Christ Scientist (1932), 185 Minn. 242, 240 N. W. 532, the court stated that the rule is that, where there is present need for a site for new church buildings, property purchased for that purpose, a good faith intention to build a church plant on the property within a reasonable time, a fund being continuously raised for that purpose, an architect employed to prepare plans for the buildings, and one unit of the buildings thereafter commenced and completed within a reasonable time, the property is exempt from general taxes, at least from the time the architect is so employed.

The local assessor necessarily will have to give consideration to all of these factors. If he determines that the lots are not entitled to exemption for the year 1946, the religious corporation may make application, under Minnesota Statutes 1941, Section 270.07, to the Commissioner of Taxation, for such relief. If that application is denied the corporation may litigate the question in the courts.

CHARLES P. STONE,
Special Assistant Attorney General.

Waseca County Attorney.
June 5, 1946. 414-D-6

MORTGAGE REGISTRY TAX

## 219

**Computation of tax—Where less than face amount of mortgage—Exemption of Reconstruction Finance Corporation under bank participation agreement—MS1941, § 287.07.**

### Statement of Facts

The facts disclose that a bank has taken a mortgage in the face amount of $18,000 under a Bank Participation Agreement with the Reconstruction Finance Corporation. Only $11,000 has actually been advanced on the mortgage to date. The remaining $7,000 is to be advanced at a future date if needed by the mortgagor. The Reconstruction Finance Corporation has not advanced any part of the $11,000 but under the Participation Agreement upon ten days' notice it may be called upon to take up 75 per cent of the amount advanced by the bank. This notice has not been given by the bank. Payments, including interest, are made directly to the bank under the mortgage, but the bank turns over to the Reconstruction Finance Corporation a small per cent in reimbursement for its agreement to secure the loan as above indicated.

### First Question

The first question is whether or not Section 287.07 of 1941 Minnesota Statutes applies to the instant case so that a statement may be filed showing the money actually advanced whereby the mortgage registry tax may be paid only on the portion advanced.

### Opinion

It is the opinion of this office that Section 287.07 does not apply to the instant situation and that the mortgage registry tax must be paid on the full face amount of the mortgage. Section 287.07 applies only in a case where a mortgage is made to a mortgagee in trust to secure the payment of bonds or other obligations to be subsequently issued. The mortgage in the instant case was not made to a mortgagee in trust and therefore does not meet the requirements of this section. Had the Legislature not enacted Section 287.07 the mortgage registry tax would have been imposed upon the face amount of the type of mortgage covered by that section even though only part of the money was advanced. Since the mortgage in the instant case does not qualify under the exemption provided in Section 287.07, the mortgage registry tax must be computed upon the full $18,000 even though less than $18,000 has been advanced.

### Second Question

The second question is whether or not 75 per cent of the amount of the mortgage is exempt from the mortgage registry tax since the Reconstruc-

tion Finance Corporation is an agency of the United States Government and may be called upon to take up that portion of the mortgage.

**Opinion**

It is the opinion of this office that no part of the mortgage is exempt from the mortgage registry tax. The bank is the named mortgagee. It made the entire advancement under the mortgage. The Reconstruction Finance Corporation has merely agreed to secure the mortgage. It has advanced nothing under the mortgage. The mortgage constitutes the exclusive property of the bank and, hence, is subject in its entirety to the mortgage registration tax.

T. R. ANDERSON,
Special Assistant Attorney General.

Fillmore County Attorney.
March 6, 1946. 418-C-1

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PERSONAL PROPERTY

## 220

**Judgment — Execution sale upon judgment — Distribution of proceeds received therefrom**—MS1945, §§ 94.09, 94.16, 277.10, 277.14, 277.16.

**Facts**

"A personal property tax judgment was entered, execution issued, real property levied upon and sold by the Sheriff to the State of Minnesota. Since that time the County has rented the building and now has in its possession $180 proceeds from such rental collection."

**Question**

" * * * how should the county auditor distribute this money?"

**Opinion**

The difficulty in the solution of your problem arises out of the fact that Minnesota Statutes 1945, Chapter 277, relating to the collection of delin quent personal property taxes, contains no specific provision authorizing either the state or the county to bid at an execution sale upon a personal property tax judgment.

The enforcement of personal property taxes is a special proceeding controlled by the statutes establishing it, and the legislature has provided a course of procedure in tax cases complete in itself. **Justus v. Board,** 94 Minn. 72.

These statutes, Section 277.10, provide for the issuance of an execution upon judgment at the request of the county attorney and that no property

of the debtor shall be exempt from seizure thereon. Executions may be renewed and reissued in the same manner as provided by law in case of executions upon judgments in civil actions.

The judgment, when docketed, becomes a lien upon the real property of the debtor in the county within which the judgment was rendered to the same extent as other judgments for the recovery of money. Section 277.14.

It is stated in 61 C. J., Section 1532, page 1131, as follows:

> "Where by law the taxes assessed on personal property become a lien on the owner's realty, the lien may be enforced by sale of the land for the delinquent personal taxes * * * ."

Obviously, where an execution has been issued, the property of the debtor, either real or personal, may be seized and sold upon execution sale.

However, a sale upon execution must be for cash and to the highest bidder. Dunnell's Digest, 2d, Section 3533. Neither the state nor the county has had any funds available so as to bid in for cash property sold upon execution sale to satisfy a personal property tax judgment. The statutes contain no provision whereby the state may bid in the property offered for sale in the amount of the tax judgment as is the case in real estate tax sales.

Absence of this statutory authority raises serious doubt as to the validity of the sale.

With respect to the collection of personal property taxes, the county attorney is charged with the duty of conducting proceedings for the collection thereof. Section 277.02. **Thwing v. City of International Falls**, 148 Minn. 37, 39.

Section 277.16 provides the manner and method for satisfying a personal property tax judgment upon payment to the county treasurer.

The county attorney has no authority to settle a personal property tax judgment. Attorney General's opinion January 17, 1945, file 421a-8. The discharge of the duties imposed by law upon the county attorney requires the exercise of discretion. Whether he may bid in behalf of the state for the amount of a tax judgment or any other amount when property is offered for sale upon execution is doubtful, particularly so by reason of the absence of statutory authority. Such authority can only be implied as being necessary and incidental to his duty to conduct the proceedings for the collection of personal property taxes.

Perhaps at the most the sale is merely irregular, and until vacated or set aside should be recognized as valid. We think that it should be so considered.

If the sale had been made to someone other than the state, no difficulty would have been encountered in distributing the proceeds therefrom or in delivering a proper certificate to the successful bidder as provided by Minnesota Statutes 1945, Section 550.22.

If, when the property was offered for sale, there were no bidders, the sheriff, in the exercise of sound discretion, could have adjourned the sale from time to time. **Singer v. Novak**, 168 Minn. 208.

When a personal property tax judgment has been entered, the state holds the same in trust for the benefit of the taxing units entitled to participate in the distribution thereof upon payment.

We believe that any money collected as the result of proceedings initiated under Chapter 277, supra, should be distributed in the same manner as personal property taxes. Consequently, the $180, which has been collected as the result of proceedings to collect delinquent personal property taxes, should be distributed in the same manner as personal property taxes.

You further state that proceedings have been instituted under Mason's Statutes 1927, Section 6442, being Minnesota Statutes 1945, Section 94.09, and you inquire how the proceeds from such sale should be distributed.

Section 94.09 provides in part:

> "All tracts or lots of real property belonging to the State of Minnesota or that may hereafter accrue to the state, including tracts or lots which have escheated to the state, may be disposed of in the following manner; provided, sections 94.09 to 94.16 shall not apply to school or other trust fund lands, belonging to the state, or that may hereafter accrue to the state, under and by virtue of any act of Congress. The sale or disposition of this real estate shall be under the supervision of the governor, attorney general, and state auditor, who may authorize and direct a sale when in their judgment it would be advantageous to do so. * * * "

This statute is apparently broad enough to permit a sale of the lands thereunder. Authority is granted to the officers therein mentioned to direct a sale when in their judgment it would be advantageous to do so.

Section 94.16 provides that the proceeds from such sale shall be credited to the general revenue fund of the state. Nevertheless the ultimate results to be accomplished by the issuance of an execution upon a personal property tax judgment should not be overlooked. The state was not the absolute owner of the judgment lien. The state's interest in the premises as a purchaser can be no greater than its interest in the judgment lien. Its interest in either is in the nature of a trust for the benefit of the taxing units, and any money derived therefrom should be distributed in the same manner as receipts from the collection of personal property taxes.

We do not believe that the practice and procedure which has been followed in this case should be generally adopted and applied until the legislature has provided the necessary procedure therefor. This would necessitate amending our present laws for the enforcement and collection of delinquent personal property taxes so as to specifically authorize the state, or the county, to bid in property upon an execution sale on a personal property tax judgment and for the sale of such property after title thereto has

been acquired and for the distribution of the proceeds received from a sale thereof.

Until such legislation has been enacted, doubt will exist as to the authority for the course of the proceedings followed in the instant case.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Cass County Attorney.
August 28, 1946. 421-A-8

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## 221

**Real estate taxes—Collection thereof—County treasurer is authorized to accept either the entire personal property tax or a half thereof prior to March 1 and the remaining half prior to July 1. There is no legal provision for paying real estate taxes under protest, nor is there any legal provision for making partial payments thereon, without a court order fixing the same, except the provision allowing payment of half of the taxes prior to June 1 and of the remaining half prior to November 1**—MS1941, §§ 275.28, 276.01, 276.02, 278.01.

**Facts—Problem One**

"Mr. A has a personal property tax of $25.00. Prior to March 1 he pays $15.00 thereon. He fails to pay the balance of the tax on July 1. Section 2088, Volume 3, Mason's Minnesota Statutes provides: 'Except when the amount of such tax exceeds the sum of $10.00, the same shall not become delinquent if half thereof is paid prior to March 1 and the remaining half is paid prior to July 1 next following the year assessed'."

**Questions**

"1. May the county treasurer accept more than half but less than the full amount of the tax prior to March 1, or must he refund to the taxpayer any amount tendered in excess of half of the tax?

"2. If more than half is accepted, what effect does such surplus payment have upon the judgment entered for failure to pay the balance prior to July 1?

"3. May the county treasurer accept less than half if tendered prior to March 1? This problem arises by reason of taxpayers mailing in remittances and not knowing the exact amount of their tax."

**Answer**

All three of these questions can be covered by the same answer. In my opinion, the county treasurer is authorized to accept either the entire per-

sonal property tax or a half thereof prior to March 1. He has no authority to accept a payment of more than a half unless it is for the amount of the whole tax; and he has no authority to accept less than a half under any circumstances whatsoever. The portion of the statute quoted above from Mason's 1940 Supplement, Section 2088 (Minnesota Statutes 1941, Section 277.01) expressly provides that the tax "shall not become delinquent if half thereof is paid prior to March 1st and the remaining half is paid prior to July 1st." The words "half thereof" referring to the payment which is allowed to be made prior to March 1 preclude any interpretation which would permit the county treasurer to accept less than a half. The words "remaining half" referring to the payment which is allowed to be made prior to July 1 preclude any interpretation which would permit him to accept more than a half but less than the full amount of the tax prior to March 1. Otherwise, the unpaid balance would not be "the remaining half." It would necessarily be a remaining fraction less than half.

If prior to March 1 less than half of the tax is tendered, the county treasurer should refuse to accept it; if more than a half but less than the entire tax is tendered, he should accept only a half. This is a simple matter where a cash tender is made at his office. If prior to March 1 a check for less than half of the tax is tendered, he should return it promptly with an explanation that he is not permitted by law to accept payment of any amount other than a half or the whole of the tax prior to that date; if the check is for more than half but less than the whole tax, he should likewise return it promptly with the same kind of explanation. In the event that he has accepted less than half of the tax, the amount so accepted should be refunded to the taxpayer after a resolution authorizing the refund and the issuance of a warrant therefor has been adopted by the county board. A similar procedure should be followed to refund any excess accepted by the county treasurer prior to March 1 over and above a half of the tax where less than the whole of the tax had been tendered. In my opinion, the county treasurers' acceptance of such excess has no effect upon a judgment entered for failure to pay the remaining half prior to July 1.

**Facts—Problem Two**

"Mr. A owns real estate on which he resides on May 1 of the taxable year. When he calls at the treasurer's office to pay his tax in the succeeding year he learns that the real estate has not been assessed as A's homestead. A makes application to county auditor for correction of assessment. Before A's homestead classification can be determined A's real estate will become delinquent unless paid. A offers to pay tax under protest and tenders to the county treasurer one-half of the tax computed on the basis of A's homestead classification which is less than one-half of the tax as assessed."

**Questions**

"1. May the county treasurer accept less than one-half of the tax as shown by his books if tendered prior to June 1 where tender is made upon the above stated facts?

"2. May the county treasurer under any circumstances accept less than one-half of the tax as shown by his books if tendered prior to June 1 and taxpayer makes payment under protest?"

**Answer**

Both of these questions are answered in the negative. Mason's 1940 Supplement, Section 2104 (Minnesota Statutes 1941, Section 279.01) provides in part:

> " * * * when the taxes against any tract or lot exceed one dollar, one-half thereof may be paid prior to June 1st * * * ."

This language is perfectly clear. It means one-half of the taxes against the tract or lot. The taxes against the tract or lot are the taxes appearing against it on a tax list prepared and delivered by the county auditor to the county treasurer. The latter is "the receiver and collector of all the taxes extended upon the tax list of the county." In my opinion, A's tender of less than one-half of the tax as assessed should be rejected. Mason's Minnesota Statutes 1927, Sections 2071, 2074 and 2075 (Minnesota Statutes 1941, Sections 275.28, 276.01 and 276.02).

There is no legal provision for making any partial payments on real estate taxes, without a court order fixing the same in a proceeding pursuant to the statute hereinafter referred to, except the provision allowing the payment of one-half of the taxes prior to June 1 and the payment of the remaining one-half prior to November 1. In a proceeding under Mason's 1940 Supplement, Sections 2126-1, etc. (Minnesota Statutes 1941, Sections 278.01, etc.) the district court may, pending the determination of the claims, objections and defenses made with respect to certain taxes, fix the amount to be paid on such taxes prior to each of the above dates, as set forth in these statutory provisions.

Real estate taxes are paid under protest for the purpose of showing that the payment is made under duress. **In re Petitions of Slaughter,** 213 Minn. 70, 5 N. W. 2d 64. Duress is not involved in the second question above where payment under protest is mentioned.

PAUL JAROSCAK,
Special Assistant Attorney General.

Pennington County Attorney.
April 19, 1945. 450-F-1

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**REDEMPTION**

## 222

**Expiration—Notice—Service of—Forfeiture to the state—Notice should be served after the commencement of the publication—MS1941, § 281.23.**

**Facts**

"Notice of expiration of redemption as provided by Section 281.23, Chapter 281, Laws 1941, was given to the official newspaper for publication. The paper failed to publish the notice for 'three successive weeks.' After commencement of such publication, as provided in subdivision five, services were made by the sheriff, and before the error on the part of the newspaper was discovered. It will now be necessary to republish for three successive weeks. The notice now to be published will be the same notice previously published. The services by the sheriff will antedate the publication now to be made."

**Question**

"Will it be necessary that second services be made following the second publication?"

**Opinion**

I would advise you to have the sheriff again serve the notices following the commencement of the second publication. That is what the law directs. Minnesota Statutes 1941, Section 281.23, Subdivision 5, Mason's Supplement 1940, Section 2164-12, reads:

> "Forthwith after the commencement of such publication the county auditor shall deliver to the sheriff of the county a sufficient number of copies of such published notice for service upon the persons in possession of all parcels of such land as are actually occupied, together with a copy of the posted notice or notices referred to in such published notice. Within 30 days after receipt thereof, the sheriff shall make such investigation as may be necessary to ascertain whether the parcels covered by such notice are actually occupied or not, and shall serve a copy of such published notice upon the person in possession of each parcel found to be so occupied, in the manner prescribed for serving summons in a civil action. The sheriff shall make prompt return to the auditor as to all notices so served and as to all parcels found vacant and unoccupied."

As the law provides that the notice shall be delivered to the sheriff and served after the commencement of the publication, I think that procedure should be followed. Tax laws are strictly construed and must be implicitly followed. While it might be that the court would hold that the service of the notice before the commencement of the publication was a valid service, yet the safest course to pursue is to have the sheriff serve the notices over again after the new publication has commenced.

RALPH A. STONE,
Assistant Attorney General.

Hubbard County Atotrney.
July 23, 1945. 423-C

TAX FORFEITED LANDS

## 223

**Repurchase—Former owner—Act does not apply to lands which have been classified by county board as conservation lands. Such classification cuts off former owner's privilege of repurchase—L 1945, C 296, § 8.**

**Facts**

The owner of certain lands which had forfeited to the state for nonpayment of taxes has undertaken to repurchase the same under Laws 1945, Chapter 296, and subsequent to the enactment of Chapter 296 but before the owner undertook to repurchase, the county board classified the lands as conservation lands.

**Question**

Whether the owner in such a case may repurchase under Chapter 296.

**Opinion**

We assume the owner has complied with the requirements of Chapter 296, ibid, and would be entitled to repurchase but for the possible effect of the land having been classified as conservation land by the county board before consummation of the repurchase.

Section 8 of Chapter 296, ibid, provides:

> "Exceptions. This act shall not apply to any lands which have been classified by the county board as conservation land. * * * "

There is, in our opinion, nothing which limits the application of this exception to cases in which the classification by the county board took place prior to the effective date of Chapter 296.

That the legislature intended to subject the repurchasing privilege of the former owner to the duty of the county board to classify tax forfeited lands is evident from a review of the classification act and former repurchase acts.

The act providing for the classification of tax forfeited lands by the county board, which appears to have been originated by L. 1935, c. 386, specifically imposes the duty upon the county board to classify "all parcels of land becoming the property of the state in trust under the provisions of any law now existing or hereafter enacted declaring the forfeiture of lands to the state for taxes." M. S. 1945, Sec. 282.01, Subd. 1. Unless reclassified, such lands which have been classified as conservation are to be held under the supervision of the county board. Section 282.01, Subd. 2, ibid.

The impact of this act upon the repurchase acts, which were originated by L. 1933, c. 407, was not specifically treated by the legislature until the 1939 session. The repurchase act enacted during that session provided that

it should not apply "to any lands classified as conservation lands under the authority of any existing law." L. 1939, c. 283, sec. 8. In the next session the legislature provided that the 1941 repurchase act should not apply "to any lands classified as conservation lands under the authority of any existing law other than lands classified under Laws 1939, Chapter 328." (Classification of tax forfeited lands by the county board, L. 1941, c. 43, sec. 8.) Here the intent to favor the interests of the former owner over that of the state is manifest, and this office held that a former owner could repurchase under the 1941 act even though the land in question had been classified as conservation under L. 1939, c. 328. (See opinion of attorney general dated October 11, 1943, to A. J. Sullivan, copy of which is enclosed.) No change in this regard was made during the 1943 session by Laws 1943, Chapter 164, Section 8.

At the 1945 session the legislature for the first time passed a continuing repurchase act. Laws 1945, Chapter 296, Section 8, thereof omitted the qualifying phrase "other than lands classified under Laws 1939, Chapter 328." It would, therefore, seem that the legislature clearly intended to subject the former owner's repurchase privilege to classification of the land by the county board.

That the legislature intended that the former owner's privilege of repurchase might be terminated other than by the expiration of the one year period limited in Section 1, Chapter 296, is clearly evidenced by Section 12, ibid, which provides:

> "No right of repurchase created or arising hereunder shall be deemed vested until consummation of the repurchase as herein provided."

It is therefore our opinion that unless the county board should reclassify the lands as nonconservation, the former owner thereof may not repurchase the land under Laws 1945, Chapter 296.

KENT C. van den BERG,
Assistant Attorney General.

St. Louis County Attorney.
October 28, 1946. 425-C-13

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## 224

**Sale by auditor under MS1941, § 282.01—Not subject to defense of statute of frauds—MS1941, § 513.05—Bidder declined to go through with sale.**

**Facts**

"At a recent sale of tax forfeited lands, two bidders A and B bid on a particular 40 acre tract. The highest bid offered by B was $975.00 and the highest bid offered by A was $1000.00. The County Auditor thereupon struck off the sale to A for the sum of $1000.00.

"After the sale had been fully completed so that there was no opportunity of reopening the tract again for sale, A came to the County Auditor and declined to go through with the sale. There was no memoranda in writing of the bid offered by A, signed by A, and the only record of the sale is the Auditor's notation on his personal records that the tract was offered for sale and sold to A for $1000.00.

"After learning that A had refused to go ahead with the sale, B called upon the County Auditor and again offered to pay the sum of $975.00, being his bid.

"The County Board feels that A should be held to his offer if that can be done. The bids offered by both A and B are unusually high considering the value of the tract involved."

**Questions**

"1. There being no memoranda in writing signed by the bidder, will an action lie against A to recover the amount of his bid and to compel specific performance?

"2. If your opinion is in the negative, then can the Auditor under the circumstances stated now accept B's offer of $975 and sell the tract to him, or must this tract again be readvertised for sale?"

**Opinion**

The statute of frauds to which you refer is Minnesota Statutes 1941, Section 513.05. It renders void every contract for the sale of lands unless the contract or some note or memorandum thereof, expressing the consideration, is in writing and subscribed by the party by whom the sale is to be made, or by his lawful agent thereunto authorized in writing. It has been in the code since early statehood and its purpose is to prevent fraud.

The provisions of our law directing sale of tax forfeited lands held by the State in trust for the taxing districts originated by Laws 1935, Chapter 386, and are now found in Minnesota Statutes 1941, Section 282.01, as amended. This section prescribes in detail the manner of selling at public or private sale of such tax forfeited lands by the County Auditor.

The first approach to your problem presents the question of whether or not the statute of frauds is applicable to the State in the sale of tax forfeited lands. "The State is not bound by the passage of a law unless named therein, or unless the words of the act are so plain, clear and unmistakable as to leave no doubt as to the intention of the legislature." Minnesota Statutes 1941, Section 645.27. The rule of construction expressed in this statute is of long standing and the statute itself is merely declaratory of case law as it existed prior to the enactment thereof in 1941. The State is not named in the statute of frauds and there can be said to be nothing in the language employed manifesting the intention of the legislature to bind the State. Neither can it be said that the purpose of the legislature, which was the

prevention of fraud, could be aimed at the State, since it is to be presumed that public officials will perform the duties of their office fairly and honestly and without fraud, oppression or duress.

We think too that when Laws 1935, Chapter 386, was enacted the procedure outlined therein for the conducting of a sale of tax forfeited land at public auction contemplated that a bidder to whom the land was struck off would be bound by his bargain. Any other interpretation would permit frustration at the whim of the highest bidder of the detail involved by the county board in directing the sale and the auditor in conducting the sale, as well as a waste of public funds expended for the costs of advertising. No contract nor memorandum in writing is required or authorized except the certificate of the auditor in instances where the land is sold for cash, made to the Commissioner of Taxation, setting forth sufficient information to enable the latter to prepare a deed of conveyance; and in sales on terms a certificate by the auditor for delivery to the purchaser setting forth such terms and a further certificate to the Commissioner of Taxation for his records. Since the statute of frauds had been on the statute books for many years when proceedings for the sale of tax forfeited lands by the county auditor were first written into law, it may well be presumed that if the legislature had intended sales of this character to fall within the statute of frauds the act would have authorized and directed the auditor to execute and deliver to the successful bidder a contract or memorandum in compliance with Section 513.05 in each instance.

While the question is perhaps not entirely free from doubt, we are led to the conclusion that the statute of frauds does not apply as a bar to an enforcement of the terms of sale of the parcel in question to "A," the successful bidder. We believe the court would hold that the full compliance with the statute relating to the sale of the land by the auditor at public auction is all that is required of the State in effecting a binding contract.

A somewhat similar question was before the court in Armstrong v. Vroman, 11 Minn. 220 (Gil. 142), where the court held enforceable a contract made at sheriff's sale on execution, and in passing upon the defense of the statute of frauds alleged by the defendant, said:

> "It is insisted by the appellant, that the execution sale was void, because it does not appear that a note or memorandum in writing, was made at the time of the sale, and subscribed as required by the Statute of frauds. If such memorandum be necessary, it was not necessary to allege the making of it. 8 Minn. (131); Lockwood v. Bigelow, ante (113). But the majority of the court are of the opinion, that the proper evidence of a sale of real estate upon execution is prescribed by the statute on that subject, and that no note or memorandum other than the certificate of sale is required. The proper certificate of sale having

been tendered in this case, and the amount of the bid demanded, the action is well brought. The order overruling the demurrer is affirmed."

DAVID W. LEWIS,
Assistant Attorney General.

Clearwater County Attorney.
February 13, 1946. 425-C

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## 225

**Sale—Bids—Written bid of $10.00 with statement that the bidder would go as high as $150.00 is not a valid bid of $150.00.**

### Facts

A lot in a platted addition in the village of Hackensack had become tax forfeited. It was offered for sale at a public sale of tax forfeited lands on February 29, 1944.

One A had mailed in a bid of $10.00 for this lot. He attached thereto his check for that amount. He also stated in writing on his written bid that "In case of competitive bidding will pay up to $150 for the lot." A did not attend the sale. He did not appoint anyone to attend the sale and bid for him.

Upon the public offering of this lot, one B bid $12.00 therefor, and the lot was sold to him upon that bid.

The auctioneer did not take notice of or overlooked the notation on the written bid of A that he would pay up to $150.00.

After the sale A ascertained that the auctioneer had so overlooked the written expression of the willingness of A to pay up to $150.00 for the lot. The county board on March 7 adopted a resolution making the sale to B void, in accordance with an opinion of the County Attorney.

B refused to return the receipt which had been given to him for the $12.00 paid, although requested to do so. He later recorded this receipt in the office of the Register of Deeds.

The county auditor issued a refund warrant for $12.00 to B. B refused to accept this warrant. He returned it to the auditor.

A holds a quitclaim deed from the former owner. He desires to purchase the lot as owner under Laws 1945, Chapter 296.

### Question

"Was the mailed or table bid of A with attachment of $10 as the appraised value and stipulation thereon that he would pay $150 for the lot in case of competitive bidding a legal bid up to $150 bearing in

mind, of course, the auctioneer overlooked the stipulation that the bidder by letter would pay up to $150, or was it a legal bid of only $10, since that is all the cash that accompanied the bid?"

**Opinion**

In my opinion the mailed bid of A was not a good bid for any sum in excess of $10.00.

The law requires that tax forfeited land shall be sold for cash only and at not less than the appraised value, unless the county board shall have adopted a resolution providing for the sale on terms, in which event the resolution is controlling. Minnesota Statutes 1941, Section 282.01.

The terms of sale on contract where the price is $25.00 or more, as mentioned in your letter of April 18, would not have any effect on the situation.

A was not present to bid for himself and he had no one there to represent him as his agent. The county auditor could not bid for him as his agent. He was not authorized to do so, and even if he had implied authority to bid for A, he was not instructed definitely as to how much to bid. The writing wherein A expressed a willingness to bid up to $150.00 was not a bid. It was merely an expression of a willingness to bid up to $150.00 if he had to go that high to secure the lot.

Even if it could be held that the auditor was the agent of A, after the $12.00 bid was received the auditor would not know by how much, within the limit of $150.00, A wanted to exceed the $12.00 bid. A should either have attended the sale himself or had someone there to act as his agent in making the bid.

RALPH A. STONE,
Assistant Attorney General.

Cass County Attorney.
August 3, 1945. 425-C

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## 226

**Sale—Where each of two parties claims that he purchased the same land at a sale of tax forfeited lands, it is the duty of the county auditor to determine the facts. The land can be offered for sale at the next sale if the county board so directs, provided the claims of both claimants are untrue**—MS1941, § 282.01, Subd. 7.

**Facts**

The sale was opened by the county auditor as auctioneer. Bidders were instructed that when a tract of land was sold, the purchaser should come forward, procure a sales slip and then present it at the auditor's office

where an official receipt would be issued to him. The various tracts of land described in the sale list were offered for sale in the order in which they appeared therein. After some of the tracts had been offered, the county auditor was relieved by an assistant. The county auditor left the place of sale, and the assistant proceeded with the sale as auctioneer.

A controversy has arisen as to the disposition made by the assistant, in the absence of the county auditor, of a certain tract of land on the list. Each of two parties claims to be entitled thereto as purchaser thereof at this sale. John Doe claims that the tract was offered for sale; that he bid $107.75, the appraised value thereof; that no other bids were submitted; and that the land was sold to him. It appears that he procured a sales slip, presented it at the county auditor's office, paid $107.75, obtained an official receipt, and left town. John Drew claims that the tract was not offered until he called attention to it. It is true that he did call attention to it; that thereupon it was offered for sale; that competitive bidding developed; that the tract was sold to him as the highest bidder for $148.70; that he procured a sales slip, presented it at the county auditor's office, paid the $148.70, and obtained an official receipt.

After it was discovered that John Doe and John Drew were holding the official receipts above referred to, steps were taken to cancel them. Warrants were issued to each party for the amount which he had paid for the tract. Both have returned the warrants, and each insists that he is entitled to the land as the successful bidder.

**Question**

May the above tract of land be offered for sale again at the next sale of tax-forfeited lands?

**Answer**

Minnesota Statutes 1941, Section 282.01, Subdivision 7, as amended by Laws 1943, Chapter 37, relating to the sale of tax-forfeited lands reads in part:

> " * * * The county auditor shall offer the parcels of land in order in which they appear in the notice of sale, and shall sell them to the highest bidder, but not for a less sum than the appraised value, until all of the parcels of land shall have been offered, and thereafter he shall sell any remaining parcels to any one offering to pay the appraised value thereof. * * * All parcels of land not offered for immediate sale, as well as parcels of such lands as are offered and not immediately sold shall continue to be held in trust by the state for the taxing districts interested in each of said parcels, under the supervision of the county board, and such parcels may be used for public purposes until sold, as the county board may direct."

In my opinion, the tract of land in question could properly be offered for sale again at the next sale of tax-forfeited lands at the direction of the county board if it had not been actually sold at the sale held on the date

above stated. However, it appears that a sale thereof was made to John Drew. Was a prior sale of the same tract in fact made to John Doe as claimed by him? If it was, then a subsequent sale would not be valid whether made to John Drew on the same date or to a purchaser at the next sale. If there is no merit to John Doe's claim, John Drew is entitled to the land and a subsequent sale to a purchaser at the next sale would not be valid. I assume that the county auditor's assistant who proceeded to conduct the sale after he relieved the county auditor was duly authorized to do so.

Whether the land was sold to John Doe before it was sold to John Drew is a question of fact which this office has no authority to determine. It is the duty of the county auditor to make a thorough investigation of what occurred at the foregoing sale in his absence and to make a definite determination as to the facts regarding the respective claims of John Doe and John Drew.

PAUL JAROSCAK,
Special Assistant Attorney General.

Cass County Attorney.
February 19, 1945. 425-C

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## 227

**TAX TITLES**

**Validity**—MS1941, §§ 284.07-284.26.

**Question**

"As to the marketability of tax titles.

"First, in the case where land is bid in by private parties and then notice of expiration of redemption is given pursuant to law.

"Second, in the case where the land is bid in by the State and notice of expiration is given and then is sold under the section of tax forfeited lands; that is where the parcels of unredeemed land are appraised and then sold at public auction.

"Parties have objected to bidding what they consider the full value because they feel that they would have to institute an action to quiet title in order to perfect these titles and I would like to have your opinion as to whether these titles would be considered by your office as marketable titles."

**Opinion**

A tax title based on proceedings properly conducted is as good as any other title, regardless of whether the land was bid in by private parties, or whether it is sold to the state under the tax forfeited land statute.

It is true that many real estate dealers, financial institutions, and attorneys hesitate to accept tax titles unless confirmed by a court in an action to quiet title, or unless quit claim deeds are obtained from the former owners. This hesitancy may be due in part to the fact that frequently abstracts do not show the record of the tax sale proceedings in sufficient detail to disclose the presence or absence of jurisdictional or other defects in those proceedings. It may also be due in part to the complexity of foreclosure proceedings and the opportunities for error in those proceedings. See Dunnell's Digest, Sections 9294, 9300, 9308, 9360, 9364, 9367, 9375, 9376, 9377, and 9434; Patton on Titles, Section 271. A tax deed is in the nature of a quit claim deed. It contains no warranties as to title, nor does it convey any interest not held by the state. In recognition of this the legislature enacted Minnesota Statutes 1941, Sections 284.07-284.26, which contain a number of provisions designed to strengthen tax titles, and also providing a simplified method of quieting tax titles.

KENT C. van den BERG,
Assistant Attorney General.

Brown County Attorney.
February 2, 1946. 410-B

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