REPORT

OF THE

ATTORNEY GENERAL

TO THE

GOVERNOR
STATE OF MINNESOTA

1951 - 1952

J. A. A. BURNQUIST
Attorney General

To His Excellency

Honorable C. Elmer Anderson

Governor

Sir:

In compliance with statutes relating thereto, I herewith transmit the report of this Department for the biennium 1951-1952.

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, 1952.

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, 1952

ATTORNEY GENERAL

J. A. A. Burnquist

DEPUTY ATTORNEY GENERAL

Geo. B. Sjoselius

ASSISTANT ATTORNEYS GENERAL

Joseph S. Abdnor
Louis B. Brechet
Joseph J. Bright
John H. Burwell
Lowell J. Grady
Victor H. Gran
Charles E. Houston
Donald C. Rogers
Knute D. Stalland

SPECIAL ASSISTANT ATTORNEYS GENERAL

Harold S. Bjornstad
George G. Edgerton
Irving M. Frisch
George H. Gould
Reginald F. Holschuh
Victor J. Michaelson
George L. Powell
Thomas M. Quayle
G. L. Ware

SPECIAL ATTORNEYS

Don Engle
Otis H. Godfrey, Jr.

DEPARTMENT CLERK

Genevieve K. Spangenberg

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UNITED STATES SUPREME COURT

DOCKET	TITLE	ACTION	DECISION OR STATUS
857A	August H. Gensmer, Jr.	Certiorari	344 U. S. 824 51 N. W. 2d 680 231 Minn. 72
6372	Vance Washburn v. Warden, State Prison	Certiorari	343 U. S. 931 51 N. W. 2d 657

UNITED STATES CIRCUIT COURT OF APPEALS

6352	Sam James Perkins v. Warden, State Prison	Habeas corpus	Denied
6433	Liquor Control Commissioner v. United States	Price Control	Control abolished

UNITED STATES DISTRICT COURT

6404	U. S. v. Commissioner of Taxation; Polk County, et al.	Declaratory judgment — tax lien	Briefs filed
6405	U. S. v. Commissioner of Taxation; Wadena County, et al.	Declaratory judgment — tax lien	Briefs filed
6459	Jensen's Super Valu v. Commissioner of Business Research, et al.	Injunction — Fair Trade Act enforcement	Denied
6465	Edwin M. Reid v. University of Minnesota	Damages — Robinson-Patman Act	Dismissed

MINNESOTA SUPREME COURT, CIVIL

DOCKET	TITLE	ACTION	DECISION OR STATUS
6171	Milton Culver's Food Market v. Pharmacy Board	Injunction — vitamins	54 N. W. 2d 7
6245	Application of Genevra Bingenheimer et al. to register title to lands	Ore under lake bed—Chain Lakes	54 N. W. 2d 912
6254	Schaeffer v. Newberry, Village of Elbow Lake, et al.	Quiet title	50 N. W. 2d 477
6330	Sophia Whiteside, et al.	Quiet title	52 N. W. 2d 127
6353	Theodore Harold Shaw v. Warden, State Prison	Habeas corpus	49 N. W. 2d 385
6368	City of Duluth	Public Examiner's fee	56 N. W. 2d 416
6369	W. R. Stephens Co. v. Commissioner of Taxation, et al.	Personal property tax — unused motor vehicles	53 N. W. 2d 220
6388	Minnesota Employers' Association v. Compensation Insurance Board et al.	Certiorari—basic rates	53 N. W. 2d 457
6389	August J. Duren v. Supt., Fergus Falls State Hospital, et al.	Mandamus — resignation	48 N. W. 2d 574
6390	Carl T. Schwanke v. Warden, State Prison	Habeas corpus	47 N. W. 2d 99
6392	Adam Caputa v. State Treasurer, et al.	Certiorari — special compensation fund	48 N. W. 2d 895
6395	Peter Adent, et al. v. Industrial Commission	Prohibition — compensation hearing	48 N. W. 2d 42
6396	Regents of University of Minnesota v. David S. Irwin, et al.	Condemnation	57 N. W. 2d 625
6397	Hilda Danielson, et al. v. Village of Mound, et al.	Quo Warranto — annexation	48 N. W. 2d 855
6399	W. L. Sholes v. University of Minnesota	Mandamus — religious instruction	54 N. W. 2d 122
6400	Harold Baker, Judge of District Court, Chippewa County	Mandamus	49 N. W. 2d 107
6403	Village of Fridley v. City of Columbia Heights	Quo Warranto — annexation	53 N. W. 2d 831
6407	David C. Stephenson v. Sheriff of Hennepin County	Habeas corpus — extradition	50 N. W. 2d 259
6409	Aileen M. Prickett v. State Treasurer, et al.	Special compensation fund	47 N. W. 2d 120
6416	John Anderson, et al.—Lena Hacker, Administratrix	Intervention — flood control	58 N. W. 2d 257
6421	St. Paul City Ry. Co. v. City of St. Paul—State of Minnesota, Intervener	Right of appeal	50 N. W. 2d 483
6438	Hennepin County Welfare Board v. Hennepin County Auditor — Director of Social Welfare, Intervenor	Mandamus — salary regulation	58 N. W. 2d 882
6442	James A. Fetsch v. Secretary of State	Defective nominating petition, presidential primary	52 N. W. 2d 113
6443	Frank P. Ryan v. Secretary of State	Withdrawal, presidential primary	52 N. W. 2d 406
6446	Harold A. Bozied v. Pete Edgerton, et al.	Certiorari — produce dealer's bond	58 N. W. 2d 313
6447	Farmers Loan & Thrift Company	Certiorari	Writ discharged
6456	Raymond Bros. Motor Transportation Co. v. Railroad and Warehouse Commission, Ibar M. Spellacy, et al.	Prohibition — certificate of public convenience	52 N. W. 2d 769

MINNESOTA SUPREME COURT, CIVIL—Continued

DOCKET	TITLE	ACTION	DECISION OR STATUS
6458	Addison Miller Estate	Income tax — residence	59 N. W. 2d
6471	C. B. Thomas v. Industrial Commission	Minors and women—pay	59 N. W. 2d
6477	Marsh v. Holm	Election — name on ballot	55 N. W. 2d 302
6478	Alfred Nelson, et al. v. Conservation Commissioner	Mandamus — Game Refuge	58 N. W. 2d 330
6479	Sorenson v. State Treasurer, et al.	Certiorari — Compensation Fund	55 N. W. 2d 630
6486	Todd County Attorney v. E. J. Ruegemer	Certiorari	57 N. W. 2d 153

MINNESOTA SUPREME COURT, CRIMINAL

DOCKET	TITLE	ACTION	DECISION OR STATUS
857A	August H. Gensmer, Jr.	Bribery	344 U. S. 824 51 N. W. 2d 680
868A	Lawrence Nobles	Murder	47 N. W. 2d 473
870A	John E. Lowrie	Attempted bribery	49 N. W. 2d 631 54 N. W. 2d 265
871A	Owen Jones	Sodomy	48 N. W. 2d 662
873A	Everett Lux	Weed content—seed sale	50 N. W. 2d 290
874A	John Kolander	Arson	52 N. W. 2d 458
875A	Deone Carle Bailey and Donald Eugene Beste	Larceny	50 N. W. 2d 272
878A	Andrew J. Suess and W. H. Berkner	Game law violation	52 N. W. 2d 409
879A	Charles H. Lorenz	Appeal expenses—murder	50 N. W. 2d 270
880A	David Morgan	Carnal knowledge	51 N. W. 2d 61
881A	Melvin S. Waltz	Assault	54 N. W. 2d 791
882A	Max Earl Shannon	Murder	51 N. W. 2d 824
883A	Charles Hogg	Manslaughter	Dismissed
886A	Harry Wilson	Rape	50 N. W. 2d 706 57 N. W. 2d 412
888A	Gudrun Gulbrandsen	Grand larceny	57 N. W. 2d 419
890A	John Pankratz	Manslaughter	57 N. W. 2d 635

MINNESOTA DISTRICT COURTS, CIVIL

DOCKET	TITLE	ACTION	DECISION OR STATUS
6067	Lake Mining Company	Royalties — iron ore — Syracuse Lake bed	Appealed to Supreme Court
6078	Youngstown Mines Corp., et al.	Iron ore — Rabbit Lake bed	Submitted
6183	Louis Boucher v. Civil Service Board, et al.	Certiorari — termination of employment	Quashed
6238	Robert L. McClendon v. Washington County Probate Court, et al.	Mandamus	Denied
6253	Application of State of Minnesota to register title to lands in St. Louis County	Mineral rights	Submitted
6280	Constance F. Adams, et al.	Title to iron ore under Carlson Lake	Awaiting trial
6281	Robert Morford Adams, et al.	Title to iron ore under Rabbit Lake	Submitted
6288	Robert M. Adams, et al.	Title to iron ore under Portage Lake	Awaiting trial
6289	Cherill M. Adams, et al.	Title to iron ore under Jeune Lake	Awaiting trial
6290	Adams Corporation, et al.	Title to iron ore under Pascoe Lake	Submitted
6291	Adams Corporation, et al.	Title to iron ore under Spruce Lake	Awaiting trial

MINNESOTA DISTRICT COURTS, CIVIL—Continued

DOCKET	TITLE	ACTION	DECISION OR STATUS
6293	Arthur Iron Mining Co. v. State, et al.	Registration of title — boundary line (Snowball Lake)	Pending
6297	Adams Holding Co., et al.	Title to iron ore under Clinker Lake	Submitted
6298	Byron H. Coolidge, et al.	Title to iron ore under Curley Lake	Submitted
6299	Will C. Brown, et al.	Title to iron ore under Little Blackhoof Lake	Awaiting trial
6300	Cherrill Adams, et al.	Title to iron ore under Mud Lake	Awaiting trial
6301	Robert M. Adams, et al.	Title to iron ore under Mahnomen Lake	Submitted
6302	The Adams Corporation	Title to iron ore under Little Rabbit Lake	Submitted
6319	Chicago, St. Paul, Minneapolis & Omaha Ry. Co. v. Railroad and Warehouse Commission	Agency service	Affirmed
6331	Clifford H. Thomas, et al. v. State Auditor, et al.	School land certificate sale	Submitted
6352	Sam James Perkins v. Warden, State Prison	Habeas corpus	Denied
6353	Theodore Harold Shaw v. Warden, State Prison	Habeas corpus	Denied
6369	W. R. Stephens Co. v. Commissioner of Taxation, et al.	Personal property tax — unused motor vehicles	Items 1 - 10 taxable as motor vehicles; item 11 as personal property
6370	Village of Pierz	Public Examiner's fee	Appealed to Supreme Court
6374	Roy Sell v. Supt., St. Peter State Hospital	Habeas corpus	Discharged
6376	Village of Lonsdale	Public Examiner's fee	$1800 — collected
6386	Mid-Continental Mutual Life	Dissolution	Dissolved
6389	August J. Duren v. Supt., Fergus Falls State Hospital, et al.	Mandamus — resignation	Quashed
6394	School District No. 1, Itasca County v. State Auditor	State aid apportionment —L. 1949, c. 648	Distribution held proper
6408	S. F. Doll	Penalty—failure to carry compensation insurance	Settled
6410	The Morse Foundation	Construction of contract under Declaratory Judgment Act—sale of real estate	Sale approved
6411	Housing and Redevelopment Authority of Hibbing v. Greenhaven, Inc. — Commissioner of Administration, Intervenor	Declaratory judgment — development project	Held illegal
6412	Jasper Plevke v. Common School Districts No. 65, et al., and Commissioner of Education	Injunction — consolidation of districts	Dismissed as to Commissioner of Education
6413	Thomas Paper Stock Company	Penalty — failure of foreign corporation to qualify	$500 collected
6414	Henry C. Domeier v. Public Examiner	Injunction — audit of accounts, City of Sleepy Eye	Dismissed
6415	Junior Mining Company	Injunction — interference with waters of Longyear Lake	Defendant company restrained
6417	Certification of Bargaining Agent: Sister Elizabeth Kenny Institute, Minneapolis	Certiorari — Labor Conciliator's order	Quashed

MINNESOTA DISTRICT COURTS, CIVIL—Continued

DOCKET	TITLE	ACTION	DECISION OR STATUS
6421	St. Paul City Ry. Co. v. City of St. Paul — State of Minnesota, Intervener	Fare increase	Reversed
	and		
6422	St. Paul City Ry. Co. v. City of South St. Paul	Fare increase	Reversed
6423	Minneapolis Street Ry. Co. v. City of Minneapolis — State of Minnesota, Intervener	Fare increase	Reversed
	and		
6424	Minneapolis Street Ry Co. v. City of Columbia Heights	Fare increase	Reversed
6425	Minneapolis Street Ry. Co.	Depreciation reserve	Pending
6426	St. Paul City Ry. Co.	Depreciation reserve	Pending
6428	Minnesota State Bar Association v. C. A. Nickoloff	Quo Warranto—restraint from illegal practice of law	Dismissed
6429	Frederick W. Greenwald v. Youth Conservation Commission	Mandamus — dismissal	Quashed
6431	Canadian National Ry., et al. v. Railroad and Warehouse Commission	Mandamus — intrastate freight rates	Order rescinded
6434	Charles J. Wilber, et al. v. City of Rochester	Mandamus — rent control veto	Dismissed as to Attorney General
6435	Christine Bothum, et al. v. Hyme Silver, Deceased, et al.	Surety on livestock dealer's bond	Pending
6436	Longyear Holding Company v. State of Minnesota	Expungement of deeds from record	Awaiting trial
6439	Adolph Schmidt v. Otter Tail County Welfare Board and Director of Social Welfare	Old age assistance	Sustained
6440	Hilda Beug v. Jack Brown, et al.	Damages	Dismissed as to Commissioner of Administration
6445	Leo Arens, et al. v. Village of Rogers	Declaratory judgment — municipal liquor store	Summary judgment of dismissal
6446	Harold A. Bozied v. Pete Edgerton, et al.	Certiorari — produce dealer's bond	Vacated
6449	Washburn Realty, Inc.	Condemnation by Fire Marshal	Repaired
6451	Wm. O. Pealer, et al.	Quiet title—iron ore permit	State adjudged owner
6452	Orpha Evjen, et al. v. I. P. Strand, et al.	Quiet title—fish hatchery	Settled
6453	Joan McCarthy v. Regents of University of Minnesota, et al.	Malpractice — hospitals	Dismissed as to Regents
6454	Alden S. Klovdahl v. Regents of University of Minnesota	Personal injury	Judgment for University
6457	Roscoe H. Crawford v. Commissioner of Administration, et al.	Mandamus	Quashed
6460	Reliable Motor Freight v. Railroad and Warehouse Commission	Mandamus — issuance of contract permit	Return satisfied court
6461	Coca-Cola Bottling Company	Personal property tax	Leave to answer denied
6462	Roland Johnson and William Krahn v. Youth Conservation Commission	Habeas corpus — delinquent children	Released
6464	Andrew C. Dunn v. Director of Vocational Education, et al.	Damages — equipment contract	Dismissed as to Director
6467	Personal Finance Co. of Minneapolis v. Commissioner of Banks	Injunction — small loan license	Settled

MINNESOTA DISTRICT COURTS, CIVIL—Continued

DOCKET	TITLE	ACTION	DECISION OR STATUS
6470	Harley O. Stenvick v. Liquor Control Commissioner, et al.	Replevin — confiscation for liquor law violation	Judgment for Plaintiff
6473	Frank J. Paa, et al., for State, County and Municipal Employees, Local No. 1417, AFL v. City of Sleepy Eye	Constitutionality of Laws 1951, c. 146 — establishment of "Adjustment panel"	Dormant
6476	Morrison County Ind. School District No. 6 v. Commissioner of Education	Certiorari — State Aid	Order filed
6480	Bodel Corporation v. State	Mineral rights	Briefs filed
6481	Business Research & Development v. Winston & Newell Co.	Injunction	Denied
6482	R.R. and W.H. Commission v. Omaha Railway Co.	Agency service	Reversed
6483	State v. Gall, et al.	Lis pendens	Pending
6484	Holek v. State, et al.	Torrens title (Palmer Lake)	Pending

MINNESOTA DISTRICT COURTS, CRIMINAL

DOCKET	TITLE	ACTION	DECISION OR STATUS
877A	George Scott	Gambling device	Dismissed
884A	Carroll Bakken	Murder	Guilty of manslaughter
885A	Robert F. Pett	Murder	Guilty
887A	Thomas Granville Underwood	Murder	Guilty
887A	Ralph W. Crippen	Murder	Pleaded guilty
889A	August Johnson	Misappropriation by public official	Guilty
893A	E. W. Bondeson	Forgery — motion to change plea after sentence	Denied
895A	Alf Thomas Grasberg	Murder	Declared insane

Grand Jury

892A	James Berlien	Assault charge	No indictment
6420	St. Cloud Reformatory	Criminal mismanagement	No indictment

PROBATE COURT

DOCKET	TITLE	ACTION	DECISION OR STATUS
6455	John L. Hancock, Decedent	Escheat	Decreed to life tenant

FEDERAL BOARDS AND COMMISSIONS

DOCKET	TITLE	ACTION	DECISION OR STATUS

Civil Aeronautics Board

6466	Mid-West Airlines Service to Fargo	Renewal of service certificate	Decision filed
6474	Wisconsin Central Airlines	Renewal of service certificate	Granted

Federal Power Commission

6448	Northern Natural Gas Co. (Intervention by State)	Rate increase	Briefs filed
6485	New York State Project 2000	St. Lawrence Seaway	Decision filed

STATE BOARDS AND COMMISSIONS

Civil Service Board

DOCKET	TITLE	ACTION	DECISION OR STATUS
6398	Willard Lorge	Dismissal	Resigned
6401	F. O. Reissner	Dismissal	Reinstated to eligible list
6419	A. V. Christensen	Dismissal	Reinstated
6468	Andrew Kronenberg	Withdrawal of resignation	Dismissed
6472	Leo S. Kyle	Dismissal	Name placed on reemployment list

Industrial Commission

6469	Women and Minors in Public Housekeeping	Minimum wages	Order filed

Pharmacy Board

6437	Meyer S. Furman	Revocation of license	Action postponed

Railroad and Warehouse Commission

6427	Northern Pacific Ry. Co.	Footwalks on Bridge No. 9 over Edgerton Street	Dismissed

TABLE NO. 1
PROSECUTIONS REPORTED BY COUNTY ATTORNEYS FOR 1951 AND 1952

COUNTY AND COUNTY ATTORNEY	IN DISTRICT COURT							
	Pleaded Guilty		Found Guilty		Acquitted		Dismissed	
	1951	1952	1951	1952	1951	1952	1951	1952
Aitkin—John T. Galarneault	12	26	.....	3	.....	2	7	2
Anoka—Robert W. Johnson	0	0	.....	.....	.....	.....	.....	.....
Becker—Robert W. Irvine	25	31	.....	1	.....	.....	3	2
Beltrami—Herbert E. Olson	38	50	1	3	1	.....	2	4
Benton—J. Arthur Bensen	2	6	.....	.....	.....	.....	.....	2
Big Stone—C. J. Benson	3	0	.....	2	.....	.....	.....	.....
Blue Earth—Carl W. Peterson	15	26	.....	.....	.....	.....	.....	.....
Brown—George D. Erickson—Robert J. Berens	7	16	1	.....	.....	.....	1	1
Carlton—Thos. Bamberry	32	40	.....	1	.....	.....	.....	10
Carver—Martin O. Stahlke	0	0	.....	1	.....	.....	.....	8
Cass—Edward L. Rogers	4	13	12	4	1	.....	3	.....
Chippewa—Sigvald B. Oyen	4	5	.....	.....	.....	.....	.....	.....
Chisago—Howard F. Johnson	4	10	.....	.....	.....	.....	.....	1
Clay—Vance N. Thysell	33	27	2	2	.....	.....	5	1
Clearwater—O. E. Lewis	10	13	.....	1	.....	.....	.....	2
Cook—J. Henry Eliasen**	4	.....	.....	.....	.....	.....	2	.....
Cottonwood—Walter H. Mann	4	6	.....	.....	.....	.....	1	.....
Crow Wing—Arthur J. Sullivan*	.....	29	.....	1	.....	.....	.....	3
Dakota—R. C. Nelsen	29	37	.....	.....	1	.....	10	8
Dodge—G. W. Freeman	5	9	.....	.....	.....	.....	2	1
Douglas—John J. McCarten	14	18	2	.....	.....	.....	8	6
Faribault—H. C. Lindgren	5	10	1	.....	1	.....	3	1
Fillmore—George E. Frogner	11	11	1	.....	.....	.....	.....	.....
Freeborn—Rudolph Hanson	17	24	3	.....	.....	2	3	6
Goodhue—Milton I. Holst	32	24	.....	2	.....	.....	7	2
Grant—I. L. Swanson	2	3	.....	.....	1	1	.....	1
Hennepin—Michael J. Dillon	457	417	14	33	10	8	33	25
Houston—L. L. Roerkohl	4	10	.....	.....	1	.....	2	.....
Hubbard—James A. Wilson	7	11	.....	.....	.....	.....	6	3
Isanti—Robert B. Gillespie	3	1	.....	1	.....	.....	.....	.....
Itasca—Ben Grussendorf	25	28	.....	4	.....	.....	.....	2
Jackson—Harvey A. Holtan	8	5	.....	.....	.....	1	.....	1
Kanabec—Robert W. Nyquist	2	1	.....	.....	.....	.....	.....	.....
Kandiyohi—V. W. Lundquist	8	8	.....	1	.....	.....	2	2
Kittson—Burt E. Sundberg** (Dec'd.)	2	.....	.....	.....	.....	.....	2	.....
Koochiching—L. P. Blomholm	14	8	.....	.....	.....	1	2	.....
Lac qui Parle—Wallace Jackson	6	5	.....	2	.....	.....	1	.....
Lake—Emmett Jones	4	4	.....	.....	.....	.....	.....	.....
Lake of the Woods—W. B. Sherwood	6	3	2	1	.....	.....	9	1
Le Sueur—George T. Havel	3	15	.....	.....	.....	.....	.....	.....

Lincoln—Durward L. Pederson	6	6		1				
Lyon—C. J. Donnelly	29	26	2	1			2	
McLeod—Arnold W. Beneke	2	9		2				
Mahnomen—A. J. Powers	9	11			4		3	2
Marshall—Duane W. Turnwall	6	11	1					
Martin—Arthur T. Edman	13	16	1				4	1
Meeker—Ed F. Jacobsen	7	5				1	1	1
Mille Lacs—John S. Nyquist, Jr.	9	17						
Morrison—Attell P. Felix	12	12	2	1			2	
Mower—Wallace C. Sieh	30	31	2		1		2	3
Murray—J. T. Schueller	2	5						
Nicollet—A. L. McConville	8	3						
Nobles—Raymond E. Mork	12	8						
Norman—O. E. Austinson	5	1			1	1		
Olmsted—Thomas J. Scanlon—Frank G. Newhouse	45	31	2		2		10	2
Otter Tail—Owen V. Thompson	34	27			2		5	15
Pennington—L. W. Rulien*—**								
Pine—George E. Sausen	4	14		1				
Pipestone—J. H. Manion*—**								
Polk—F. H. Stadsvold	22	18				1		1
Pope—Wm. Merrill	1	4	1					
Ramsey—James F. Lynch	358	274	14	11	6	5	15	6
Red Lake—Chas. E. Boughton, Jr.*		1						1
Redwood—Thos. F. Reed	5	6			1			
Renville—Russell L. Frazee	6	2						
Rice—Urban J. Steimann	11	22						
Rock—Mort B. Skewes	4	8						2
Roseau—Bert Hanson	9	3	1				4	1
St. Louis—Thomas J. Naylor	139	162	4	6	3	5	25	20
Scott—M. J. Daly	12	14				1	1	
Sherburne—Howard S. Wakefield	7	11		2			1	
Sibley—R. G. Williamson	6	6						2
Stearns—David T. Shay*—**								
Steele—Byron J. Casey	8	7		2				1
Stevens—Thomas J. Stahler	0	0	3	2			1	
Swift—Roy W. Holmquist	8	4	1				1	2
Todd—Frank L. King	16	15	4	3	3		2	6
Traverse—Earl E. Huber	3	3						
Wabasha—Robert R. Dunlap—Martin J. Healy**	2							
Wadena—Charles W. Kennedy	16	7						
Waseca—Einer C. Iversen	1	2	1	1		1	1	1
Washington—Wm. T. Johnson	14	10	3	2			4	5
Watonwan—Paul V. Fling	6	1					2	
Wilkin—R. N. Nelson	5	2		1				
Winona—W. Kenneth Nissen	21	22				1	5	
Wright—Walter S. Johnson	4	8						4
Yellow Medicine—Robert M. Baker	5	2	1				1	1
Totals	1,783	1,797	82	99	39	31	206	172

*No report received for 1951.

**No report received for 1952.

TABLE NO. 1—Continued
PROSECUTIONS REPORTED BY COUNTY ATTORNEYS FOR 1951 AND 1952

COUNTY AND COUNTY ATTORNEY	IN MUNICIPAL COURT							
	Pleaded Guilty		Found Guilty		Acquitted		Dismissed	
	1951	1952	1951	1952	1951	1952	1951	1952
Aitkin—John T. Galarneault	268	259	3	1	7			
Anoka—Robert W. Johnson	34	327	8	11			4	
Becker—Robert W. Irvine	273	412	36	25	1	2	16	23
Beltrami—Herbert E. Olson	160	242	5	3	1	2	6	7
Benton—J. Arthur Bensen	102	64	1	1	1		24	11
Big Stone—C. J. Benson	53	77		6		1	18	2
Blue Earth—Carl W. Peterson	939	1,067	53	55	7	16	24	24
Brown—George D. Erickson—Robert J. Berens	92	249	3	8				
Carlton—Thos. Bamberry	699	797	21	27		1	21	39
Carver—Martin O. Stahlke	153	103			1	1	29	25
Cass—Edward L. Rogers	144	339	7	3			7	3
Chippewa—Sigvald B. Oyen	152	129	1				3	2
Chisago—Howard F. Johnson	185	179	6	22			12	3
Clay—Vance N. Thysell	336	372	6	4			9	8
Clearwater—O. E. Lewis	154	157	1		1			
Cook—J. Henry Eliasen**	137		12				3	
Cottonwood—Walter H. Mann	83	87		16			2	5
Crow Wing—Arthur J. Sullivan*								
Dakota—R. C. Nelsen	1,052	939	11	7	2	7	7	7
Dodge—G. W. Freeman	125	108	1	3	2		1	1
Douglas—John J. McCarten	110	400	149	40	2	5	7	11
Faribault—H. C. Lindgren	83	79	2				1	1
Fillmore—George E. Frogner	237	141	1	8			1	
Freeborn—Rudolph Hanson	353	406	13	11	3	5	2	4
Goodhue—Milton I. Holst	256	608	38	23		2	2	18
Grant—I. L. Swanson	11	23						
Hennepin—Michael J. Dillon	1,591	1,505	55	47	6	19	51	55
Houston—L. L. Roerkohl	250	249	9	2			3	1
Hubbard—James A. Wilson	195	182	14	5		4	2	12
Isanti—Robert B. Gillespie	99	101	3	6				5
Itasca—Ben Grussendorf	530	458	24	23			6	22
Jackson—Harvey A. Holtan	177	184		41		1	3	1
Kanabec—Robert W. Nyquist	48	73		6			3	3
Kandiyohi—V. W. Lundquist	133	181	6	4	1	2	7	1
Kittson—Burt E. Sundberg** (Dec'd.)	106				1		1	
Koochiching—L. P. Blomholm	298	386	9	10			3	3
Lac qui Parle—Wallace Jackson	101	130	5	4			1	3
Lake—Emmett Jones	267	312					3	2
Lake of the Woods—W. B. Sherwood	79	88	1			1	5	7
Le Sueur—George T. Havel	169	178						5

Lincoln—Durward L. Pederson	101	79					6	
Lyon—C. J. Donnelly	228	216						1
McLeod—Arnold W. Beneke	428	493	2					
Mahnomen—A. J. Powers	55	77			1	1		1
Marshall—Duane W. Turnwall	151	250	1	1				1
Martin—Arthur T. Edman	318	365	1					
Meeker—Ed. F. Jacobsen	223	272						
Mille Lacs—John S. Nyquist, Jr.	287	431	10	14	4	4	6	12
Morrison—Attell P. Felix	315	792	1	2		2	11	4
Mower—Wallace C. Sieh	185	333	17	15	4	4	17	15
Murray—J. T. Schueller	86	91		2			2	4
Nicollet—A. L. McConville	97	487					1	2
Nobles—Raymond E. Mork	139	322	1				1	10
Norman—O. E. Austinson	96	159						
Olmsted—Thomas J. Scanlon—Frank G. Newhouse	968	984	17	18	1	3	36	59
Otter Tail—Owen V. Thompson	210	380		7		1	39	30
Pennington—L. W. Rulien*—**								
Pine—George E. Sausen	184	245						2
Pipestone—J. H. Manion*—**								
Polk—F. H. Stadsvold	49	68	2	2	1		3	14
Pope—Wm. Merrill	113	103	1			1		
Ramsey—James F. Lynch	1,889	2,666	29	65	4	11	2	12
Red Lake—Chas. E. Boughton, Jr.*		196		5		1		2
Redwood—Thos. F. Reed	264	246	1		1	1	5	13
Renville—Russell L. Frazee	89	132	1	4			6	7
Rice—Urban J. Steimann	479	572	16	25	2	4	30	11
Rock—Mort B. Skewes	107	197						
Roseau—Bert Hanson	103	133						
St. Louis—Thomas J. Naylor	400	518	23	11			46	24
Scott—M. J. Daly	227	319	2	18		3		4
Sherburne—Howard S. Wakefield	145	214	5	8	2	2	1	
Sibley—R. G. Williamson	198	204	2	3		2	8	27
Stearns—David T. Shay*—**								
Steele—Byron J. Casey	437	509	12	6	6	1	5	14
Stevens—Thomas J. Stahler	199	155	3	3	1	3	4	10
Swift—Roy W. Holmquist	159	299	2	4		2	7	4
Todd—Frank L. King	140	176	2	3		1		2
Traverse—Earl E. Huber	86	107		2				7
Wabasha—Robert R. Dunlap—Martin J. Healy**	227		3		1		7	
Wadena—Charles W. Kennedy	164	221				1		
Waseca—Einer C. Iversen	157	195	2	10			3	5
Washington—Wm. T. Johnson	663	731	5	2	6	4	28	28
Watonwan—Paul V. Fling	185	228						
Wilkin—R. N. Nelson	348	250	1	1		1	1	4
Winona—W. Kenneth Nissen	4,692	4,054	16	10	5	9	10	19
Wright—Walter S. Johnson	303	238	10	2	1		7	3
Yellow Medicine—Robert M. Baker	38	42	2	2				
Totals	26,166	30,340	694	667	76	131	579	665

*No report received for 1951.

**No report received for 1952.

TABLE NO. 2

TABULATED STATEMENT OF CRIMINAL CASES AS REPORTED BY COUNTY ATTORNEYS FOR 1951 AND 1952

NATURE OF ACCUSATION	DISTRICT—MUNICIPAL—JUSTICE COURTS							
	Pleaded Guilty		Found Guilty		Acquitted		Dismissed	
	1951	1952	1951	1952	1951	1952	1951	1952
I. Crimes Against the Person (Ch. 619)								
Murder—1st degree	1		1	4				
2nd degree	1	6	3	2				
3rd degree	3							
Manslaughter—1st degree	2	6	4	3	1		1	
2nd degree	1	4	4	1				
Assault—1st degree	15	24	2	8	2	1	2	6
2nd degree	47	46	3	9	4	9	11	16
3rd degree	377	336	55	53	15	27	62	62
Robbery—1st degree	52	55		6		1	4	6
2nd degree	19	10		1		1	2	
3rd degree	14	4	1	1	1	1	2	1
Kidnaping	1	2			1	1	1	
Slander	1	1				1		1
II. Crimes Against Morality, etc. (Ch. 617)								
(a) Sex Crimes, Indecency, etc.								
Rape	4	5	2	1	1		1	
Carnal knowledge—Female under 10	2							
Female 10 to 13	3	8						
Female 14 to 17	58	69	4	2	1		13	7
Indecent assault	43	40	4	9	4	1	5	9
Adultery	10	4	1				5	3
Abortion	8	1						
Bigamy	2	6						
Fornication	5	3						
Incest	2	2					2	
Sodomy	21	15	2	4	3		5	1
House of ill fame								1
Indecent exposure	22	32	3			2		1
Abduction	1	1						1
Misc.	56	57	1		1	1		1
(b) Crimes against Children, etc.								
Paternity, illegitimate child (Ch. 257)	187	232	16	25	2	3	23	15
Absconding to evade paternity proceedings		1						
Abandonment, wife or child	99	101	9	5	1	1	57	54
Non-support, wife or child	231	229	39	21	4	1	57	55
Neglect of minor							1	
Contributing to minor's delinquency	27	25	5	2	1		25	6
Cruelty to child	1	2						

Child labor law violations	6	6	.....	.....	1	1	.....	.....
Miscellaneous	.....	1	.....	.....	.....	.....	.....	.....
(c) Miscellaneous Crimes against Morality, etc.								
Public dance laws, violations	.....	7	.....	.....	.....	.....	.....	.....
Gambling and lottery laws, violations	24	15	2	.....	.....	.....	6	1
III. Crimes Against Property (Ch. 620-622)								
Arson—1st degree	.....	1	.....	.....	1	.....	.....	.....
2nd degree	.....	.....	.....	.....	.....	.....	.....	1
3rd degree	4	8	1	1	.....	.....	.....	.....
Burglary—1st degree	.....	5	1	.....	.....	.....	1	.....
2nd degree	9	4	.....	1	.....	.....	1	.....
3rd degree	153	166	3	6	.....	.....	17	12
Unlawful entry	22	16	.....	.....	1	1	5	1
Forgery—1st degree	6	4	.....	1	.....	.....	2	.....
2nd degree	122	98	5	4	1	.....	9	7
3rd degree	6	6	.....	.....	.....	.....	1	1
Larceny, grand—1st degree	87	90	2	4	1	2	13	27
2nd degree	308	330	11	9	4	5	46	39
Larceny, petit	385	331	13	12	2	2	40	27
Giving check without funds	374	372	4	2	.....	.....	95	86
Receiving stolen property	23	20	1	.....	.....	.....	6	2
Mortgaged chattels, sale, removal, etc.	31	23	1	.....	.....	.....	3	19
Malicious mischief	44	112	.....	1	.....	4	1	11
Extortion	3	4	.....	.....	.....	.....	1	.....
Trespass	11	11	.....	.....	1	4	3	1
Fraud	21	18	.....	.....	2	.....	4	4
Fraud on innkeeper (Ch. 327)	9	9	.....	.....	.....	1	3	5
Miscellaneous	10	6	.....	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	1	.....	.....	.....	2	2
Resisting or interfering with officer	66	60	3	7	.....	1	6	5
Concealed weapons, carrying, etc.	13	6	.....	.....	.....	.....	1	.....
Language provocative of assault	27	38	6	2	1	.....	5	3
Contempt of court	15	8	2	3	.....	.....	.....	2
Escape	24	25	.....	3	.....	.....	2	.....
Breach of peace	56	53	6	3	5	.....	3	6
Disorderly conduct	304	340	15	13	3	5	6	10
Public Nuisance	42	35	3	4	1	2	1	4
Miscellaneous	12	16	.....	3	1	.....	.....	1

TABLE NO. 2—Continued

TABULATED STATEMENT OF CRIMINAL CASES AS REPORTED BY COUNTY ATTORNEYS FOR 1951 AND 1952

NATURE OF ACCUSATION	DISTRICT—MUNICIPAL—JUSTICE COURTS							
	Pleaded Guilty		Found Guilty		Acquitted		Dismissed	
	1951	1952	1951	1952	1951	1952	1951	1952
V. Miscellaneous Crimes (and various special statutes)								
Cruelty to animals (Ch. 614)	12	2	1	2	1	3	3	1
Vagrancy	85	51	5	3	2	2	5	6
Violations of laws re:								
Compulsory education	25	15	3	2	1	.....	1	2
Forestry	17	20	1	.....	.....	.....	1	3
Wild animals (game and fish) (Chaps. 97-102)	1,417	1,551	29	38	4	10	30	17
Health	43	68	.....	3	.....	5	1	1
Food	25	35	.....	1	.....	.....	.....	5
Motor vehicles—License	373	1,690	7	17	.....	7	7	34
Traffic	14,910	17,817	350	340	25	30	116	162
Tampering	25	21	1	.....	.....	.....	.....	6
Intoxicated driver	1,176	1,593	43	59	4	11	10	11
Criminal negligence causing death	14	21	.....	4	.....	1	.....	.....
Unauthorized use	211	203	2	3	1	1	7	10
Drunkenness	1,859	1,683	68	38	4	4	15	22
Intoxicating liquor	112	185	11	9	3	4	15	16
Non-intoxicating liquor	99	113	10	7	2	5	6	8
Narcotics	8	3	.....	.....	.....	.....	.....	.....
Aeronautics	2	5	.....	.....	.....	.....	.....	.....
Gas tax	61	104	3	.....	.....	.....	.....	.....
Miscellaneous crimes and ordinance violations	3,941	3,385	2	3	.....	.....	2	10
Confiscations	.....	.....	1	.....	.....	.....	3	.....
Totals	27,949	32,137	776	766	115	162	785	837

SELECTED OPINIONS

AGRICULTURE

1

Mosquitoes—Any municipality may avail itself of the mosquito abatement law—M. S. 1949, Sections 18.31 to 18.43.

Facts

"The City of Glenwood is a city of the fourth class operating under a home rule charter which is silent on the matter of mosquito control."

Question

"May the City of Glenwood appropriate and expend public funds for the purpose of applying liquid spray for the control or eradication of mosquitoes throughout the City although mosquitoes are not so numerous as to be considered a menace to the health of the inhabitants?"

Answer

The City of Glenwood, although not authorized by charter to expend funds for the eradication of mosquitoes, may proceed under the provisions of the mosquito abatement law, M. S. 1949, Sections 18.31 to 18.43, under which it may engage in a mosquito abatement program and levy taxes and appropriate money for that purpose.

IRVING M. FRISCH,
Special Assistant Attorney General.

Glenwood City Attorney.
August 18, 1952. 923-P

2

Trees—Land for agricultural development and purposes—Forestry—Horticulture—Planting nursery stock of various trees, and using growing trees for ornamental purposes, growing fruit trees and other trees commonly used for shade trees or for landscaping should be construed to constitute use of land for agricultural purposes within meaning of—M. S. 1949, Section 282.031.

Facts

"A prospective purchaser wishes to acquire property for the purpose of raising nursery stock of various kinds of trees and also for the raising of holly trees in which he would take holly for decoration purposes each

year leaving the trees standing. The nursery would include some various fruit trees as well as Lombardy, Poplar, Maple and similar types of trees used in landscaping."

Question

Do the facts above quoted constitute "agricultural development" or "agricultural purposes" within the meaning of section 282.031?

Opinion

Section 282.031 was enacted for the benefit of veterans of World War I and World War II. Such obvious purpose of the enactment requires, I believe, a liberal construction of its terms to carry into effect the legislative intent.

In the Minnesota Labor Relations Act, agricultural products are defined to include but are "not restricted to, horticultural, viticultural, dairy, livestock, poultry, bee, and any farm products." M.S. 1949, Section 179.01, Subd. 13. In the Minnesota Cooperative Marketing Act, the definition of "agricultural products" includes horticultural * * * and other farm products. Section 22.02, Subd. 2.*

Such dictionaries as Webster's New International, Second Edition, Funk & Wagnall's Standard and New Century include horticulture in definition of agriculture. "'Agriculture' is indefinite word, including in broad sense, farming, horticulture, and forestry, * * * unless restricted by context of statute in which used." **Forsythe v. Village of Cooksville**, 190 N. E. 421, 356 Ill. 289. In **De Weaver v. Jackson & Perkins Co.**, 63 N. Y. S. 2d 593, it was held that agriculture included cultivation of a large tract of land for propagation and growth of roses, shrubs and other horticultural and floricultural products. The Federal Internal Revenue Bureau has adopted a construction that agricultural work includes the growing of nursery stock. S. S. T. 231.

For reasons above stated and upon the authorities herein cited, it is my opinion that the clearing of land and placing it under cultivation and using the same for the purpose of raising nursery stock of various kinds, including fruit trees and variety of growth referred to in above quoted statement of facts, should be considered as "agricultural development" and "agricultural purposes" within the meaning of M.S. 1949, Section 282.031.

J. A. A. BURNQUIST,
Attorney General.

Hubbard County Attorney.
January 4, 1951. 923-D

*See opinion No. 97, Attorney General's 1940 report.

CONSERVATION

DRAINAGE

3

Bridges—Culverts—Construction—Maintenance—Repairs—Where does burden fall?—County road, town roads, private crossings over drainage ditches—M. S. 1949, Section 106.271.

Facts

A proceeding is pending for the establishment of a drainage ditch. It is proposed to be located largely within the boundaries of a county road. The attorney for the petitioners is of the opinion that the county, as the owner of the road parallel to the proposed ditch, will have to pay for a bridge or culvert for each farm entrance from the road to the farm, for the reason that the bridge or culvert is required upon the highway in order to give access between the road and farms

A town road intersects the county road at a right angle and before reaching the traveled portion of the county road, it intersects the ditch. A bridge will be required on the town road across the ditch, the location of which is within the boundaries of the county road. Your statement does not so state but I assume that the town road crosses the county road and extends beyond the county road on the side thereof opposite the bridge.

Question

"Does the town road terminate at the outside limit of the county road, or does the right-of-way of that town road cross the county road, or who does own the right-of-way in that part of the road which is common to both highways?"

Opinion

If the county road is a state aid road, the county is vested with all the rights, title, easements and appurtenances thereto appertaining, held by, or vested in, the town, or dedicated to public use prior to the time such road was designated as a state aid road. M.S. 1949, 160.07.

If the county road is not a state aid road, the easement therefor is owned by the public.

The easement in the town road is vested in the public.

The county and the town hold their road easements for public purposes, subject to the paramount power of the legislature which created them. The town and the county are merely departments of the state, political subdivisions, created as convenient agencies for the exercise of governmental powers as may be entrusted to them. **Monaghan v. Armatage**, 218 Minn. 108, 15 N. W. (2d) 241. Neither the county nor the town holds either easements

in a proprietary capacity but rather in a governmental capacity as trustee for the people. And it will be remembered that the easements are for highway purposes and nothing more. The fee owner of the real estate owns all other property in the land over which the highway passes. When a ditch is established damages incident thereto are determined. The viewers' report shows the damages occurring to roads, and the town or county, which is by law charged with the duty of keeping such road in repair, is awarded damages by reason of bridges or culverts necessary to be built and maintained by the county or town as required by Section 106.271. See M.S. 1949, 106.151.

SECOND PROBLEM

Facts

An existing ditch was constructed since enactment of L. 1947, C. 143, now found in M.S. 1949, C. 106. About two-thirds of the ditch is located within the boundaries of a county road and one-third is outside of such boundaries. Two town roads intersect the ditch. Entrances from the county road to adjoining farms cross the ditch. Bridges and culverts were erected at such intersections. Such bridges and culverts have been damaged by flood waters. Repairs are needed. The towns claim that the bridges are located, for the most part, within the boundaries of the county road and that it is the duty of the county to maintain the bridges. The county claims that the bridges are a part of the town road and that it is the duty of the town to maintain them. The county claims further in respect to the private crossings to farm lands that the maintenance of such crossings is a burden on the ditch system.

You comment that:

> "In the construction of modern ditches, the cost of the bridges is generally the biggest single item, far exceeding the cost of the excavation. If a ditch six miles long is built through a township, and the township has to construct bridges at each cross road, the cost to the town would be tremendous. It would come very close to use of public funds to benefit private property, as that ditch is built for the benefit of private property and still the town has to spend its own funds to build bridges over the ditch. If the other contention should be true, that the town also has to build all of the crossings from farmsteads because of the fact that the crossings are made necessary by the construction of the ditch and the ditch is on the right-of-way of the town road which parallels it, then of course the cost would be entirely out of reason as far as the town is concerned."

Questions

Does the burden of expense for repair of bridges and culverts on such town roads rest upon the county, the town, or upon the ditch system?

Does the expense of repair of the bridges or culverts on farm crossings rest upon the county, the town, or the owners of the farms served by the crossings?

Opinion

The duties and obligations of public corporations to maintain bridges and culverts are specified in M.S. 1949, 106.271, Paragraph 4. This section requires that the county board shall maintain as a part of the ditch the private bridges and culverts constructed as a part of the ditch system. Those private bridges and culverts not constructed as a part of the ditch system must be maintained by the owner of the adjacent land served thereby. Such owner was presumably awarded damages therefor when the ditch was established. M.S. 1949, 106.151.

I agree with you that where the bridge is built on a town road and a necessity for the bridge is occasioned by the construction of a county ditch, that the viewers should award the town damages, occasioned by the building of the bridge. The amount of damages would be the amount of money that the town was reasonably required to expend for the construction of the bridge. Added to this, I consider should be such sum as would indemnify the town against the perpetual maintenance thereof. These two sums added together constitute the damage sustained by the town because of the necessity of building a bridge over the ditch.

In M. S. 1949, 106.151, which specifies the duties of the viewers, we read the rules for assessing benefits and damages resulting to the state, county and other municipal corporations. Therein is the language "* * * except that all benefits and damages assessed and allowed for bridges or culverts shall be assessed and allowed to the state, county or other municipal corporation which is by law charged with the duty of constructing and maintaining such bridge or culvert as required by Section 106.271."

Section 106.271 states, in part:

> "On public highways, all bridges and culverts required by the construction and improvement of any public open ditch, shall be constructed and maintained by the public authority charged by law with the duty of keeping such highway in repair, except as hereinafter in this section noted."

The last quotation from the chapter of the law relating to public drainage ditches makes it quite plain and specific that the duty of constructing and maintaining such bridges and culverts does not fall upon the administrative officers charged with the construction of the ditch, but falls upon the public authority whose duty it is to construct and maintain other bridges and culverts on the same road. As I view this quoted language, it is largely a declaration of policy. Certain public officers are charged with certain duties in respect to roads and these duties include construction and maintenance thereof. Bridges are a part of the road. Planning on the part of these officers includes policy. On a certain type of road, all bridges may be of the uniform width of 24 feet, 30 feet or 36 feet, depending upon what the authority decides. This is for the road authority to decide, not for the ditch authority. The maintenance of that bridge, as well as its construction, is within the duty of such authority charged by law for the construction and mainte-

nance thereof. So the last quoted portion of the law sets at rest who shall have the determination of the type of bridge to be constructed and how it shall be maintained. Nothing is said in that language that it shall be at the expense of the town, county or state without the right of reimbursement. And that cannot be read into the law because it cannot necessarily be implied.

If a county or town were compelled to build a bridge across a drainage ditch without the allowance of damages and the drainage proceeding therefor, it would be in effect requiring the road and bridge fund to contribute to the cost of the construction of the ditch. In other words, it would be spending public money to aid in a project calculated to benefit privately owned lands. That is not the scheme of the ditch law. In **Alden v. County of Todd,** 140 Minn. 175, 167 N. W. 548, it was stated that the statute does not permit the county board to establish a ditch unless, among other essentials, it is found that the estimated benefits to be derived from the construction of the said work are greater than the total costs, including damages awarded, and that such damages and benefits have been duly awarded and assessed. No contributions are intended to be made except in direct proportion to benefits received.

It is not within the discretion of the viewers to omit to award damages. It is their plain duty to make such an award.

CHARLES E. HOUSTON,
Assistant Attorney General.

Wilkin County Attorney.
May 16, 1952 and May 27, 1952. 642-A-12

4

Bridges — Repairs — Rebuilding bridge across drainage ditch — obligation of town to rebuild bridge on town road — obligation of beneficiaries of ditch proceedings to rebuild bridge—M. S. 106.471.

Facts

"Boon Lake Township lies in the extreme northeastern part of Renville County. Joining it on the east is West Lynn Township in McLeod County. Between the two townships is a township road running in a northerly and southerly direction.

"The south five miles of this six mile road was laid out on October 23, 1894 and the north one mile was laid out and established May 27, 1907.

"On August 2, 1904, an order was made establishing Judicial Ditch No. 1 of Renville and McLeod counties. This ditch and its laterals transversed the eastern part of Boon Lake Township. The main branch of the system crossed over into West Lynn Township at a point two miles south of the north end of the six mile road in question.

"On November 29, 1907, these two townships entered into a written agreement, which appears on the records of both townships, relative to the assignment and maintenance of this six miles of township road separating the two townships. This agreement, after assigning the south three miles to West Lynn Township, and the north three miles to Boon Lake Township, provided that the south three miles was **'to be opened and kept in repair'** by West Lynn Township, and the north three miles was **'to be opened and kept in repair'** by Boon Lake Township. The agreement is very brief and contains nothing more which would be material here.

"This drainage system crossed that portion of the road which was assigned to Boon Lake Township, **'to be opened and kept in repair,'** under the maintenance and repair agreement entered into by and between the two townships on November 29, 1907.

"When the drainage system was first established, a wooden bridge was constructed over the ditch at the point where it crosses the road in question. This bridge has long since deteriorated and had to be taken out. In its place two steel culverts, with the combined capacity of less than the original bridge, were installed. The records of the original ditch proceeding do not indicate which of the two townships was required to construct the original bridge. The Viewers Report clearly indicates that neither damages nor benefits were assessed for or against either of the two townships. The records of Boon Lake Township fail to disclose whether that township participated in the cost of the construction of the original wooden bridge.

"Judicial Ditch No. 1 is now being repaired under Section 106.471. The repair proceeding is regular and in order. The two culverts installed across the road in question, after the first wooden bridge rotted away, are much smaller in capacity than the old bridge and, in the repair job, must be removed, and a new bridge or culvert of the same capacity as the first bridge constructed or installed. A culvert can be installed at less than one-half of the cost of a new bridge. The new culvert, so the engineer informs me, will have the same capacity as the original bridge. It will be no smaller and no larger so far as its capacity is concerned, although it will be of a different form and shape than the original wooden bridge, as you will understand."

Question

"Upon the facts herein stated, which of the two townships, Boon Lake or West Lynn, must bear the expense of installing this culvert in the ditch across this road in the ditch repair proceedings?"

Opinion

The order establishing the ditch was made in August, 1904, and the law then in force applied. Such law did not, as now [M. S. A. 106.471, subd. 1(b)], provide that

"After construction, all highway bridges and culverts on any ditch system hereafter established shall be maintained by the municipality or public authority charged with the duty of maintaining the same as set forth in section 106.271. * * *"

The duty to build and maintain a bridge depends on what was done in the drainage proceeding. If in 1904, the ditch plans and specifications and the order establishing the ditch show that the bridge in question was a part of the project and the cost of the building thereof was a part of the cost of construction of the ditch, then neither of the towns involved built the bridge and the bridge being a part of the drainage project, it should be forever maintained at the expense of the drainage system.

It is observed that although the road was laid out in 1894, the ditch was established in 1904 and it was in 1907 that the two towns made the contract separating their respective duties of maintenance on the road. When the ditch was established, the two towns were jointly liable for maintenance of the road. The bridge was made necessary on the road only by reason of construction of the ditch. The two towns then being jointly liable for the construction and maintenance of the road, both towns were damaged by reason of the construction of the ditch because of the expense of construction and maintenance thereof. We must assume that this item of damage was considered in the ditch proceedings. But, on the other hand, the road may have benefited by reason of the drainage. Benefits may have off-set the damages and it may have been so determined in the drainage proceedings. If so, and if the bridge was not specified as a part of the drainage proceedings, it is my opinion that the duty to build and maintain the bridge was a burden imposed upon the two towns. See **Town of Lisbon v. Counties of Yellow Medicine et al.**, 142 Minn. 299, 172 N. W. 125.

For lack of facts, I am unable to give a better statement of the law.

From the foregoing you will see that I am unable to categorically answer your question and I am unable to say that either town is liable for the cost of building the bridge now proposed. It may be that under the plans and specifications in the ditch proceeding and the engineer's report which, undoubtedly, was adopted by the court when the ditch was established, the building of the bridge is the obligation undertaken by those benefited by the construction of the ditch and that it must be accomplished through the ditch proceedings.

Within the City of Minneapolis, Lake Calhoun and Lake of the Isles are situated. The city determined to construct a canal between the two lakes. This was part of the city park system. The canal intersected the right of way of the Chicago, M. and St. P. Ry. Co. This necessitated the building of a bridge to carry the tracks over the canal. Our court held in **C. M. and St. P. Ry. Co. v. City of Minneapolis**, 115 Minn. 460, 133 N. W. 169, that the duty of the railroad company was the same as it would have been if this had been a natural waterway. It held that the railroad company had the uncompensated duty of providing the bridge. The basis of the rule is the superior

nature of the public right inherent in the reserved or police power of the state. A railroad, though constructed first in time, is constructed subject to the implied right of the state to lay out and open new highways crossing its right of way. The railroad company has the duty in the use of its tracks to make necessary and reasonable readjustment as will permit the exercise of the superior public right.

The Minneapolis case cites **Chicago v. Luddington** (Ind.), 91 N. E. 939, which held that the rule applicable to highways is also applicable to public ditches established across the right of way of a railway company and that compensation need not be made to the railway company to cover the cost of a bridge made necessary to carry its tracks over the ditch.

It also cites **Chicago, B. & Q. R. Co. v. Board of Supervisors** (8th Circuit), 182 Fed. 291, 31 L. R. A. (N. S.) 1117, in which it is held:

> "In proceedings to condemn right of way for a public drainage ditch across a railroad the company is not entitled to be awarded as damages the expense of building a new bridge over the ditch, but its damages are confined to the value of the easement across its right of way, regardless of whether or not the ditch follows a natural watercourse over its right of way."

The decision in the Minneapolis case was affirmed by the United States Supreme Court in 232 U. S. 430, 58 L. Ed. 671, 34 Sup. Ct. 400.

The duty of a railroad company to construct bridges at its own expense over public drainage ditches is treated in the note to **Chicago, B. & Q. R. Co. v. Appanoose County**, 31 L. R. A. (N. S.) 1117.

In reading Section 106.271 of this drainage act, we note that the first sentence reads:

> "The auditor or clerk shall notify the state and each municipality, railroad company, or other corporation to construct any bridge or culvert required upon its road or right of way, within a reasonable time named in the notice."

Thus, this language puts municipalities in the same class as railroad companies in respect to the notice.

The following paragraph of the section provides that if the work is not done within the time limited, the board or court may order it built as a part of the construction of the system and the cost shall be deducted from damages allowed the corporation or collected from it, as in the case of assessment of benefits, that is, by civil action.

Then follows the provision that:

> "On public highways, all bridges and culverts required by the construction and improvement of any public open ditch, shall be constructed and maintained by the public authority charged by law with the duty of keeping such highway in repair, except as hereinafter in this section noted."

Now that we have seen what the courts require of railroad companies in the matter of bridges, the question follows whether the courts would apply the same rule to a town or municipality having the burden of building and maintaining roads.

It seems to me that this is in a twilight zone since towns are entitled to damages under the ditch law where damages are sustained.

This opinion relates to repairs, not improvements.

CHARLES E. HOUSTON,
Assistant Attorney General.

Renville County Attorney.
May 15, 1952. 642-A-12

5

Funds—Disposition—No statutory provision exists for disposition of money remaining in ditch fund of abandoned ditch—Funds derived from assessments or proceeds from bond issues constitute trust funds—Clearwater County v. Peefer, 236 Fed. 183—M. S. 106.341-106.371, 106.381, 106.391, 106.411, 106.421, 106.471 subd. 6, 106.661.

Question

What is to be done with funds in the county treasury which remain in a ditch fund after abandonment of the ditch?

Opinion

We are not advised as to the proceedings which resulted in the abandonment of the ditch, nor are we advised as to the source of the unexpended balance in the ditch fund to the credit of the abandoned ditch. We have not been advised as to whether all ditch liens have been paid and satisfied, nor are we advised as to whether there remain outstanding any unpaid ditch bonds.

Money which accrues to a ditch fund or funds is derived from either assessments or the proceeds from the sale of bonds. M. S. A., Sections 106.341, 106.371, 106.381, 106.411, 106.421, and 106.471.

The county auditor is required by Section 106.371 to keep a ditch lien record in each ditch proceeding showing the amount of the lien remaining unpaid from time to time against the particular tract of land assessed. When such lien has been paid the auditor is required under Section 106.391 to issue a proper certificate of such payment.

After the ditch lien has been recorded in the manner as provided by Section 106.341, the respective county board is authorized to issue bonds, which bonds shall pledge the full faith, credit and resources of the county

for the payment of the principal and interest thereof. Section 106.411. Funding bonds may be issued under Section 106.421 which, when issued, are general obligations of the county.

Bonds may also be issued and the proceeds derived therefrom used for the repair of ditches. Section 106.471. Subd. 6 of this section authorizes the creation of a fund to be used exclusively for ditch repairs.

Upon compliance with the procedure prescribed by Section 106.661, a ditch may be abandoned. No statutory provision is made for the disposition of any unexpended balance to the credit of a particular ditch upon abandonment thereof. Money remaining to the credit of any ditch fund constitutes a trust fund which must be used for the purposes for which it was acquired. The legislature has not provided for the disposition of any unexpended balance remaining to the credit of a particular ditch fund upon abandonment thereof. This is a proper matter for the consideration of the legislature.

As bearing on the character and nature of a ditch fund see **Clearwater County v. Peefer**, 236 Fed. 183.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Mower County Attorney.
July 22, 1952. 602-F

6

Outlet—Sewer—Law does not contemplate use of drainage ditches for disposal of industrial waste direct from the industry but the law contemplates use by municipalities of drainage ditches as sewer outlet—Rights of land owner—M. S. 1949, 106.561.

Facts

"In the period of 1919-1922, Judicial Ditch No. 4 was constructed in Lac qui Parle County, Minnesota. This ditch is entirely within this one county. Much of this ditch runs parallel to the Minneapolis and St. Louis Railway and its right of way. This Judicial Ditch No. 4 goes through the City of Dawson, Minnesota, in Lac qui Parle County.

"At the present time, construction is being started in the City of Dawson, Minnesota, on Minneapolis and St. Louis Railway right of way property, of a large cooperative soy bean mill. The land on which this soy bean mill is being constructed is leased from the Minneapolis and St. Louis Railway. The location of the soy bean mill is approximately 150 feet from Judicial Ditch No. 4, which is a tiled ditch. The attorney for the soy bean cooperative has petitioned the county board of Lac qui Parle County, Minnesota, for permission to dispose of the water from the mill by a tile leading into Judicial Ditch No. 4. The petition states that 30,000 gallons of well water will be discharged into Judicial Ditch

No. 4 every twenty-four hour period. This water is well water that will be used for cooling extraction condensers and all the waters will be discharged without deleterious impurities or sediments. From what the auditor can determine from the original file in connection with this ditch and from the approximate location of the proposed soy bean mill, the Minneapolis and St. Louis Railway, back about 1922, paid approximately $240.00 for benefits to that particular part of the railroad right of way property, then unimproved, on which the soy bean mill will now be built."

Questions

1. "Is section 106.501 of Minnesota Statutes Annotated (Laws 1947, c. 143, sec. 50) applicable to this situation of drainage from an industrial plant into Judicial Ditch No. 4?"

2. "Does the fact that the Minneapolis and St. Louis Railway paid a small amount for benefits to this particular property where the soy bean mill will be located permit the soy bean mill, as lessee of this land from the railway, to drain its disposal water, amounting to 30,000 gallons each day, into Judicial Ditch No. 4 without paying an additional assessment?"

Opinion

I answer both questions in the negative.

Section 106.501 is not applicable because this is not a proceeding to improve the drainage system.

This drainage ditch was established in the period 1919-1922. The drainage proceeding must have been initiated under a petition provided in G. S. 1923, Sec. 6718. This provision is that which is described in L. 1905, C. 230, Sec. 27. Reading that section, we are referred to Section 3 of the same chapter. The purpose of the ditch must have been to provide a public benefit or promote the public health.

At the hearing thereon, as required by C. 230, Sec. 32, G. S. 1923, Sec. 6721, the court, before the ditch was established, must have found, among other things, that the proposed ditch would be of public utility or promote the public health.

When the viewers determined the benefits and damages to lands (G. S. 1923, Sec. 6681), they considered the benefits and damages **to each tract**, the **number of acres** in each tract benefited or damaged, and the amount that each tract would be benefited or damaged by the construction of the ditch. In respect to the railroad, they determined the benefits "that the road bed * * * will be made better by the construction of such ditch." No determination was made on account of benefits to the railroad company by reason of the construction of an industrial plant on its right of way and furnishing a means of disposing of industrial waste. So, it appears that no assessment has been imposed or paid in anticipation of the use now intended.

The use contemplated is in the nature of sewage disposal. This is an operation authorized by law relating to municipal corporations. The city of Dawson, under its charter, Chapter 5, paragraph 65th, "may also provide for the laying out and construction of a general system of sewerage within said city * * *." Chapter 8, Sec. 8, provides that the city council may permit any person to lay private sewers in streets or alleys provided the same are connected with the public sewers of the city and conform to regulations.

M. S. 1949, 106.561 enables the county board, in case of a public drainage system lying wholly within one county, to grant to a municipality upon its petition the right to discharge its sewage into a drainage ditch as an outlet under certain specified conditions. The order granting such right is upon terms there provided.

So, it will be seen that there is a method by which the desired end stated in your letter may be accomplished but not in the manner therein outlined. It appears to me that the operators of the mill should petition the city council for a drain to be connected with the city sewage system of the city. The city council may apply to the county board in the manner hereinbefore mentioned for permission to connect to the city sewage system with the drainage ditch but there will be no direct dealing between the county board and the proprietors of the mill.

Drainage ditches are contemplated to drain surface waters but there is specific authority for municipalities under certain procedure to make use thereof.

CHARLES E. HOUSTON,
Assistant Attorney General.

Lac qui Parle County Attorney.
March 20, 1951. 602

7

Petition—Signers—Sufficiency of petition for drainage ditch—Municipality owning an easement over which a public highway is laid and the state as owner of an easement over which a trunk highway is laid must be counted as owners in determining whether petition is signed by 51% of owners of land described in petition.

Question

May a drainage petition be signed by the authorized representative of any municipal corporation or the commissioner of highways, where the only ownership involved in the land is a right of way or easement for a public road for highway purposes?

Opinion

M. S. 1949, 106.031, Subd. 1 specifies in the second sentence:
"* * * Such petition shall be signed by not less than a majority of the resident owners of the land described in the petition or by the owners of at least 51 per cent of the area of such land."

The answer to your question turns on the meaning of the word "owner." In substance, the question is whether the owner of an easement is the owner of land within the meaning of this section.

An easement is property, a liberty, privilege, or advantage, in land, without profit, existing distinct from an ownership of the soil. It is an interest in real estate. **Warner v. Rogers**, 23 Minn. 34; **Minneapolis-Western Ry. Co. v. Minneapolis and St. L. Ry. Co.**, 58 Minn. 128, 59 N. W. 983; **Delisha v. M., St. P., R. and D. Elec. Traction Co.**, 110 Minn. 518, 126 N. W. 276; **Burnquist v. Cook**, 220 Minn. 48, 19 N. W. (2d) 394. It can be conveyed only by deed.

An owner has been defined as "A person in whom one or more interests are vested." Restatement, Property, Section 10a; 30 W. & P. 606.

"A proper drainage act is justifiable as an exercise of the police power, the power of eminent domain, and the taxing power." Dunnell's Dig., Section 2919.

Since this power rests in part in eminent domain, it seems proper to consider the law relating to eminent domain. In the statute relating thereto, "The word 'owner' extends to all persons interested in such property as proprietors, tenants, encumbrancers, or otherwise." M. S. 1949, 117.02, subd. 3. A municipal corporation having an easement in land for highway purposes is thus interested therein. The state, represented in highway matters by the commissioner of highways, is interested in easements on land held for trunk highway purposes. Thus an easement for a gas pipe line is "property" within the meaning of the constitution and the public drainage laws of this state. **In re Petition of Dreosch**, 233 Minn. 274, 47 N. W. (2d) 106. In the same case, the court says on page 282 (quoting from **Panhandle Eastern Pipe Line Co. v. State Highway Comm.**, 294 U. S. 613, 55 S. Ct. 563, "* * * 'A private right of way is an easement and is land. * * *'"

It appears to follow that the owner of an easement is the owner of land or a landowner.

It is my opinion that the authorized representative of a municipal corporation, which corporation has an easement in land for a public highway, is a qualified signer of a petition under M. S. 1949, 106.031, and the municipality must be counted as an owner when determining whether 51% of the area of the land described in the petition have signed the same. It is further my opinion that the state is the owner within the meaning of this section of land described in such petition, when it has an easement upon which is laid a trunk highway. When the commissioner of highways signs such petition, the state should be counted as an owner in determining whether the petition has been signed by the owners of at least 51% of the area of the land described in the petition.

It is my opinion that the words "or by the owners of at least 51 per cent of the area of such land" means that such petition must be signed by all of the owners of at least 51 per cent of the area of such land. So in addition to the owner of the easement it is required that the owner of the underlying fee interest must sign.

CHARLES E. HOUSTON,
Assistant Attorney General.

Renville County Attorney.
May 15, 1952. 602-i

8

Repair—Bids and Contracts—Only one bid submitted—Competitive bids—County board may let contract for repair of ditch involving work, labor and materials, under M. S. 1949, Section 106.471, subd. 4 (b), and Section 106.231 where only one bid is submitted notwithstanding provisions of M. S. 1949, Section 471.34.

Facts

A proceeding for the repair of a county ditch in your county has been instituted under M. S. 1949, Section 106.471. The ditch to be repaired is an open ditch and the repair of the same requires considerable work and labor and a nominal amount of materials. Bids for the repair have been taken and one bid has been received in the sum of $20,616.00. You ask the

Question

"In a contract for repair of a county ditch where only one bid has been received, is the County Board authorized to let the contract?"

Opinion

M. S. 1949, Section 106.471, subd. 2(b), requires that, where the estimated cost of the repairs to a ditch is $1,000 or more, the work must be done by letting a contract after advertising for bids therefor. By subd. 4(b) of said Section 106.471, a contract for the repair of a ditch is let in the same manner as provided for original ditch construction. See M. S. 1949, Section 106.231.

The statutory provisions relating to the letting of a contract for the repair of a ditch contemplate competitive bids. However, there is no requirement therein (106.231) precluding acceptance of a single bid submitted in response to the advertisement required by that statute; nor is there anything in M. S. 1949, Section 471.34, which prevents your county board from accepting the single bid. Section 471.34 reads in part:

"When any county * * * in this state calls for bids for the purchase of **any supplies or equipment**, no bid submitted shall be accepted unless competitive bids have also been submitted."

This quoted statutory provision was construed in **Otter Tail Power Co. v. Village of Elbow Lake**, 234 Minn. 419, 49 N. W. (2d) 197, as follows:

"We believe the proper construction of Section 471.34 is that it covers only contracts for the purchase of supplies and equipment and does not cover contracts for work or services or contracts for the purchase of equipment and supplies which include also the furnishing of work and labor in connection with the installation thereof."

If the proposed ditch repair and the estimated cost thereof is authorized by the applicable provisions of M. S. 1949, C. 106, and the county board has determined that the one bid submitted substantially complies with the advertisement for bids and the plans and specifications, that the bid is fair and reasonable and that the bidder is a "responsible bidder," the county board may accept the bid referred to in your letter, notwithstanding that it is the only bid submitted in response to the advertisement for bids.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Steele County Attorney. 602-J
August 1, 1952. 707-A-1

9

Repairs—Cost—Tax Lien—General taxpayers are not liable for expense in the repair of ditches—Drainage proceedings are statutory—Tax liens existing at time of tax forfeiture against forfeited lands are cancelled upon forfeiture—M. S. 1945, 106.19; 106.485, subd. 1.

Facts

In February, 1945, a petition for the repair of State Ditch No. 91 was filed with the clerk of the district court of Roseau County. In May, 1946, an amended petition in the same matter was filed. In August, 1946, an order for the repair was filed with the clerk of the district court. In July, 1947, a payment was made to the contractor. In November, 1947, a certificate of acceptance and final approval by the district court and the engineer was filed in the office of the clerk of the district court.

A lien on the lands subject thereto was filed and recorded to pay the cost of the repair in the sum of $36,863.09. Such lien was payable in three installments with the taxes for the years 1947, 1948 and 1949.

When the work of repair was completed, there was no credit to this ditch of funds sufficient to pay such cost. County warrants were issued (I presume drawn on the general revenue fund) and delivered to banks and

such banks paid the county a sum of money equivalent to the face of such warrants. One of such warrants is still outstanding in the sum of $5,000. In addition thereto, warrants were issued (I presume also drawn on the general revenue fund of the county) in the principal sum of $800 for the payment of interest on the principal warrants aforesaid. You do not state under what statutory authority it is claimed that such warrants were issued.

Such cost of repair will be collected by the county only as taxes are paid against the lands involved in the assessments and represented by the liens aforesaid. A large part of the lands against which such assessments were imposed is tax forfeited. So long as such lands are held by the state in pursuance of such tax forfeiture, such assessments will not be paid under authority of present law. You state that there is a very remote chance that there will ever be sufficient funds to the credit of this ditch to pay the warrants.

Question

Can the deficit be made up out of general funds of the county and, if not, in what other manner can it be done?

Opinion

Drainage proceedings are entirely statutory. At the time that this ditch was repaired, the law in force applicable thereto was found in M. S. 1945, C. 106. The county board was bound to comply strictly with the procedure outlined by statute. Anything that it did, not warranted by statute, is void. **Teichert v. County of Chippewa**, 225 Minn. 406, 31 N. W. (2d) 11.

M. S. 1945, 106.19, made the state lands assessable for benefits by reason of the construction of a drainage ditch. M. S. 1945, 106.485, subd. 1, provides that in such a repair proceeding, "To raise the necessary money to reimburse the general revenue fund, the county board is hereby authorized to apportion and assess the cost of the repairs pro rata upon all lands, corporations and municipalities which have participated in the total benefits as theretofore determined." The words "as theretofore determined" refer to the determination of benefits at the time of construction of the ditch. So, for this repair there was authority to assess lands which then were or now are tax forfeited.

Your question appears to be a practical one as to how the assessments against tax forfeited land will be collected and money realized therefrom to reimburse the general revenue fund. Such assessments may be paid by appropriation by the legislature. For example, see L. 1951, C. 652.

I know of no authority in the statutes whereby the general taxpayers can be required to pay for special benefits to privately owned lands or to tax forfeited lands.

CHARLES E. HOUSTON,
Assistant Attorney General.

Roseau County Attorney.
November 19, 1951. 602-J

COURTS AND CRIMINAL LAW

COURTS

10

District—Clerk—Deputy—Removal—Salary—Deputy Clerk appointed by Clerk of Court with approval of Judge may be removed by Clerk. M. S. A. 485.03. In counties having less than 45,000 population, salary of Deputy Clerk is to be determined by L. 1917, C. 476, M. S. A. 385.011 (footnote). Section 382.265 applies to clerk hire and not to compensation of Deputy Clerk of Court.

Facts

The County Board has heretofore allowed a certain sum for clerk hire in the office of the Clerk of the District Court. There are two full time deputies in the Clerk's office, whose compensation has been paid in monthly installments. One of the deputies retired and another was appointed in his place. About two months thereafter at the annual meeting of the County Board, the Board, without notice to the Clerk or his Deputy, reduced the Clerk hire as previously allowed to the Clerk. No reduction was made by the Board affecting the compensation of other personnel in the court house.

Questions

"1. Was the arrangement the Clerk of Court had with the Board a contract?

"2. If so, did the Board by its action cause a breach by arbitrarily cutting the Clerk's allowance without notice?"

Opinion

The first question, for the reasons hereinafter stated, is answered in the negative.

The population of Brown County is less than 45,000, and the compensation of the Deputy Clerk of the District Court is, in the absence of a special act fixing the same, to be determined by L. 1917, C. 476, M. S. A. 485.011 (footnote). The Deputy Clerk of the District Court is appointed by the Clerk with the approval of the Judge. The Clerk is responsible for the acts of his deputies and may remove them at his pleasure. Section 485.03.

The compensation of the deputy is statutory and not contractual. The relationship of employer and employee does not exist between the County Board and a Deputy Clerk of the District Court.

Section 382.265 relates to clerk hire and is not applicable to the salary of the Deputy Clerk of Court. AGO October 9, 1950, file 144a-2, copy enclosed. What we have stated herein requires a negative answer to the second question.

As bearing upon these questions, see **Sortedahl v. Board of County Commissioners**, 84 Minn. 509; **Wallace v. Board of County Commissioners of Douglas County**, 227 Minn. 212.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Brown County Attorney.
April 30, 1952. 144-A-1

11

District — Clerk — Fees and emoluments — Drivers' license fees — Moneys received by clerk of district court as fee for processing driver's license application is a fee and emolument of clerk of district court's office under L. 1951, C. 254.

Facts

"Laws 1951, Chapter 254, Subdivision 1, provides that in any county having less than 8,000 inhabitants, if the salary, fees, and emoluments of the clerk of the district court do not aggregate $2,700.00 at the end of the calendar year 1951, and at the end of each calendar year thereafter, such clerk may file with the county auditor a sworn statement showing the total amount of salary, fees, and emoluments received by him for official services during that calendar year, whereupon the auditor shall issue to the clerk a county warrant in the amount of the difference between the amount received by the clerk and $2,700.00.

"Subdivision 5 of the same law provides in part that fees and emoluments, as referred to in this section include all receipts, other than salary, of the clerk of the district court by virtue of his office."

Question

"Are drivers' license fees collected by the clerk of a county to be included in the emoluments of his office when the deficiency in the clerk's income is computed at the end of the year?"

Opinion

Your inquiry is answered in the affirmative. L. 1951, C. 254, Sec. 1, Subd. 5, as referred to in your letter, defines fees and emoluments as including "all receipts, other than salary, of the clerk of the district court by virtue of his office." M. S. 1949, Sec. 171.06, Subd. 4, authorizes the clerk of district court to retain 20 cents out of the driver's license fee of $1.00 for the express purpose of covering all expense involved in receiving, accepting, or forwarding to the highway department driver's license fees. These driver's license fees constitute a receipt of the clerk of court's office by virtue of the foregoing provision of the driver's license law.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Public Examiner.
July 11, 1952. 144-A-4

12

District—Jury service—Village employees—Village may require that the amount of fees and compensation received by an employee for services rendered during the period of municipal employment shall be deducted from the salary of the employee—M. S. A. 593.04, 593.05, 628.43, 628.49, 357.22, 357.23.

Question

"Can Village adopt resolution whereby village employees upon surrender to village of juror's pay can be paid in full for time spent in serving as petit juror?"

Opinion

Every citizen is required to render jury service unless exempted by law or excused by the court. M. S. A., Sections 593.04, 593.05, 628.43, and 628.49. A citizen who has been summoned for jury service is entitled to receive fees and mileage as prescribed by law. An employee of a municipality is not, under certain circumstances, entitled to receive witness fees. See M. S. A., Sections 357.22 and 357.23.

We are not aware of any statute which prohibits a municipal employee from receiving fees and mileage as a juror, as prescribed by law, and at the same time receiving compensation as an employee of a municipality. Neither are we advised of any law which would preclude the village from requiring that the amount of fees or compensation received by a municipal employee for any services performed during his regular hours of employment should be deducted from the salary of such employee. Such a requirement or rule could be made so as to constitute a condition of employment of all municipal employees of the village. This is a matter which rests largely within the discretion of the proper officers of the village.

It is a matter of common knowledge that many private corporations do not dock any of their employees while engaged in serving as jurors. At the present time employees of private corporations, as well as public corporations, are given a reasonable time to be absent from their work for the purpose of exercising the precious right of a citizen to vote. However, as heretofore pointed out, the matter of deducting from the salary of municipal employees the amount of fees or compensation received for services performed during the regular hours of employment is a matter to be resolved by the proper officers of the village.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

North St. Paul Village Attorney
November 4, 1952. 260-A-5

13

District—Sentence—Modification—Court which has imposed sentence may reduce the sentence during same term of court in which imposed even though partly executed—U. S. v. Benz, 282 U. S. 304, 51 S. Ct. 113.

Question

Whether the judge can modify a sentence during the same term of court in which it was imposed only when the sentence was suspended or if he can also modify the sentence when commitment has been made.

Opinion

In the decision of the Supreme Court in the case of **State v. Carlson,** 178 Minn. 626, 228 N. W. 173, cited in the opinion of which you enclose a copy in your letter, the court said:

> "* * * Except where otherwise provided by statute, it is the settled and apparently the universal rule that where the court has imposed a valid sentence it cannot change or modify such sentence after the expiration of the term at which it was imposed."

In that case the court further stated that:

> "* * * It is also generally held that the court cannot change the sentence even at the same term after it has been partly executed. **In some cases, however, it has been held that after a sentence has been partly executed the punishment may be reduced, although it cannot be increased."** (Emphasis supplied.)

A statement in 168 A. L. R. 714 reads as follows:

> "The right of a trial court to alter a sentence by way of mitigation during the term at which it is imposed, even though execution has been entered upon, has been established in the Federal courts and several state courts."

We have found no Minnesota Supreme Court decision on the exact question here involved.

However, in a decision in the case of **United States v. Benz,** reported in 282 U. S. 304, 51 S. Ct. 113, the United States Supreme Court answered in the affirmative the following question certified by the court below:

> "After a District Court of the United States has imposed a sentence of imprisonment upon a defendant in a criminal case, and after he has served a part of the sentence, has that court, **during the term in which it was imposed,** power to amend the sentence by shortening the term of imprisonment?" (Emphasis supplied.)

By reason of the decision of the United States Supreme Court in the above cited case, followed in a number of states, it would appear that a court which has imposed a sentence may reduce the sentence during the same term of court in which it was imposed although it has been partly executed.

J. A. A. BURNQUIST,
Attorney General.

Division of Public Institutions.
August 22, 1952. 341-K-9

14

Justice — Certificates of conviction — Statute does not apply to reports by Justice of the Peace on convictions for violating village or city ordinances—M. S. 633.27.

September 19, 1932 Opinion Reversed; December 3, 1937 Opinion Adhered to.

Opinion

In an opinion dated November 21, 1907 (No. 149, 1908 report), this office held that it was not obligatory upon justices of the peace and clerks of municipal courts to report to the county attorney any criminal prosecutions under village or city ordinances.

In an opinion dated September 19, 1932 (file 266b-17), the writer thereof ruled that a justice of the peace must report to the clerk of the district court convictions under village and city ordinances.

However, in a later opinion dated December 3, 1937 (No. 168, 1938 report), the office of Attorney General took the position that the sections from which the present statutes here involved are derived did not apply to prosecutions under a village ordinance.

As in statutory construction a later law, if it cannot be reconciled with a former, supersedes the former, a later opinion of the Attorney General inconsistent with a former opinion supersedes the former opinion. In the matter of which you write, we adhere to the opinion dated December 3, 1937 (No. 168, 1938 report).

M. S. 1949, Section 633.27, provides for the filing of reports of convictions by a justice of the peace with the clerk of the district court of his county. It also provides that no bills for justice fees shall be allowed until all fines collected by such justice have been forwarded as provided by law. M. S. 1949, Section 633.36, requires that all the fines collected by a justice of the peace shall be paid to the county treasurer within 20 days after he receives them. Under the December 3, 1937 opinion hereinabove referred to, it was held that reports by the justice of the peace of convictions under a village ordinance are not required.

That ruling appears to be justified by the fact that M. S. 1949, Section 411.31, provides that city justices shall, as the common council may require, report to the council all the proceedings instituted before them and shall account for and pay over to the city treasurer all fines and penalties collected or received by them belonging to the city. In your communication you speak of the Justices of the Peace of the City of Alexandria. I find that the charter of that city, in C. 3, Section 45 thereof, contains provisions similar to those in Section 411.31.

M. S. 1949, Section 412.871, provides that "All fines, forfeitures, and penalties recovered for the violation of any ordinance shall be paid into the village treasury. Every court * * * shall make return thereof under oath."

By reason of the different statutory provisions hereinabove referred to requiring that fines for violation of village or city ordinances shall be paid into the village or city treasury, I am of the opinion that above cited M. S. 1949, Section 633.27, should be construed as not applying to reports on and fines imposed by a justice of the peace for the violation of city or village ordinances.

J. A. A. BURNQUIST,
Attorney General.

Douglas County Attorney.
July 26, 1951. 266-B-17

15

Justice—Costs—To be assessed against the defendant in a criminal case, M. S. A. 633.33, do not include board of defendant either before or after trial.

Question

May a justice of the peace, in a criminal case, include in a judgment to be entered against a defendant for a violation of a municipal ordinance defendant's board while confined in the county jail, and also other expenses incurred by the municipality prior to the trial as a part of the costs within the meaning of M. S. A. 633.33?

Opinion

It is our opinion that in a criminal case in a justice court the board of a defendant, either before or after trial, may not be assessed as costs to be included in the judgment entered against the defendant. The statutory provisions relative to criminal proceedings before a justice of the peace make this conclusion reasonably certain.

Section 633.19 authorizes a justice of the peace in certain cases to enter costs which have accrued against the complainant. Section 633.25 provides for the entry of a judgment against the defendant and his sureties for the fine assessed. Section 633.33 reads as follows:

"In all cases of conviction under this chapter the justice shall enter judgment for the fine and costs against defendant, and may commit him until the judgment is satisfied, or issue execution on the judgment to the use of the county. No justice shall commit a defendant under this section for more than three months."

The term "costs" as used in the aforesaid statute means those charges fixed by law which have been necessarily incurred in the prosecution of one charged with a public offense, and includes the fees of public officers as prescribed by statute. It would be proper to include the fees of the police officers and the justice fees as provided for in Section 357.14. However, as above stated, the term "costs" does not include the board of the defendant while confined in jail either before or after trial. **City of Carterville v. Cardwell**, 132 S. W. 745 (Mo.); **U. S. v. Briebach**, 245 Fed. 204; **McRostie v. City of Owatonna**, 152 Minn. 63, 188 N. W. 52.

We are not advised as to the nature of the expenses which may be incurred by a municipality in a criminal case prior to trial and for that reason we do not pass upon that part of the question submitted.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Robbinsdale Village Attorney.
July 10, 1952. 266-B-7

16

Justice—Jurisdiction—Traffic violations—Should dispose of traffic violation under village ordinance—Such judicial authority cannot be delegated to or exercised by a police officer.

Facts

The village of North St. Paul has two justices of the peace and does not have municipal court.

Question

"Could Village by ordinance allow person having violated traffic ordinance — such as failure to obey stop sign — overtime parking, etc. — appear before party in charge of the police office — and pay fine?"

Opinion

A village justice of the peace has jurisdiction to hear and dispose of all violations of village ordinances, including traffic violations. Such judicial power and authority cannot be delegated. The village council cannot, by ordinance, clothe a police officer with judicial power. Accordingly, we answer the aboye question in the negative.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

North St. Paul Village Attorney.
July 21, 1952. 989-A-24

17

Justice—Jurisdiction—Traffic violations—Violation of the village ordinances—Minn. Const., Art. VI, Section 8; M.S.A. 488.09 and 633.01. **State ex rel. Carlton v. Weed**, 208 Minn. 342.

Facts

The village of Mapleview, Mower County, is duly organized, incorporated, and operating under the 1949 village code. Ordinances have been enacted by the village which prescribe a penalty for violation thereof. Mapleview is located approximately one mile north of the city of Austin which has a municipal court and several justices of the peace.

Questions

"1. Do the Justice Courts of the City of Austin have jurisdiction to hear cases arising out of violations of the village ordinances?

"2. Do the Justice Courts, located in townships outside the corporate limits of the Village of Mapleview, have original jurisdiction to hear cases arising out of the violation of Mapleview Village ordinances?

"3. Do the Justice Courts of the City of Austin have original jurisdiction over cases arising out of violations of state traffic laws when such arrests are made within the corporate limits of the Village of Mapleview?

"4. Do the Justice Courts of townships outside the corporate limits of the Village of Mapleview have original jurisdiction to hear cases arising out of the violation of state traffic laws when such violations occurred within the corporate limits of the Village of Mapleview?"

Opinion

Before specifically answering each of these questions we deem it desirable to examine the pertinent provisions of the home rule charter of the city of Austin, and constitutional and statutory provisions which we believe control the disposition of each of these questions.

Minn. Const., Art. VI, Sec. 8, provides in substance that no justice of the peace shall have jurisdiction in a criminal cause where the punishment shall exceed three months' imprisonment or a fine over one hundred dollars. Under this provision the legislature is directed to provide for the election of justices of the peace and to prescribe their duties and compensation. The territorial jurisdiction of a justice is statutory and not constitutional.

In a criminal case the jurisdiction of a justice of the peace is prescribed in Section 488.09, which reads as follows:

"No justice of the peace shall have jurisdiction of offenses committed in any city or village wherein a municipal court is organized and existing, but all such offenses otherwise cognizable by a justice shall be

examined and tried by such municipal court, and all cases arising under the charter, ordinances, or by-laws of such city or village shall be tried by the court without a jury. The court shall have jurisdiction concurrently with the justices of all offenses committed elsewhere within the county."

and, Section 633.01 in part provides:

"Justices of the peace have power and jurisdiction, throughout their respective counties, as follows:

"* * *

"(4) To cause to come before them persons who are charged with committing any criminal offense and commit them to jail, or bail them, as the case may require; provided that no justices of the peace shall have jurisdiction of any offenses committed within the limits of any city or village wherein a municipal court is organized and existing, but such offenses, otherwise cognizable by justices of the peace, and those arising under the charter, ordinances, or by-laws of the city or village shall be examined or tried by the municipal court therein existing; provided that this section shall not apply to any cities or villages having justice of the peace courts established by home rule charter, nor to territory within one-half mile of the outer limits of the state fair grounds."

The charter of the city of Austin, Ch. III, Sec. 1, provides for the election of one justice of the peace in each ward of the city. The powers and duties of such justices of the peace are prescribed in Section 15 of the charter which, so far as material, reads as follows:

"The justices of the peace shall possess all the authority, powers, rights, and perform all of the duties as justices of the peace of this state under the general laws, and shall have concurrent jurisdiction with the justices of the peace of the County of Mower, and may have their office and hold court anywhere in said city, and shall have in addition thereto exclusive and original jurisdiction to hear, try and determine summarily and without a jury all complaints, conduct all examinations and trials for offenses committed within said city, for violation of any provision or provisions of the charter, or any ordinance, by-law, rule, or regulation made or adopted under or by virtue thereof, and of all cases cognizable before the justice of the peace, in which the city is a party, and of all rights, actions, prosecutions and proceedings in the recovery of any fine, forfeiture or penalty under any by-law, ordinance or regulation of the city or its charter, and in all cases of offense committed against the same; and such other and further jurisdiction as is conferred by Section 1074 of the General Statutes of 1894, and the amendments thereto. Provided, that appeals may be taken from the judgments of justices of the peace to the district court of the County of Mower, State of Minnesota, upon the same grounds, and under the same provisions, and subject to the same restrictions, and with like effect as is provided by the general laws of this state for appeals from justices of the peace.

"In all actions, prosecutions and proceedings of any kind before any city justice, such justice shall take judicial notice of all ordinances of said city, and it shall not be necessary to plead or prove such ordinances in said court."

From M. S. A., Vol. 27, page 314, it appears that there is a municipal court established in the city of Austin, under the general laws applicable to municipal courts. The village of Mapleview has no municipal court. Justices of the peace for the village have been elected as provided for in the 1949 village code.

Our supreme court in **State Ex Rel. Carlton v. Weed**, 208 Minn. 342, 294 N. W. 370, had for consideration the question of jurisdiction of a justice of the peace in a criminal cause where the crime was committed within a municipality having a municipal court. In the course of the decision the court examined the statutory provisions hereinbefore referred to and held that these provisions should be construed as being in pari materia, pp. 344, 345. The decision is concluded with the following paragraph:

"Here Alexandria is a home rule charter city, and its charter provides for justice of the peace courts. That it may also have municipal courts is not to be denied. The legislature in its wisdom may provide for concurrent jurisdiction of both courts within the city limits, as it has throughout the county. Apparently it has done so, and it is not for us to question the legislative policy."

From the charter provisions of the city of Austin and the statutory provisions hereinbefore referred to, together with the decision in **Carlton v. Weed**, supra, we reach the following conclusions:

That justices of the peace of the city of Austin and its municipal court have concurrent jurisdiction over all criminal causes within the county, subject to the limitations contained in Art. VI, Section 8, supra, except in any municipality wherein there exists a municipal court. Such justices of the peace and municipal court likewise have concurrent jurisdiction over all cases arising out of violations of the ordinances of the city of Austin for which a penalty is prescribed, and such justices of the peace and municipal court have jurisdiction to hear and determine causes which involve violations of the ordinances of the village of Mapleview, for which violations a penalty is prescribed. Any justice of the peace of Mower County has jurisdiction to hear cases involving violation of any ordinance of the village of Mapleview for which violation a penalty is prescribed.

The foregoing requires that each of the questions submitted be answered in the affirmative.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Attorney for Village of Mapleview.
September 24, 1952. 266-B-24

18

Municipal—Costs—County not responsible for costs of prosecution of minor for violation of city ordinance after hearing in juvenile court—M. S. A., Sections 260.21, 260.22—Such costs should be paid by city—Sec. 488.22.

Facts

"Your reply to the question indicated as question One leads me to believe that the costs to which you have reference are such costs as might be incurred in the **juvenile court.** The costs which I meant to inquire about are the costs incurred in municipal court after the matter has been referred back to the municipal court. At such hearing, for instance, the municipal court judge sometimes finds the defendant guilty and imposes a fine, say, $10.00 plus costs in the sum of $3.50. Then, the municipal court judge suspends the fine and the costs. In the billing to which I referred in my original inquiry, the county's objection was to payment of costs so incurred in **municipal court** in prosecutions under a city ordinance. It was the theory of the county that, when the judge of probate, as juvenile court judge, declined jurisdiction and certified the case back to municipal court, it was then on the same basis as any other prosecution under city ordinance."

Question

"Where a case involving a minor charged with violation of a city ordinance is certified by the juvenile court back to the municipal court and is heard and disposed of in municipal court, should the county or the city pay the costs incurred in the municipal court?"

Opinion

Expenses incurred in the juvenile court in connection with a minor charged with a violation of a municipal ordinance should be paid by the county when certified as prescribed by Section 260.29.

The costs incurred in the municipal court upon a prosecution of a minor for a violation of a city ordinance after certification by the juvenile court as provided for in Section 260.21 are not a proper charge upon the county Such costs, in our opinion, should be paid by the city unless the same have been paid by the defendant. See Section 488.22.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Freeborn County Attorney.
July 14, 1952. 306-B-6

19

Municipal—Judge—Special—Shall act only in the absence or disability of the municipal judge—M. S. A. 488.05; "Disability" and "Disqualification" construed.

Question

"Does the wording 'Where there shall be a Municipal Judge and a special Municipal Judge, the special Municipal Judge shall act only in the absence or disability of the Municipal Judge' pertain or mean only physical absence or physical disability? In other words, does the word disability in the text include in its meaning the word disqualified and may the special Municipal Judge act where the Municipal Judge is disqualified?"

Opinion

M. S. A. 488.05 in part provides:

"* * * In the absence or disability of the municipal judge and special municipal judge of such court, if there be one, the mayor or president of the council may designate a practicing attorney to sit in place of such municipal judge from day to day. * * * Where there shall be a municipal judge and a special municipal judge, the special municipal judge shall act only in the absence or disability of the municipal judge * * *; provided that any such special municipal judge shall not be prohibited from practicing in the municipal court or in any other court, but he shall not sit in the trial of any cause or proceeding wherein he may be interested, directly or indirectly, as counsel or attorney, or otherwise."

It will be noted that the special municipal judge is, by virtue of this statute, disqualified from sitting upon the trial of any cause or proceeding wherein he may be interested, directly or indirectly, as attorney or otherwise. This prohibition is not applicable to the regular municipal judge.

There is no statute authorizing the disqualification of a judge of the municipal court by reason of bias, prejudice, or personal interest. Section 542.16 relates to the disqualification of a judge of the district court by filing an affidavit of prejudice and does not apply to a judge of the municipal court. **State ex rel. Burk v. Beaudoin**, 230 Minn. 186, 187, 40 N. W. 2d 885; **State ex rel. Nichols v. Anderson**, 207 Minn. 78, 289 N. W. 883.

In **City of Duluth v. La Fleaur**, 199 Minn. 470, 272 N. W. 389, the court in construing Mason's Minnesota Statutes 1927, Section 9221, now coded as M. S. A. 542.16, on page 471 in substance said that this statute does not appear to cover judges of municipal courts. Disqualification of a municipal judge to sit upon the trial of a case must be by virtue of some statute. This was pointed out by our court in **State v. Ledbeter**, 111 Minn. 110, 126 N. W. 477, which involved the case of the disqualification of the trial judge. On page 114 the court said:

"If the judge was disqualified in this case, it must have been by virtue of some clear and positive statute; for at common law, while a judge could not sit in his own case, nor in one in which he had a pecuniary interest, yet his relationship, by affinity or consanguinity, to a party or his attorney, was not a disqualification."

From the foregoing we conclude that the provisions of Section 542.16, relating to the filing of an affidavit of prejudice, are not applicable to judges of the municipal court.

We now reach that part of your question which requires a determination of whether the word "disability," as used in Section 488.05, should be construed so as to mean disqualification of the judge on account of bias, prejudice, interest, or other reasons.

In a Wisconsin case, **Eccles v. Free High School District,** 155 N. W. 197, a statute similar in some respects to Section 488.05 was before the court for consideration. A part of the Wisconsin statute is quoted on page 957 of the decision as follows:

> "* * * In case of sickness, temporary absence or disability of said judge he may, by order in writing filed and recorded in said court, appoint the county judge of said county * * * to discharge the duties of such judge during such sickness, temporary absence or disability, who shall have all the powers of such judge while administering such office. * * * in all * * * cases any circuit judge may hold court as the judge of the municipal court in the event of the absence, sickness or other disability of the municipal judge or upon his special request. * * *."

In construing the word "disability" as used in this statute the court on page 958 said:

> "It is contended by the appellant that the phrase 'In case of sickness, temporary absence or disability of said judge,' when considered in connection with the other parts of the statute, do not include the disqualification of the municipal judge on account of his prejudice in the case. The argument is that the 'disability' contemplated by this statute is one like the sickness or absence of the judge, and that it does not include a disability arising from prejudice of the judge. The Legislature evidently intended to make provision for the discharge of the municipal judge's duties when he was unable to discharge his judicial duties, and, when so interpreted and applied to the subject-matter of the statute, the language employed includes in its general meaning all disqualifications of the municipal judge, and the word 'disability' aptly expresses such intent as inclusive of all disqualifications in addition to sickness and absence. In ordinary language the condition of a judge who cannot act because he is not indifferent in the case is spoken of as a disqualification which legally disables him to perform the judicial function. **Bias or prejudice of a judge as to the parties constitutes in the law a disability of such judge for the discharge of his duties."** (Emphasis supplied.)

In construing the word "disability" as used in this statute, the court stated that its conclusion was corroborated by a provision contained in Section 35 of the act which provided that in case the municipal judge is disqualified to act on account of prejudice in the case, he is authorized to call in the circuit judge or county judge. Under the Wisconsin statute the municipal judge could be disqualified to act for the causes which were

enumerated in Section 35 of the act which was before the court for consideration, and which included prejudice in the cause. No such provision is made in any of our statutes which is applicable to judges of the municipal court.

Under recognized principles for the orderly administration of justice and our constitutional provisions, a litigant is entitled to a fair and impartial tribunal to hear and determine his private rights. These constitutional provisions are guaranties which recognize as a primal necessity that there be laws providing impartial tribunals for the adjudication of such rights. See **Stahl et al. v. Board of Supervisors of Ringgold County, et al.** (Iowa), 175 N. W. 772, 776.

These constitutional guaranties, Minnesota Constitution, Art. I, Section 8, and the due process clause of the United States Constitution, Amend. XIV, are self-executing and require no legislative provisions for their enforcement.

Our court in **Payne v. Lee**, 222 Minn. 269, 24 N. W. (2d) 259, on page 272 said:

> "Failure to recognize bias as a ground of disqualification is an abuse of discretion and a violation of Minn. Const. (Bill of Rights), Art. 1, Section 8, which provides:
>
> 'Every person * * * ought to obtain justice freely and without purchase; ***completely and without denial*** * * *.' (Emphasis supplied.)
>
> "A concept of judicial administration which leads one to assume that justice can be obtained 'completely and without denial' before a tribunal that is partial, biased, or hostile is certainly one alien to our institutions. If we were to assume that complete justice could with any likelihood be so dispensed, it would be a justice which commanded neither the respect nor the confidence of the citizen."

And, referring to the due process clause of the United States Constitution, on page 275 said:

> "The failure to provide a litigant a fair and impartial tribunal before which to adjudicate his private rights is also in violation of the due process clause of U. S. Const., Amend. XIV."

It is our opinion that the decision of our court in the Lee case, supra, is dispositive of that phase of the question under consideration. Consequently, to give effect to the aforesaid constitutional provisions the word "disability" as used in Section 488.05 should not be limited to a physical disability but must be construed so as to include disqualification of the judge by reason of bias, prejudice, interest or other reasons which would deny to a litigant the rights guaranteed by said constitutional provisions.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Perham Village Attorney.
December 29, 1952. 307-J

20

Municipal—Jurisdiction—Witnesses—Power to compel attendance of witnesses in a criminal case coextensive with territorial jurisdiction of court.

Question

Does the municipal court of the city of Winona have the power in criminal cases to compel the attendance of witnesses outside of the county but within the state?

Opinion

The municipal court of the city of Winona was established by Special Laws 1885, Ch. 115. This act has been subsequently amended, but these amendments are not material to the question considered. So far as pertinent, the original law, Section 2, in part reads:

> "Said court shall be a court of record and shall have a clerk and seal, and shall have jurisdiction to hear, try and determine all actions at law where the amount in controversy does not exceed the sum of three hundred (300) dollars. Also to hear, try and determine all criminal cases and conduct all criminal examinations heretofore cognizable before a justice of the peace of the city of Winona."

Section 31 of the original law reads as follows:

> "The territorial jurisdiction of said municipal court shall be the same as that of justices of the peace in Winona county, except as is hereinbefore otherwise provided."

Under these sections the territorial jurisdiction of the municipal court in a criminal case is the same as a justice of the peace except as otherwise provided in the original law.

A court of justice of the peace is of limited jurisdiction. The powers of a justice of the peace are such only as are conferred by statute. Dunnell's Minn. Digest, Vol. 4, Section 5270. **State v. Miesen,** 96 Minn. 466, 105 N. W. 555.

The jurisdiction of a justice of the peace in a criminal case is stated in M. S. A. 633.01, which reads:

> "Justices of the peace have power and jurisdiction, throughout their respective counties, as follows:
>
> "(1) To cause to be kept all laws made for the preservation of the peace;
>
> "(2) To cause to come before them, or any of them, persons who break the peace, and commit them to jail, or bail them, as the case may require;
>
> "(3) To arrest and cause to come before them, persons who attempt to break the peace, persons who keep houses of ill-fame, or frequenters of the same, or common prostitutes, and compel them to give security for their good behavior, and to keep the peace;

"(4) To cause to come before them persons who are charged with committing any criminal offense and commit them to jail, or bail them, as the case may require; provided that no justices of the peace shall have jurisdiction of any offenses committed within the limits of any city or village wherein a municipal court is organized and existing, but such offenses, otherwise cognizable by justices of the peace, and those arising under the charter, ordinances, or by-laws of the city or village shall be examined or tried by the municipal court therein existing; provided that this section shall not apply to any cities or villages having justice of the peace courts established by home rule charter, nor to territory within one-half mile of the outer limits of the state fair grounds."

In certain cases a person charged with a criminal offense or who has escaped from the custody of the officer may be apprehended outside of the county but within the state. Sections 629.40 and 629.43.

Section 20 of Ch. 115, supra, in part provides:

"Complaints in criminal cases, where the defendant is not in custody, may be made to the court while in session, or to the judge when the court is not in session, and shall be made in writing or reduced to writing by the judge or clerk, and sworn to by the complainant, whether the offense charged be a violation of the criminal laws of the state, or of the ordinances, regulations or by-laws of said city. Warrants shall be issued by the judge or by the clerk on the order of the judge, and may be served by the marshal or any police officer of said city, or by the sheriff of Winona county, at any place within this state."

From these last mentioned statutory provisions, and said Section 20, a person who has committed a criminal offense within the territorial jurisdiction of the justice of the peace or the municipal court may be apprehended when outside of the respective county of the justice or the court, but within the state.

No authority or power is specifically granted to a justice of the peace or the court in the aforementioned statutes or in Ch. 115, supra, to issue process so as to compel the attendance of witnesses in a criminal case whether such witnesses are within or without the county.

The right of an accused to have compulsory process for obtaining witnesses in his favor is a constitutional right. Minn. Const., Art 1, Section 6.

As bearing upon the powers of a justice of the peace to summon witnesses, the following statutory provisions are pertinent:

"633.32. In all cases arising under this chapter the justice shall summon the injured party, and all others whose testimony is deemed material as witnesses at the trial, and enforce their attendance by attachment, if necessary."

"633.26. Every person summoned to appear before a justice, pursuant to the provisions of this chapter, as a juror or witness, who shall fail to appear, and every witness appearing who refuses to be sworn

or to testify, is liable to the same penalties and may be proceeded against in the same manner as provided by law in respect to jurors and witnesses in civil causes in justice courts."

We believe that the power of a justice of the peace as well as a municipal court under Ch. 115, supra, to compel the attendance of witnesses in a criminal case, is coextensive with the territorial jurisdiction of the court in a criminal case. The territorial jurisdiction of a justice of the peace is defined by statute, Section 331.01, supra, and is limited to the county except where the accused may be apprehended when outside of the county as provided in the statutory provisions hereinbefore referred to. Such power and authority is limited to the circumstances and the instances authorized by these statutory provisions and, in our opinion, should not be considered as applicable to requiring the attendance of a witness in a criminal case by subpoena or other process. In such a case we believe that the witness to be coerced by subpoena or other process must be within the territorial jurisdiction of the court.

As bearing upon the jurisdiction and power of the court, Dunnell's Minn. Digest, Vol. 2, Section 2345a, in part reads as follows:

"A court has no extraterritorial jurisdiction or powers. It cannot exert its powers beyond the territory of the state in which it is organized. Its process has no force and its judgments cannot be enforced outside such territory."

We have not found any decision of our own court touching upon the question under consideration. The authorities which we have examined sustain our conclusions.

American Jurisprudence, Vol. 58, Section 15, page 31, in part reads:

"Generally speaking, all persons within the jurisdiction of a court before which cause is to be tried may be compelled to attend as witnesses therein through the means of duly issued subpoenas."

Corpus Juris, Vol. 70, Section 17, page 42, in part reads:

"Generally speaking, a subpoena has no extraterritorial effect and a court cannot compel the attendance of a witness who is beyond its jurisdiction."

Decisions are cited to support the principle of law stated. In the Alabama case, **Redmond v. State**, 59 So. 181, the court said:

"The right of the defendant to compulsory process for the attendance of his witnesses, conferred by section 6 of the constitution, does not extend to process for a witness beyond the jurisdiction of the Court, whose attendance it cannot compel. Citing Sanderson v. State, 53 So. 109, and authorities therein collected and cited."

And, in the Kentucky case, **Hey v. Emerson**, 135 S. W. 294, which involved an order to require the personal attendance of a nonresident as a witness for the defendant, the court refers to the pertinent statute and quotes therefrom as follows:

"Upon the affidavit of a party, and the written statement of his attorney, that the testimony of a witness is important, and that the just and proper effect of his testimony cannot in a reasonable degree be obtained without an oral examination in Court, the Court may, at its discretion, order the personal attendance of the witness to be coerced, although such witness may otherwise be exempt from personal attendance by the provisions of this code."

In construing this provision the court said:

"This section applies to witnesses within the jurisdiction of the Court. It has no application to witnesses without the jurisdiction of the Court, whom the Court is without power to compel to attend the trial."

Our court has held that where the jurisdiction of the court in a civil matter was limited to the county, the service of a summons upon a defendant outside of the county did not give the court jurisdiction. **Juster v. Court of Honor**, 120 Minn. 325, 139 N. W. 701.

We believe that the general rule stated in American Jurisprudence and Corpus Juris, as above quoted, should be controlling upon the question submitted, and accordingly we answer the same in the negative.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Winona City Attorney.
June 20, 1952. 306-B

21

Municipal—Law books—Village may purchase such law books for its municipal court as governing body thereof deems advisable; and such books purchased shall be the property of the village—M. S. 1949, Section 648.39, Subd. 1 and 3; Section 412.211.

Opinion of December 12, 1950 (306a) Superseded.

Facts

"The Village of Hibbing has for some years been purchasing individual volumes of Corpus Juris Secundum and West Publishing Company's Minnesota Statutes Annotated, together with such other law books as the Motor Vehicle Law as published by Mason Publishing Company. The Municipal Court turns over collections to the General Fund of the Village of Hibbing and payments of the above books are made from the General Fund. Such books have been used not only by the Municipal Court but also by other attorneys and other officials and employees of the Village of Hibbing. The books are the property of the Village and not the Municipal Judge."

Question

"May the Village of Hibbing under its general powers purchase supplies such as law books, in addition to M. S. A., as may be needed by its Municipal Court?"

Opinion

M. S. 1949, Section 648.39, Subd. 1, provides in part as follows:

"The commissioner of administration shall purchase 1,000 copies of each edition of Minnesota Statutes, to be distributed by him as follows:

"* * *."

Subd. 3 thereof provides:

"Subd. 3. Each city, village, borough, and town shall purchase from the commissioner of administration, for the use of each justice of the peace, judge of the municipal court, clerk of the municipal court, and clerk of the city, village, borough, or town, as the case may be, such number of copies as the city, village, borough, or town shall determine is needed."

This is the only mandatory provision in the Minnesota Statutes relating to the purchase of law books by a municipality. However, every municipality which establishes a municipal court has the implied power to equip it so that it can function efficiently.

The general powers conferred upon villages by M. S. 1949, Section 412.211, permit every village to acquire such real and personal property as the purposes of the village may require. The purposes of the village may well include the purchase of law books for its municipal court.

It is, therefore, my opinion that this general power gives the village the authority to purchase such law books for its municipal court as in the discretion of its governing body may be deemed advisable. It, of course, is understood, as you suggest, that the books purchased shall be the property of the village.

The December 12, 1950 opinion of this office (306a), to the extent that it is inconsistent herewith, is hereby superseded.

J. A. A. BURNQUIST,
Attorney General.

Hibbing Village Attorney.
December 21, 1951. 306-A

22

Municipal—Sentence—Prisoners—Jails and workhouses—Municipal Court of Redwood Falls has no authority to sentence prisoner to workhouse in the City of Minneapolis—M. S. 642.04, 643.01, 643.02, 617.63, 617.61, 616.11, 616.12, 617.715, 610.19, 610.35, 641.07.

Facts

The Municipal Court of the City of Redwood Falls is organized and operates under L. 1895, C. 229. Redwood County maintains a jail in the City of Redwood Falls but maintains no workhouse.

Questions

1. Does the Municipal Court of Redwood Falls have "authority to sentence a prisoner found guilty of a misdemeanor either under the Statute or the Ordinances to the Minneapolis Workhouse"?

2. If the Municipal Court does not have such authority, if proper application be made to the District Court, could a prisoner "be transferred by the District Judge from a commitment to the County Jail to the Minneapolis Workhouse under the provisions as outlined in Section 642.04 and Sections 643.01-02, M. S. A."?

Opinion

As applied to the facts submitted, both questions are answered in the negative.

M. S. 642.04, to which you refer, provides in its part here material that when in any city of the fourth class no jail exists which in the judgment of the city council is sufficient or suitable for the detention of persons lawfully under arrest in the city, the council may cause persons lawfully arrested to be detained in any city or county jail or lockup **in the same or in an adjoining county**, subject to the conditions in that statute specified.

Although it does not affirmatively appear from your inquiry, we assume for the purpose of this opinion that the City of Redwood Falls does not maintain a city jail, and if it does, it is not sufficiently suitable for the detention of persons lawfully under arrest in the city. While the language of this statute relates only to the detention of persons lawfully under arrest in the city, and does not relate to their detention under a commitment after conviction, it has been interpreted as authority for the confinement of the prisoner in the county jail under a commitment for violation of a city ordinance. See Attorney General report 1934, opinions Nos. 267 and 675. Even so, the statute cited is not authority for a commitment by the Municipal Court of Redwood Falls in the County of Redwood to a workhouse located in the County of Hennepin. The express language of that statute and the geographical locations of Redwood and Hennepin counties constitute the authority for that statement.

Nor are the provisions of Sections 643.01 and 643.02 applicable to the situation presented by you.

M. S., Section 643.01, prescribes that "In any county of this state in which there is * * * maintained by any county or by any city and county, a workhouse, correctional or work farm for the confinement of criminal offenders, any district judge of the judicial district in which the county is situated, shall have the power, * * * to order any prisoner * * * confined

in the county jail of such county under sentence * * * to be transferred from such county jail and recommitted to any such workhouse, correctional or work farm * * *." Section 643.02 merely prescribes the procedure to be followed where the authority conferred by Section 643.01 is invoked. But Section 643.01 may be invoked only where the prisoner is confined under sentence in a county jail in a county where there is a workhouse, correctional or work farm for the confinement of criminal offenders. That situation does not exist in Redwood County.

Your attention is directed to the provisions of Section 610.35 which, so far as here material, provides as follows:

> "* * * When a sentence may be imprisonment in a county jail, the offender may be sentenced to and imprisoned in a workhouse, if there be one in the county where he is tried or where the offense was committed, and if there be no workhouse in the county where the offender is tried or where the offense was committed, then the offender may be sentenced to and imprisoned in a workhouse in any county in this state; provided, that the county board of the county where the offender is tried shall have some agreement for the receipt, maintenance, and confinement of the prisoners with the latter county. * * *"

With reference to the offenders who may be sentenced by your municipal court to the county jail of Redwood County upon their conviction of a misdemeanor under the state law, the problem raised by you in your inquiry might be satisfactorily worked out through the use of the statute last above quoted.

With reference to the offenders who may be sentenced by your municipal court and committed to your county jail upon their conviction for the violation of any ordinance of the city, it may be possible to work out your problem under M. S. 641.07, to which your attention is directed. See Attorney General's opinion dated July 25, 1952, file 91-G, dealing with the provisions of Section 641.07.

LOWELL J. GRADY,
Assistant Attorney General.

Redwood County Attorney.
September 23, 1952. 306-B-9

23

Probate—Fee—County law library—Fees to be collected by probate judge—M. S. A. 140.43.

Facts

Laws 1949, C. 184, Sec. 10, Subd. 1, M. S. A. 140.43, is badly written and reads:

> "When the county law library is established the judge of the probate court in proceedings in his court in the matter of the estate of a deceased person looking to the entry of a decree of distribution of such

estate, except in any summary proceeding under M. S. A. 525.51, to collect, as a county law library fee, the sum of $1.00 from the petitioner instituting the proceeding at the time of the filing of the petition therein."

Question

"Is a decree of descent a 'decree of distribution' within the meaning of this section so that the probate judge will be required to collect the law library fee in actions to determine descent of land?"

Opinion

If it should be said that the judge is required to collect anything under Subd. 1, it seems to me that the words "decree of distribution" are broad enough to include what is ordinarily called a decree of descent. If this subdivision means anything, it seems to me that it means that the judge shall collect $1 in any proceeding for the determination of the descent of property under the laws relating to wills and intestate estates except in summary proceedings provided in M. S. A. 525.51.

CHARLES E. HOUSTON,
Assistant Attorney General.

Pennington County Attorney.
June 20, 1951. 285-B

24

Probate—Guardianship—Deed—Conveyances—Married women under guardianship—Conveyance of real estate by married women under guardianship as minors—Construction of M. S. A., Section 507.02 and Section 525.60.

Reconciling Opinion of November 3, 1949, and Opinion No. 25, 1938 Report, dated November 4, 1937.

Opinion

The opinions of this office of November 4, 1937, No. 25, 1938 Attorney General's Report, and November 3, 1949, relating to the construction of M. S. A., Section 507.02 and Section 525.60, have been given consideration.

The opinion dated November 4, 1937, pertains to L. 1935, C. 72, Section 142, which is now M. S. A., Section 525.60. The writer thereof appears to have had in mind only married women under guardianship as minors, and not married women who are minors but not under guardianship. The section construed, namely, Section 525.60, is the one that provides that, if a female ward, under guardianship as a minor only, marries, the marriage terminates "the guardianship of her person but not of her estate, provided that such guardianship shall not affect her capacity to join with her husband in instruments involving his interest in real estate."

Under that section it appears that a married woman who is a minor and a ward under guardianship may "effectively join with her husband in instruments affecting only his real estate interests" but that the marriage of such a minor who is under guardianship does not terminate her incapacity with reference to her own property.

The opinion written as above stated, on November 3, 1949, is in answer to the following question: "May a married woman under 21 years of age convey her separate real estate, her husband joining in the deed?" It is obvious that in answering that question it was assumed that the married woman referred to was a minor but not one under guardianship.

The answer to the question was based on the last sentence of M. S. A., Section 507.02, which definitely provides that, "The minority of the wife shall not invalidate any conveyance executed by her." It must, I believe, be assumed that the legislature did not intend to apply this last quoted sentence of said Section 507.02 to the minority of a wife who is under guardianship or to repeal that sentence by the passage of M. S. A., Section 525.60, which refers to a wife who is a minor and under guardianship.

When consideration is given to the intent in enacting the sections in question and that of the opinions thereon, the two opinions to which you refer in your communication need not be construed to be in conflict. However, for the purpose of eliminating any misunderstanding of the position of the Attorney General in the matter in question, it is herein ruled that, in so far as it is possible to infer from any statement or phraseology used in the opinion of November 4, 1937, or in the opinion of November 3, 1949, any construction contrary to that herein made, said opinions are hereby superseded.

J. A. A. BURNQUIST,
Attorney General.

Land Registration Department, Hennepin County. 131
August 26, 1952. 498-C

25

Probate Judge — Vacancy — Term — Successor when elected serves for full four year term; no provision for calling special primary election—M. S. 1949, Sections 205.07-205.17, 202.19, 202.26, 202.27.

Facts

"Our Swift County Probate Judge has resigned as of September 1, 1952, and the Governor of this State has made an appointment to fill this vacancy. Our Probate Judge's term would have expired January 1, 1955, if she had not resigned.

"I presume from some of your past opinions that a successor will have to be elected at this November General Election and I further presume that that successor will hold office for a full four year term and not only for the unexpired term of the resigned Judge."

Questions

"1. Am I correct in my presumptions above stated?

"2. Will we have to hold a special primary election for this office?

"3. If we have to hold a special primary election, how long a period of time will we have to allow for filings and what procedure would have to be followed as to notice of election, and so forth?

"4. If it is unnecessary to hold a special primary election, how long a period of time do candidates have to file for this office?"

Opinion

We first answer question 1.

Your conclusion that a successor to the resigned Probate Judge should be elected at the November general election is correct. (Minn. Const., Art. VI, Sec. 10.) The successor thus elected will serve for a four year term beginning the first Monday in January, 1953. (**Flakne v. Erickson**, 213 Minn. 146, 6 N. W. (2d) 40.)

Answering question 2, you are advised that a special primary election need not be held. The said Article VI, Sec. 10, supra, provides in part:

> "And such successor shall be elected at the first annual election that occurs more than thirty days after the vacancy shall have happened."

In view of the fact that the resignation specifies that it will take effect on September 1, that becomes the determinative date. (**State ex rel. Dosland v. Holm**, 202 Minn. 500, 279 N. W. 218.)

There is no statutory provision affirmatively providing for the calling of a special primary election. It will be noted that the provisions of M. S. 1949, Sections 205.07 to 205.17, which authorize the Governor to issue writs calling special elections, including primary elections, are limited to those cases in which the vacancy occurs in the office of representative in congress or member of the state legislature, or in any other elective public office the filling of which is not otherwise provided for. Thus the provisions of those sections of the statute are not here applicable.

We limit our conclusions herein to the particular facts here before us.

We believe that the conclusions of the court in the case of **Flakne v. Erickson**, supra, are here applicable. In that case the general election was to be held on November 3, a Judge of the District Court having died October 1, 1942. The court stated at page 150:

> "We know of no statutory or constitutional limitation upon the number of candidates who may file, or otherwise qualify, for any elective office. That is the situation before the primary election when candidates are chosen, and the same freedom of choice is given to those who become candidates under Id. 202.19 (Section 601-3[3]3), which is virtually a substitute for the primary where situations such as we have here arise."

The language of the court is there significant. When the court says that the filing under 202.19 is a substitute for the primary where situations such as the court has referred to have arisen, we believe that in view of the fact that the vacancy will occur September 1 places this question within the same category as that which the court considered in the Flakne case.

In view of our answer to question 2, no answer is necessary to question 3.

Answering question 4, it is our conclusion that the ruling of the court in the case of Flakne v. Erickson here controls, and that filings must be made on or before the third Tuesday preceding the day of the general election — that is, October 14, 1952.

Section 202.26 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, or to nominate a candidate for an office in which a vacancy has occurred and for which no person is a candidate.

Again, we find that Section 202.27 provides that certificates of nomination shall be filed "with the county auditor, to be placed upon the india tint ballots, on or before the third Tuesday preceding the day of election."

In the Flakne case the court held that these sections must be construed with reference to each other since they are **in pari materia**, and the court there concluded that the foregoing quoted portion of Section 202.27 was applicable.

DONALD C. ROGERS,
Assistant Attorney General.

Swift County Attorney.
August 22, 1952. 347-K

CRIMINAL LAW

26

Autopsy and inquest — Coroner — Exhumation and autopsy — Procedure where coroner refuses to act—M. S. A. 390.11, 614.20.

Facts

"An elderly gentleman was found dead recently in the southeastern part of our county, apparently the result of a suicide by hanging. The Coroner so found but many of our residents now believe it was foul play and they are insisting upon an investigation of the matter.

"It appears to me that there is no use in doing anything unless and until we have the body exhumed and an autopsy made by some competent medical men. The Coroner insists that his original finding of suicide is correct and refuses to order an inquest and, of course, refuses to, in any way, aid or assist in the exhumation of the body and an autopsy."

Question

"Is there any way by which the body could be exhumed legally and an autopsy made without the approval of the Coroner?"

Opinion

(1) Autopsies are permitted by M. S. A. 614.20 in the cases therein specified. The statute cited, so far as here pertinent, confers the right to dissect the dead body of a human being in "cases where the husband, **wife, or next of kin**, charged by law with the duty of burial, shall authorize dissection for the purpose of ascertaining the cause of death, and then only to the extent so authorized."

You do not advise whether the deceased left a surviving spouse. If he did, the spouse could authorize the autopsy. If he did not but left next of kin, the next of kin could give the authority.

Although Section 614.20 does not **expressly** confer the right to exhume the body in cases where the surviving spouse or, if none, the next of kin consent to the performance of the autopsy, that right is impliedly conferred by the statute where the necessary consent is given. See **Clay v. Aetna Life Ins. Co.** (D. C. Minn.), 53 F. (2d) 689, at 693; cf. also **Sejrup v. Shepard,** 201 Minn. 132, 275 N. W. 687.

(2) The office of coroner is created by statute. The duties of coroner are prescribed by statute. M. S. A. 390.11, so far as here pertinent, provides:

"Coroners **shall** hold inquests, post mortem examinations, or autopsies upon the dead bodies of such persons as are supposed to have come to their **death by violence** * * *."

Where, in the performance of his duty under the above quoted statute, the coroner directs an inquest, post mortem examination or autopsy upon a dead body already interred, the coroner has the authority to exhume the body upon which the inquest is to be held or the post mortem examination or autopsy to be conducted. See **Sejrup v. Shepard, supra.**

Death by hanging, even though self-inflicted, is, in my opinion at least, "death by violence" within the meaning of Section 390.11.

In an opinion of the Attorney General dated January 15, 1908 (103f), printed as Opinion No. 39 in the 1908 Report of the Attorney General, the then Attorney General passed upon a question somewhat similar to the one presented by you. In that opinion it was stated:

"* * * While a death by suicide would no doubt come within the strict letter of the statute, as being a 'death by violence,' we think that where it clearly appears that the death was due to a suicide the coroner is justified in declining to hold an inquest. **If, however, there is any suspicion that a crime has been committed, or the evidence does not conclusively indicate that the death was caused by suicide, I think the coroner, in the proper discharge of his duties, should hold an inquest."** (Emphasis supplied.)

While it is true that a coroner, like any other public officer, possesses considerable discretion in the performance of his official duties, yet it is not an unlimited discretion. See opinion of the Attorney General dated January 29, 1935 (103f), printed as Opinion No. 117 in the 1936 Report of the Attorney General. In the last cited opinion, in response to an inquiry whether "the coroner is the only one to decide when an inquest and autopsy are to be had in a certain case," the then Attorney General said:

> "* * * If the coroner is derelict in his duties he, of course, can be removed for non-feasance in office. **In a proper case mandamus would lie to compel him to hold an inquest.**" (Emphasis supplied.)

Whether the case involved in your inquiry is a proper case for mandamus to compel the coroner to act depends upon the facts in the case. When those facts are disclosed by an investigation of the matter, you will be able to determine for yourself whether a proper case for mandamus is presented.

LOWELL J. GRADY,
Assistant Attorney General.

Aitkin County Attorney.
July 27, 1951. 103-F

27

Autopsy and inquest—Coroners' inquests authorized—Do not require consent of next of kin—M. S. 1949, Section 390.11.

Facts

> "'A' is found dead in the water of a lake. The facts show that he had only been at the lake for approximately five minutes immediately prior to the time that he was found. There is reason to believe that death might have been due to heart failure rather than drowning. It is known that the decedent has double indemnity life insurance. The family refuses to allow an autopsy to determine whether the death was due to drowning or heart failure."

Question

> "When there is no ground for belief that the decedent came to his death through foul play or the negligence of others can the coroner require an autopsy without the permission of the decedent's next of kin?"

Opinion

By M. S. 1949, Section 614.20 there is conferred the right to dissect the dead body of a human being "where a coroner is authorized to hold an inquest upon the body, and then only so far as he may authorize dissection."

M. S. 1941, Section 390.11 contains the provisions authorizing the holding of an inquest by the coroner. By that section it is provided that a coroner "shall hold inquests, post mortem examinations, or autopsies upon the

dead bodies of such persons as are supposed to have come to their death by violence." In such cases the obligation on the part of the coroner appears to be mandatory.

The last cited section, as amended by L. 1945, C. 529, further provides that a coroner "may hold such inquest when the death is believed to have been and was evidently occasioned by accident or casualty." Whether in the circumstances in question the facts are sufficient to justify a belief that death has "been and was evidently occasioned by accident or casualty" must be determined by the coroner upon reasonable investigation and in the exercise of sound discretion.

If the coroner finds, upon such investigation and in the exercise of such discretion, that the person concerning whom you have written is "supposed to have come to * * * death by violence," it is the duty of the coroner to hold an inquest. If, after such investigation and in the exercise of such discretion, the coroner believes that the death of the person in question has "been and was evidently occasioned by accident or casualty," he may hold such inquest, but the holding thereof does not appear to be mandatory.

If an inquest is held by the coroner in compliance with and as authorized by Section 390.11, the consent from the next of kin is not required.

J. A. A. BURNQUIST,
Attorney General.

Becker County Attorney. 103-i
August 17, 1951.

28

Checks—Giving without funds—Court of county where checks were given would have jurisdiction—M. S. A. 622.04.

Facts

B of Delavan telephoned C of Litchfield advising him that he desired to purchase 16 head of cattle. C sold the cattle by telephone conversation under promise that C would be paid in cash for the cattle when the same were delivered at Delavan or thereabouts; that the trucker was to be B's agent, and that B should pay the hauling charges. When the truck delivered the cattle, B gave the trucker two checks, one for $400 and another for $2,000, dated November 24, 1951, drawn on the Blue Earth State Bank, payable to C and signed by B. On the face of the $2,000 check appeared the notation:

"Bal. Hol. Hf. Keep check till Nov. 28, 1951."

This check was deposited a few days later and was returned protested for nonpayment. On November 26 B mortgaged the stock purchased,

and shortly afterward this stock was transported across the Iowa line. On December 3 the mortgagee satisfied the chattel mortgage covering the cattle.

Questions

1. Whether a crime has been committed.
2. In what county should the crime of giving checks without sufficient funds, under M. S. A. 622.04, be prosecuted?

Opinion

1. This office does not pass upon questions of fact. Whether or not certain facts constitute a crime is ultimately a jury question. It is for the county attorney to determine whether or not, after he has been advised of the facts, a person should be charged with the commission of a crime.

2. M. S. A. 627.01 provides that every criminal cause shall be tried in the county where the offense was committed. In **State v. Billington, 228** Minn. 79, 36 N. W. (2d) 393, one of the questions involved was whether the trial court of Becker County had jurisdiction to try the defendant. The checks which were involved in that case were issued and given in Becker County and were payable on a bank in Minneapolis. The court, on page 86, held that the trial court of Becker County had jurisdiction to try the defendant. From this decision we conclude that the county where the checks were issued and given would be the proper county in which to institute the criminal proceedings, and that the trial court of that county would have jurisdiction.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Meeker County Attorney.
March 18, 1952. 133-B-43

29

County Attorney — Special counsel — Grand jury — Corrupt Practices Act — Powers and duties of an attorney employed to assist the county attorney relating to violations of Corrupt Practices Act—M. S. A. 211.33, 388.05, 630.18.

Facts

Your question relates to the duties and powers of an attorney employed by a private citizen to assist the county attorney to perform his duties under M. S. A., Ch. 211, known as the "Corrupt Practices Act."

The part of the section pertaining to the employment of an attorney for the purpose above stated reads as follows:

"* * * Any citizen may employ an attorney to assist the county attorney to perform his duties under the provisions of this chapter, and such attorney shall be recognized by the county attorney and the court as

associate counsel in the proceeding; and no prosecution, action, or proceeding shall be dismissed without notice to, or against the objection of, such associate counsel until the reasons of the county attorney for such dismissal, together with the objections thereto of the associate counsel, shall have been filed in writing, argued by counsel, and fully considered by the court, with such limitation as to the time of filing such reasons and objections as the court may impose."

Question 1

"Does the statute contemplate any private, independent investigation to be conducted by the special counsel?"

Opinion

From the wording above quoted it would not appear that the statute contemplates a private, independent investigation to be conducted by the attorney employed to assist the county attorney, but there is nothing in the act which prevents the attorney so employed from carrying on a private, independent investigation of his own, and thus be enabled to present to the county attorney relevant facts and names of witnesses capable of giving competent testimony.

Question 2

"If the statute does not contemplate any independent investigation upon the part of the special counsel, could you comment upon the possibilities of appropriate conduct of said counsel?"

Opinion

As to the duties of the county attorney, M. S. A., Section 211.33, reads as follows:

"If the county attorney of the county shall be notified by any officer or other person of any violation of any of the provisions of this chapter, it shall be his duty forthwith to diligently inquire into the facts of such violation, and if there be reasonable ground for instituting a prosecution, it shall be the duty of such county attorney to present the charge, with all the evidence which he can procure, to the grand jury of such county. If any county attorney shall fail or refuse to faithfully perform any duty imposed upon him by the provision of this chapter, he shall be guilty of a misdemeanor; and, on conviction thereof, shall forfeit his office. It shall be the duty of the county attorney, under the penalty of forfeiture of his office, to prosecute any and all persons guilty of any violation of the provisions of this chapter, the penalty of which is fine or imprisonment, or both, or removal from office. * * *"

The authorized employment by a citizen of an attorney to assist a county attorney in the matter of collecting evidence for the grand jury and, if an indictment is returned, in prosecuting a violator of the Corrupt Practices Act is obviously not for the purpose of displacing a county attorney,

but to render assistance to him in the performance of his duties and to afford to the associate counsel opportunity to be heard before dismissal of prosecution of the person charged with violation of the provisions of the above cited Chapter 211.

Upon the private attorney employed by a citizen is not conferred the power of the county attorney, but the right to be the associate counsel of the county attorney for the purpose of assisting the latter in the enforcement of the law. The responsibility of the county attorney is made clear by the provision that a county attorney who fails or refuses to perform faithfully any duty imposed upon him by the chapter under consideration is guilty of a misdemeanor that results, upon his conviction, in the forfeiture of his office. Until such conviction the county attorney continues to possess all the powers conferred upon him by law. Such "associate counsel" has only the authority to assist the county attorney and to oppose, as above stated, any proposed dismissal of the prosecution. This right to object to a dismissal of the proceeding against the violator of the Corrupt Practices Act is given the "associate counsel" who, under the law, must be served with notice of any proposed dismissal. If he objects thereto the county attorney must file his reasons for a motion to dismiss, which, together with the associate counsel's objection thereto, shall be argued by counsel and fully considered by the court.

It is my opinion that under M. S. A., Section 628.63, there is imposed upon the county attorney alone the duty, if the grand jury so requests, to examine the witnesses in its presence, but to permit any attorney other than the county attorney to examine witnesses without a statutory provision expressly authorizing that to be done will, I believe, under Section 630.18 and the supreme court decision hereinafter cited, invalidate an indictment. The attorney employed by a private citizen to assist the county attorney is not given the authority by the provisions of the above cited Section 211.33 to appear before the grand jury to examine witnesses, but, of course, if he can give legal and competent testimony he may be summoned by the grand jury to testify before that body in the capacity of a witness.

The law in this regard is stated in the case of **State v. Ernster**, 147 Minn. 81, 179 N. W. 640. On page 85 of the report containing the opinion, the court said:

> "The common law respecting grand jury functions, as supplemented by our statutory enactments, clearly intends that there shall be no star chamber proceedings at which persons may come, either by delegations or singly, to advise or urge action on the part of the jury whether to indict or to find a no bill. * * * The grand jury is supposed to be a fearless and impartial investigator of crime, and to the more fully accomplish this purpose the law seeks to provide against every influence of outsiders, and specifies that the mere **presence of an unauthorized person when a witness testifies, or when the case is discussed, or the vote taken, is fatal to the indictment.** Justice Harlan in Hurtado v. California, 110 U. S. 516, said:

"'Grand juries perform most important public functions, and are a great security to the citizens against vindictive prosecutions either by the government, or by political partisans, or by private enemies'." (Emphasis supplied.)

Another question submitted is as to whether the associate counsel here considered has powers similar to those of the county attorney regarding investigation and subpoenas. Under the section in question it is the duty of the county attorney to inquire diligently into the facts and, as above stated, the associate counsel may, if he desires, conduct his own investigation, but neither the county attorney nor such associate counsel has the power to cause witnesses to be subpoenaed to appear before either of them at their own offices or there to answer questions submitted by either of them. However, the county attorney is given the power by M. S. A., Section 388.05, to cause witnesses to be subpoenaed to appear before the grand jury. Such power is not conferred upon the "associate counsel" appointed under Section 211.33, but if he knows or finds by investigation persons who are able to give competent testimony and should, therefore, be subpoenaed as witnesses before the grand jury, it must be assumed that on the request of such "associate counsel" the county attorney will cause the issuance of subpoenas for their appearance before the grand jury.

J. A. A. BURNQUIST,
Attorney General.

Ramsey County Attorney.
September 26, 1952. 121-A-1

30

Dogs—Discussion of authority of town board, if any, to order a dog confined which has bitten a person. M. S. 1949, Section 35.67, and Regulation 1100 of the State Board of Health.

Facts

"A" was attacked and bitten by a dog owned by "B." Upon complaint of "A," the chairman of the town board and the town health officer ordered "B" to keep the dog confined and not permit him to run at large for a period of two weeks under authority of Regulation 1100 of the 1944 printed regulations of the State Board of Health. "B" refuses to comply with the order and claims that "A" provoked the dog to attack him.

Questions

1. "Has the town board the power to order the dog confined for a period of two weeks after the attack?

2. "If so, can 'B' be prosecuted for a misdemeanor in refusing to obey the order?"

Opinion

Regulation 1100 of the State Board of Health relating to rabies reads as follows:

> "When any person has been attacked by an animal suspected of being or known to be rabid, the attending physician or the health officer, in communication with the Section of Preventable Diseases, Minnesota Department of Health, shall determine as soon as practicable the advisability of said person receiving preventive treatment."

This rule in the foregoing form was adopted by the State Board of Health in 1949. It superseded in part Regulation 1100 of the State Board of Health as it was in force and effect in 1944. The 1944 rule [no longer in effect] did require that "The offending animal shall not be killed, but shall be observed for symptoms over a period of two weeks, unless it cannot safely be secured." By M. S. 1949, Section 144.49, a person violating a regulation of the State Board of Health is guilty of a misdemeanor. However, in view of the foregoing, we are unaware of any rules and regulations of the State Board of Health which have any application to the facts presented in your letter.

M. S. 1949, Section 35.67 et seq., in part authorizes the executive officer of each town board of health, when complaint, in writing, shall have been made to him that rabies exists in the town to investigate the truth of the complaint and determine whether or not rabies does exist in such town. If he finds and determines that rabies does exist, he shall make and file a proclamation setting forth the fact and prohibiting the owner or custodian of any dog from permitting or allowing the dog to be at large unless it is effectively muzzled. It is unlawful for any person to permit his dog to run at large contrary to the terms of the proclamation when such a proclamation has been made.

Your letter in no way indicates that a quarantine has been imposed in conformity with the requirements of said Section 35.67 et seq. so as to make a violator thereof guilty of a misdemeanor.

In view of the foregoing, and from the facts appearing in your letter, we are unable to determine under what authority, if any, the town board has power to order "B's" dog confined for a period of two weeks. In making this statement we necessarily assume that your town has not enacted any township laws covering the situation presented in your statement of facts and that it lacks legal authority for so doing. See L. 1951, C. 533, and M. S. 1949, Section 368.01.

The general statutory provisions pertaining to dogs, including the rights of a person who has been attacked by a dog, are contained in M. S. 1949, C. 347. See also L. 1951, C. 315.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Pope County Attorney.
July 14, 1952. 146

31

Drunken driving—Conviction upon plea of guilty to crime of drunkenness does not constitute a bar to prosecution for operating and driving a motor vehicle while under the influence of intoxicating liquor in violation of M. S. 1949, Section 169.12, upon the ground of double jeopardy within meaning of Minn. Const., Art. I, Section 7.

Facts

"* * * a defendant was charged with drunken driving on a village street, upon the complaint of a village constable, who subsequently withdrew that complaint and in a second complaint charged the same defendant with being drunk on a public highway in said village, on the same date, for the same occurrence, to which second complaint the defendant entered a plea of guilty and was fined."

Question

"Does the plea of guilty to the complaint of being drunk on the highway or village street operate as a bar to a new complaint being made by another individual or village officer, charging drunken driving, the same relating to the same occurrence and the same date?"

Opinion

A plea of guilty by the defendant to a complaint charging drunkenness would not "operate as a bar to a new complaint * * * charging drunken driving" in violation of M. S. 1949, Section 169.12.

Drunkenness and driving and operating a motor vehicle while under the influence of intoxicating liquor are separate and distinct offenses, and a conviction upon a plea of guilty to the crime of drunkenness would not constitute a bar to a subsequent prosecution for driving and operating a vehicle while under the influence of intoxicating liquor upon the legal premise of a former jeopardy within the meaning of Minn. Const., Art. I, Section 7. See **State v. Ivens**, 210 Minn. 334, 298 N. W. 50.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Houston County Attorney.
August 15, 1951. 133-B-8

32

Drunken driving—Operating a motor vehicle while under the influence of 3.2 beer is no defense for prosecution for drunken driving under M. S. 1949, Section 169.12, or an ordinance containing similar language.

Question

Would the fact that a man had been drinking nothing stronger than 3.2 beer be a defense in a prosecution under the drunken driving statute or a drunken driving ordinance containing the same language as the statute?

Opinion

M. S. 1949, Section 169.12, reads in part as follows:

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

The question you submit is directed to the meaning of the words "by any person who is under the influence of intoxicating liquor," as used in said statute.

The term "while under the influence of intoxicating liquor" in a motor vehicle statute was discussed in **State v. Graham**, 176 Minn. 164, 222 N. W. 909, and the court said in part:

> "* * * The expression 'under the influence of intoxicating liquor' is in common, everyday use by the people. It is older than this law. When used in reference to the driver of a vehicle on the public highways, it appears to have a well understood meaning. The trial court, in the case of Elkin v. Buschner, 1 Monag. (Pa.) 359, 361, 16 A. 102, 104, in discussing the question as to when a man is intoxicated, used this language in instructing the jury:
>
> " 'Whenever a man is under the influence of liquor so as not to be entirely at himself, he is intoxicated; although he can walk straight, although he may attend to his business and may not give any outward and visible signs to the casual observer that he is drunk, yet if he is under the influence of liquor so as not to be at himself, so as to be excited from it and not to possess that clearness of intellect and that control of himself that he otherwise would have, he is intoxicated.'
>
> "This instruction was approved. It would seem that the statements so made express quite clearly the meaning of the words 'under the influence of intoxicating liquor.' When a person is so affected by intoxicating liquor as not to possess that clearness of intellect and control of himself that he otherwise would have, he is under the influence of intoxicating liquor. That would appear to be the common understanding of the expression, and well known. In that light the use of the expression in the statute renders the law neither obscure nor uncertain. We hold the statute to be constitutional and valid."

A statute prohibiting the driving of an automobile while the motorist is under the influence of intoxicating liquor was intended to punish those who were in fact under the influence of intoxicating liquor, whether intoxi-

cation was caused by beer with alcoholic content of 3.2 per cent or by liquor with greater alcoholic content. See 22 W. & P., 1951 pocket part, p. 110, and cases cited therein.

In view of the foregoing, we therefore answer your inquiry in the negative. If a person operates a motor vehicle while intoxicated, it is of no consequence that he got that way by drinking beer with alcoholic content of 3.2 per cent or less.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Benson City Attorney
August 13, 1951. 632-B-2

33

Embezzlement—Venue should be laid in county where crime was committed —M. S. A., Section 627.01—Minn. Const., Art. I, Section 6—**State v. New**, 22 Minn. 76.

Facts

A distributor at the city of B in C county employed X, a resident of A county, to sell his products in said A county. X received the products at B city and sold them in A county. He collected the amount due therefor but did not remit the money so collected to the distributor's office in B city, and X is short in his account with the distributor. Settlement of the money collected by X was to be made to the distributor at B city. It was understood that X could mail remittances to the distributor, and that it would not be necessary for him to take the money collected to the distributor although he did at times deliver the money collected to the distributor at B city. X also made payments personally to the distributor at B city.

The distributor has requested that X be charged with embezzlement, and that criminal proceedings be instituted against him in A county, the place of his residence and wherein he sold the products for the distributor and received payment therefor.

Question

Should the venue charging X with the crime of embezzlement be laid in A county?

Opinion

In a criminal prosecution the accused is by statute and the constitution entitled to the right to a trial by an impartial jury of the county wherein the crime shall have been committed. Minn. Const., Art. I, Section 6; M. S. A., Section 627.01; **State v. Heidelberg**, 216 Minn. 383-385, 12 N. W. 2d 781.

The facts presented do not disclose that X was at any time, during the period when he sold the products for the distributor and received payment therefor, absent from A county. Intent to embezzle the distributor's money

is an element which must be taken into consideration. Such intent to embezzle could not have occurred outside of A county unless X had been absent from such county.

In our opinion the facts as presented are controlled by the decision in **State v. New**, 22 Minn. 76. In this case the indictment alleged that the embezzlement and conversion with which the defendant was charged was committed in Hennepin County. In the course of its decision the court, on page 79, said:

> "The evidence showed that he received the money from his employer in that county, and that he never handed it over or accounted for it, as it was his duty to do, but appropriated it to his own use without authority. Where he made the appropriation did not affirmatively appear. Without now determining where the offense would, in law, have been deemed to have been committed, if it had appeared that the unlawful appropriation had been made in Ramsey county, it is sufficient at this time to say that when it is considered that there was no evidence that defendant carried the money out of Hennepin county, or made the unlawful appropriation of it in any other place, the evidence of its receipt by defendant in that county, and of his unexplained failure to hand it over or account for it, is at least prima facie evidence that the offense charged was committed in Hennepin county. The impracticability of any other rule, in prosecutions for an offense of this kind, will be obvious upon a moment's reflection."

Assuming that the failure of X to deliver over and pay to the distributor at B city the money which he received for the products sold by him in A county constitutes the crime of embezzlement, we believe that the venue for the criminal prosecution therefor should be laid in A county. Our conclusion is in harmony with the decision of our court in **State v. New**, supra. See also **State v. Billington**, 228 Minn. 79, 86, 36 N. W. 2d 393.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Aitkin County Attorney.
March 24, 1952. 133-B-24-d

34

Gambling—Lottery—Certain device recording a score dependent upon operator's skill is not per se gambling—Device giving prizes to certain operators attaining certain scores by drawing and chance constitutes lottery under M. S. 616.01—Sections 614.01, 614.06, 614.07, 314.14 (2), 325.53 (2), and 325.54 considered.

Facts

"A machine consists of a flat hardwood board with a lighted scoring device at one end, and open on the other end, which is operated by inserting in said machine a coin, which coin causes the scoring device to light up and register the score of the player. The player manually slides a weighted metal disc to the lighted end of the board, where said disc makes contact with electrical devices which register a score in terms of numbers on the lighted board. After a specified number of plays the scoreboard lights up the final score, and further manual operation of the metal disc is possible, but the score will not register on said scoreboard. The control of the sliding metal disc is entirely controlled by the player of the machine, but the scoring of said player's sliding the metal disc is entirely mechanical."

Questions

"Does the score registered by the operator's skill in sliding said metal disc violate the statutes as a gambling device or lottery if:

a. At the end of each week a prize is given by virtue of a drawing of tickets placed in a box, such tickets being given free of charge to persons making over a certain specified score on the machine aforesaid, and that such score is noted by the owner of the place of business in which said machine is operated; and that the only way to qualify for said ticket is to attain a high score on said machine, and that the drawing of tickets is made from all the tickets placed in said box by the operator of the business wherein said machine is placed, and not upon the basis of the highest score, but from a drawing made from the relatively high scoring players during the week?

b. At the end of each week, a prize is given to the player who has attained the highest score in the operation of said machine during that period; and that the only way to qualify for said prize is to play said machine, and to attain during the week said prize is offered, the highest score registered upon the scoreboard of said machine?"

Opinion

In your description of the device or machine you state that the score as registered results "by the operator's skill in sliding said metal disc" across a board, and at the end such disc "makes contact with electrical devices which register a score in terms of numbers on the lighted board." If the operation or playing of the machine or device ended at that point and such score as registered resulted, as stated, from the operator's skill in sliding the metal disc, then the elements essential to constitute "gaming," "gambling," or a "gambling device" as defined by the courts, including our own, are lacking. In **People v. Lavin** (N. Y.), 71 N. E. 753, on page 755 the court said:

"It was there said (30 N. C. 271): 'We believe that in the popular mind the universal acceptation of a "game of chance" is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill, or adroitness have honestly no office at all, or are thwarted by chance. As intelligible examples, the games of dice are determined by throwing only, and those in which the throw of the dice regulates the play, or the hand at cards depends upon a dealing with the face down, exhibit two classes of games of chance.' On the other hand, games of chess, checkers, billiards, and bowling were held to be games of skill. This distinction has obtained in all those jurisdictions where the definition of the term 'game of chance' has been material under their statutory law. Wortham v. State, 59 Miss. 179; Eubanks v. State, 5 Mo. 450; Harless v. U. S., 1 Morris (Iowa) 169; Glascock v. State, 10 Mo. 508. Throwing dice is purely a game of chance, and chess is purely a game of skill. But games of cards do not cease to be games of chance because they call for the exercise of skill by the players, nor do games of billiards cease to be games of skill because at times, especially in the case of tyros, their result is determined by some unforeseen accident, usually called 'luck.' The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game?"

Foley v. Whelan, 219 Minn. 209, 17 N. W. 2d 367 involved a question of the right to recover money lost on a slot machine. In the course of the decision the court on page 214 said:

"The words 'game' and 'gamble' and 'gaming' and 'gambling,' respectively, are taken as synonymous. Opinion of the Justices, 73 N. H. 625, 63 A. 505, 6 Ann. Cas. 689. Because the words are synonymous, all our statutes relative to gambling are found in the statutes under the heading of 'Gaming.' As said by Mr. Justice Cooley in People v. Weithoff, 51 Mich. 203, 16 N. W. 442, 47 Am. R. 557, in holding that betting upon a **game** constitutes **gaming**: '* * * those game or gamble who thus bet' (51 Mich. 212, 16 N. W. 446), and 'The word "game" is very comprehensive, and embraces every contrivance or institution which has for its object to furnish sport, recreation or amusement. Let a stake be laid upon the chances of the game, and we have gaming' (51 Mich. 214, 16 N. W. 447-448). We pointed out in State v. Shaw, 39 Minn. 153, 156, 39 N. W. 305, 307, that gambling devices are used 'in games of chance.' They are the instrumentalities by which the games are played. The insertion of a coin in a slot machine and the pulling of a lever sets its internal mechanism in motion. Occasionally the machine pays off in money, depending upon the operation of its mechanism. While the machine is so regulated that the chances are uneven against the player and in favor of the keeper, the result in the particular case is one of chance. The player risks the money used to set the machine in operation on his chances of winning a payoff by the machine. He bets his money against that of the machine's keeper, which is kept therein for the purpose. If the player loses, the machine keeps his coin; if he wins, it pays him with the payoff. The machine is the owner's robot or mechan-

ical gambler, which not only accepts the bets of all comers but decides them also. It is, as we said of a 'stock clock' in State v. Grimes, 49 Minn. 443, 52 N. W. 42, a device or contrivance to determine as between the player and the keeper of the machine 'who wins or who loses his money on a contest of chance.' Consequently, slot machines are universally regarded as gambling devices."

The question of what constitutes a gambling device is one of fact, the ultimate determination of which is for the courts and juries.

There are certain statutes which must be considered in determining whether a particular machine or device constitutes a gambling device.

Gambling is prohibited by Section 614.06, which in part reads as follows:

"Gambling with cards, dice, gaming tables, or any other gambling device whatever is hereby prohibited."

Section 614.07 makes it unlawful to suffer or keep a gambling device upon the premises described in this statute. Section 340.14, subd. 2, relating to licensed places for the sale of intoxicating liquor in part provides:

"No licensee shall keep, possess, or operate, or permit the keeping, possession, or operation of, on the licensed premises, or in any room adjoining the licensed premises, any slot machine, dice, or any gambling device or apparatus, nor permit any gambling therein * * *."

A gambling device is defined in Section 325.53, subd. 2, as follows:

" 'Gambling devices' means slot machines, roulette wheels, punchboards, number jars and pin ball machines which return coins or slugs, chips, or tokens of any kind, which are redeemable in merchandise or cash."

The intent of the legislature in enacting the act of which the last referred to statute is a part is found in Section 325.54, which reads as follows:

"The intentional possession or wilful keeping of a gambling device upon any licensed premises is cause for the revocation of any license under which the licensed business is carried on upon the premises where the gambling device is found."

We do not believe that if the transaction of playing the machine here in question is limited to merely recording a score resulting from the skill of the operator that such transaction would offend the statutes above referred to.

However, it appears from question (a) that at the end of each week a prize will be given. The winner will be drawn by lot. Names of players who have attained a score as determined by the owner of the premises where the machine is located will have a chance to win a prize; selection of such winner will be by chance. Such a plan or scheme raises the question of whether the same constitutes a lottery. A lottery is defined in Section 614.01 as follows:

"A lottery is a scheme for the distribution of property by chance among persons who have paid, or agreed to pay, a valuable consideration for the chance, whether it shall be called a lottery, raffle, gift enterprise, or by any other name, and is hereby declared unlawful and a public nuisance."

Three elements are essential to constitute a lottery, namely, a chance, a reward or prize, and a consideration therefor. **State v. Stern,** 201 Minn. 139, 275 N. W. 626.

It is our opinion that the plan or scheme for awarding prizes in the manner as described in question (a) above constitutes a lottery within the meaning of the lottery statutes. The machine being used as a part of and in connection with such plan or scheme for awarding a prize by chance for which a consideration is paid, as only those paying to use the machine are given such chance, it necessarily follows that the use of the machine for such purpose would be in violation of law.

Upon the assumption that a prize will be given only in the manner described in question (b), namely, to the person receiving the highest score, which results solely from the operator's skill, then such a plan would not be in violation of law.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Granite Falls City Attorney.
April 13, 1951. 733-d

35

Gambling—Lottery—Plan submitted held lottery—Water regatta—Purchase of admission ticket necessary for participation in drawing—M. S. 1949, Section 614.01.

Facts

"The American Legion at Lake City, Minnesota, is host this year to the First District Legion Convention commencing June 15th.

"They propose during this convention to promote an entertainment which will be advertised as a 'Water Regatta,' and will consist of boat racing, diving, swimming, and other competitive sports. An advance sale of admission tickets to this event will be conducted. The purchase of a ticket will qualify the holder to participate in a drawing to be conducted at some time during the entertainment, at which time an automobile will be awarded to the holder of the ticket number drawn."

Question

On the above stated facts, would the foregoing plan, if pursued, constitute a violation of the statutes prohibiting lotteries?

Opinion

M. S. 1949, Section 614.01, provides:

"A lottery is a scheme for the distribution of property by chance among persons who have paid, or agreed to pay, a valuable consideration for the chance, whether it shall be called a lottery, raffle, gift enterprise, or by any other name, and is hereby declared unlawful and a public nuisance.

"Every person who shall contrive, propose, or draw a lottery, or shall assist in contriving, proposing, or drawing a lottery, shall be punished by imprisonment in the state prison for not more than two years, or by a fine of not more than $1,000, or by both."

There are three elements of a lottery under this statute: (1) prize, (2) chance, and (3) payment of a consideration, directly or indirectly, for the chance. The presence of two of these elements — namely, (1) prize and (2) chance — in the plan submitted is obvious. The question then remains: do the participants in the plan pay a valuable consideration for the chance to participate? If they do, the plan constitutes a lottery within the meaning of M. S. 1949, Section 614.01. See **State v. Schubert Theatre Players Co.**, 203 Minn. 366, 281 N. W. 369. If they do not, the plan does not constitute a lottery under the statute cited. See **Albert Lea Amusement Corp. v. Hanson,** 231 Minn. 401, 43 N. W. (2d) 249.

It appears from your statement of facts that **only** those persons who purchase an admission ticket to the entertainment event will be qualified or permitted to participate in the chance. If that restricted plan be pursued, the decision of the Minnesota Supreme Court in **State v. Schubert Theatre Players Co., supra,** would control. If, on the other hand, no consideration whatever passes from the persons permitted to participate in the drawing to the sponsor of the plan for the right to participate, then the decision of the Minnesota Supreme Court in **Albert Lea Amusement Corp. v. Hanson, supra,** holding that the plan does not constitute a lottery within the meaning of Section 614.01, would control.

LOWELL J. GRADY,
Assistant Attorney General.

Wabasha County Attorney.
March 28, 1951. 510-C-5

36

Information—County Attorney—Duty—County Attorney to file an information where he has knowledge or information which would subject a defendant to additional punishment under the law—M. S. 1949, Section 610.31.

Facts

"The statutes subjecting a defendant to additional punishment under the law when he has formerly been convicted of a crime, said statutes being from 610.29 to 610.34, and in particular, calling your attention to Section 610.31, M. S. A., which states, 'it shall be the duty of the county attorney of the county in which such conviction was had to file an information with the court wherein the conviction was had accusing such person of such previous convictions, etc.,' and Op. Atty. Gen. 1928, No. 132, which states, 'it is the duty of county attorney to file information in every case wherein he has knowledge or information that defendant has been formerly convicted of a crime, etc.'

"A number of county attorneys do not file informations in accordance with Section 610.31 and prison officials do not make a report in accordance with Section 610.32.

"I am of the opinion that there should be some uniformity in the various counties regarding this matter that would subject defendants to additional punishment under the law. I also appreciate that there are convictions where the circumstances probably do not justify additional punishment when the person again gets in trouble, but apparently the law does not leave any discretion in the matter to the county attorney."

Question

"Is a county attorney compelled and required to file an information informing of previous convictions in every case regardless of the circumstances?"

Opinion

M. S. 1949, Section 610.31, in part provides:

"If at any time before sentence, or at any time after sentence but before such sentence is fully executed, it shall appear that a person convicted of a felony, or an attempt to commit a felony, has been previously convicted of any crime so as to render him liable to increased punishment by reason thereof under any law of this state, it shall be the duty of the county attorney of the county in which such conviction was had to file an information with the court wherein the conviction was had accusing such person of such previous convictions, * * *."

This law follows the general pattern of the so-called Baumes law. See N. Y. Penal Law, Sections 1941-1943, as amended by N. Y. Laws 1926, C. 457. In construing the New York law the court said:

"The district attorney is charged with the duty of filing an information accusing the convicted defendant of his previous convictions. This is not discretionary; it is **mandatory**."

People v. Gowasky, 244 N. Y. 451; 155 N. E. 737, 742.

Under our law, Section 610.31, supra, it is the absolute duty of the county attorney to file an information in every case where he has knowledge or information that a defendant has been formerly convicted of a crime that would subject him to additional punishment under the law.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Stearns County Attorney
August 21, 1951. 121-B-7

37

Removal of building—Severance and removal of building from realty by vendee under contract for deed without consent of vendor should be prosecuted under M. S. A. 621.26 and not under 621.20 or the larceny statute.

Facts

The vendee of a contract for deed which is several years in default has removed the house from the premises therein described without the consent of the vendor.

Questions

Does the act of the vendee constitute a criminal act under M. S. A. 621.20?

In the event that the aforesaid statute does not apply, what criminal charge, if any, might properly lie?

Opinion

Both questions will be considered together.

A crime in this state is defined by statute as an act or omission forbidden by law and punishable upon conviction by death, imprisonment, fine, or other penal discipline. Dunnell's Minnesota Digest, Vol. 2, Section 2406, and cases cited. The statutes of this state prescribe the acts and omissions upon which criminal responsibility must be determined.

In the instant case there are several statutes to be considered, and therefrom determined whether or not the act of the vendee in the circumstances related constitutes a crime. M. S. A., Section 621.20, provides:

> "Every mortgagor or other person who shall remove any building, fixture, or fence situate or being upon any real estate on which a mortgage or mechanic's lien exists, either before or after the foreclosure of such mortgage or lien, to the prejudice of the holder thereof, with intent to impair or lessen the value of such mortgage or lien, without first having obtained the consent of the person owning or holding the same,

shall be punished by imprisonment in the county jail for not more than six months, or by a fine of not more than $500, or by both." (Emphasis supplied.)

The gist of the criminal act under this statute is the removal of a building being upon any real estate on which a **mortgage** or mechanic's lien exists to the prejudice of the holder thereof and with intent to impair or lessen the value of the mortgage or lien without first having obtained the consent of the vendor or one holding the same. It does not appear from the facts presented that there was either a mortgage or a mechanic's lien upon the real estate from which the vendee removed the building in question without the consent of the vendor. The real estate of which such building was a part had been sold under a contract for deed. There is a well recognized distinction between a real estate mortgage and a contract for deed. See M. S. A., Chapters 580 and 581, relating to foreclosure of mortgages by advertisement and action, and Section 559.21 which pertains to the cancellation and termination of a contract for deed.

In our opinion the act of the vendee, upon the facts presented, does not constitute a crime under Section 621.20, supra.

The statute defining the various acts which constitute the crime of larceny involves acts in connection with personal property, choses in action and other species of personal property. Removing a building from real estate of which the building is an appurtenant part does not constitute larceny within the meaning of that term and as defined by M. S. A., Chapter 622.

This general principle of law is stated in 52 C. J. S., p. 792, as follows:

> "Things which the law regards as constituting a part of the land in which they are contained or on which they are deposited, such as minerals in the soil, or manure made on farming lands in the ordinary course of husbandry, or a tombstone erected at a grave, or a **house**, or things which constitute a structural part of a building, such as the doors, or piping, or the lead of the roof, are not, at common law, the subjects of larceny, until they become severed from the realty of which they are constructively a part."

However, in the event that a building has been severed from the land so that it was not an appurtenant part thereof and constituted personal property and not real property, an unlawful and wilful appropriation thereof would constitute larceny.

By Section 621.25 (3) it is unlawful for a person to "sever from the freehold of another or of the state any produce thereof, or anything attached thereto." A building would be included within the term "anything attached thereto." Both the vendor and the vendee under a contract for deed for the sale of real estate are freeholders. See Words and Phrases, Permanent Edition, Vol. 17, page 647. In the light of this legal effect, which constitutes both the vendor and vendee as a freeholder, we are of the opinion that from the facts above stated there has been no violation of the last mentioned statute.

Section 621.26 reads as follows:

"Every person who shall unlawfully and wilfully destroy or injure any real or personal property of another, which is not specially described herein, and where the punishment is not specially prescribed by statute, shall be punished as follows:

"(1) If the value of the property destroyed, or the diminution in value by injury to the same, shall be less than $20.00, by imprisonment in the county jail for not more than three months, or by a fine of not more than $100;

"(2) If the value of the property destroyed, or the diminution in value by the injury, shall be $20.00 or more, by imprisonment in the county jail for not more than one year, or by fine of not more than $500, or by both.

"In addition to the punishment herein prescribed, he shall be liable in treble damages for the injury done, to be recovered in a civil action by the owner of the property, or the public officer having charge thereof."

Clearly, the removal of the building as above related did destroy and injure the real estate of another, to-wit: the vendor in whom the legal title thereto reposed, and if the act of the vendee in removing such building was wilful, then it is our opinion that prosecution should be laid under this statute.

We have made a careful examination of the opinions of this office and have not found any former opinion which has any bearing upon the questions considered. We have not found any decision of our own court or of any foreign jurisdiction where similar questions were before the court for consideration. From our examination of the various statutes we have concluded that the only statute under which a criminal charge should be made, upon the facts presented, is Section 621.26 supra.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Itasca County Attorney.
August 1, 1952. 133-B-59

EDUCATION

SCHOOL DISTRICTS

38

Bids and contracts—Acceptance—Contract let on bids by school district, after acceptance of bids, should not be modified by insertion of a condition not contained in the invitation for bids and in the bid.

Facts

Consolidated School District No. 6 of Carlton County invited separate bids "for the General Construction, Heating, Ventilating and Plumbing and Electrical work" on a certain school building to be built. Bidders were advised in the invitation that **"Proposed forms of contract documents, including plans and specifications"** were on file at places specified. They were further advised that "No bid shall be withdrawn subsequent to the opening of bids without the consent of the [school] Board or for a period of thirty (30) days after the scheduled time of closing bids." Such time appears to have been October 25, 1951.

At a proper time the bids were considered by the school board. The contracts were awarded to low bidders. The contract for general construction was awarded to the K-H Co. and on October 25, 1951, a letter by the clerk of the board was written and mailed to the company, saying:

> "In accordance with your bid given to the Board of Education of the Barnum School, we wish to advise you that your company has been tentatively awarded the contract for General Construction of the Industrial Arts addition to the Barnum school, for the sum of Twenty Four Thousand Three Hundred Dollars ($24,300.00).
>
> "Contract will be entered into upon receipt of N. P. A. approval."

I understand that the last quoted sentence was understood by the parties to mean that, if and when, under the laws of the United States and regulations thereby authorized and in force, the materials required for the construction of the building should be made available, a formal written contract between the parties would be made.

Not until February 14, 1952, did the board receive approval by the agency of the government of the United States that the materials were available. Thereupon, a contract was submitted to the successful bidder to be executed. The contractor stated that, because of uncertainty concerning wages which it might be required to pay during the performance of the contract, the contractor had, before signing the contract, inserted a clause providing that if the contractor shall during the performance of this contract be required to pay a higher scale of wages than that prevailing at the time the contract is made, then in that case the contractor shall be entitled to additional compensation to the extent of such wage increase.

Questions

1. "Is it legal for the Barnum Board of Education to insert an escalator clause into the contract to provide that the difference anticipated in labor costs after May 1, 1952 can be added to the contractor's bid?

2. "Is there any legal manner by which the contractors' bids can be altered to provide for the unexpected rise in labor costs in this particular case?"

Opinion

The bidders were informed by the invitation, as shown by the language in bold face, that they were to bid upon a certain form of contract, plans and specifications. The bid in question stated:

> "The undersigned having familiarized themselves with the local conditions affecting the cost of the work, and with the contract documents, including Advertisement for Bids, Information for Bidders, Form of Proposal, General Conditions, Plans and Specifications, on file in the office of C. H. Welch, Clerk of the Board of Education, and at the offices of W. E. Ellingsen, Architect, 217 Torrey Building, Duluth, Minnesota, hereby proposes to furnish all labor, material and equipment to complete the General Contract for the Industrial Arts Building addition to the brick school building, located in the Town of Barnum, Minnesota, and to perform such work, all in accordance with Contract Documents, prepared by W. E. Ellingsen, Architect, the base proposal being the sum of TWENTY-FOUR THOUSAND THREE HUNDRED DOLLARS ($24,300.00)."

Such bid constituted an offer. A contract with the best bidder, containing substantial provisions beneficial to him, which were not included in the specifications is void. The rule is stated in 43 Am. Jur., Public Works and Contracts, 781, Section 40, and in **Diamond v. City of Mankato**, 89 Minn. 48, 93 N. W. 911; **LeTourneau v. Hugo**, 90 Minn. 420, 97 N. W. 115; **Patterson v. Barber Asphalt Paving Co.**, 96 Minn. 9, 104 N. W. 566; **Independent School District No. 102 v. Farmers & Merchants State Bank**, 153 Minn. 353, 190 N. W. 539. The second question requires a negative answer.

The proposed contract is not in response to the invitation for bids.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.
March 4, 1952. 707-A-12

39

Consolidation—Real estate—Conveyance of real estate after consolidation is effected by officers of the newly consolidated district—The former constituent districts merged in the consolidated district terminate their governmental existence upon consolidation—M. S. 1949, 125.06, subd. 2.

Facts

In Jackson County, Independent School District No. 6, by consolidation, absorbed former Common School Districts numbered 16, 23 and 53. Independent School District No. 6 thereupon took over management of the enlarged district. Before such consolidation, Districts 16, 23 and 53 owned

real and personal property. In one such district, the deed of conveyance of land to the district contained a clause to the effect that, should the premises conveyed not be used for school purposes, the land should revert to the grantor. Buildings are on such land.

Questions

"1. In conveying the real estate and the personal property belonging to these various school districts, who executes the instruments of conveyance,

a. The Board of the former school district, or

b. The Board of School District No. 6, the new Joint Consolidated District?

"2. Some of the former school districts have considerable assets in the way of funds on hand and equipment. One former district has very little assets. Are the assets of the joining districts merged with the new district without regard to the amount brought in by such districts, or is there a provision for crediting or allocating back to the taxpayers of such joining districts some portion of such assets which are in access [excess] of other joining districts? In other words, District 23 has $5000 worth of funds on hand at the time consolidation was completed. District 53 has none. Is District 23 entitled to any consideration for contributing more in the way of assets to the new consolidated district?"

Opinion

I presume that your first question refers to a conveyance to a purchaser from Independent School District No. 6. If and when the voters in that district authorize it, the school board in District No. 6 should adopt a resolution directing the chairman and clerk of the district to execute and deliver a deed of conveyance covering the land described in the resolution, naming the purchaser as grantee, and directing that upon payment of the actual consideration named in the deed to the district, the deed be delivered to the purchaser. See M. S. 1949, 125.06, subd. 2.

The new consolidated district is the successor of the former districts merged therein. All property of the former constituent districts is now owned by the present consolidated district. The former districts have lost existence. The language of M. S. 1949, 122.23, indicates that the legislature intended that, when the several districts were consolidated, the governments of the former districts were dissolved. Today, there is no District 16, 23 or 53. Section 122.26 (2) is not applicable to the facts.

CHARLES E. HOUSTON,
Assistant Attorney General.

Attorney for School District, Windom.
March 12, 1952. 166-F-2

40

Consolidation—(1) Requirements for filing resolution of approval by board of district which contains graded elementary or secondary school discussed.

M. S. 1949, Sections 122.20, 122.22, as amended by L. 1951, C. 706. Opinions of March 15, 1950 and January 26, 1950 (File 166f-3) differentiated.

(2) Where consolidated district contains more than one district which maintained graded elementary or high school, provisions of M. S. 1949, Section 122.23, not applicable and a new election must be called. In such event L. 1951, C. 706, Section 8, Subds. 5 and 6, apply and boards of old districts continue until July 1st.

Opinions dated November 8, 1951 and August 23, 1951 (File 166f-7) differentiated.

Facts

An application and plat for the consolidation of common school districts 55, 56, 61 and 112, and independent districts 51 and 103, all of Todd County, and common school districts 68, 77 and 91 of Otter Tail County have been submitted to your office by the county superintendent of schools of Todd County. The proposed consolidated district contains seven common school districts, which maintain ungraded elementary schools, and two independent school districts, Nos. 51 and 103. The two independent districts each maintain a graded elementary and secondary school. You make reference to M. S. 1949, Sections 122.19, 122.20, 122.21 and 122.22, all as amended by L. 1951, C. 706, and to Section 122.23.

Questions

"1. In referring to M. S. 1949, Section 122.21, as amended by Laws of 1951, C. 706, will the consolidation of the districts indicated above be completed when the school boards of districts 51 and 103 have adopted the resolutions approving the consolidation? (See Opinion of January 26, 1950 relating to questions submitted by the county superintendent of Ramsey County.)

"2. Referring to M. S. 1949, Section 122.23, which school board of either district 51 or 103 will be the school board which will take over the government and administration of the affairs of the newly consolidated district?

"3. If neither school board in such case is empowered to take over the government of the newly consolidated district, would it be necessary to elect a new school board? If so, what procedures shall be used in the election of such school board?"

Opinion

Questions similar to those here raised were considered by this office in opinions dated March 15, 1950, and January 26, 1950, (our file 166f-3). In

view of the amendments made by said C. 706, it is necessary that we review the present procedure, which must in certain instances be differentiated from that referred to in the opinions of March 15, 1950, and January 26, 1950.

In respect to question 1, the answer must be determined by construing together the provisions of Sections 122.20 and 122.22 as they were amended by the said C. 706. Section 122.20 was amended by Section 2 of C. 706. Among the new matter added by the amendment is the following:

> "If the territory of any district or districts maintaining a graded elementary or secondary school or schools, or both, or any part of any such territory, is included in the proposed consolidated school districts, no such election shall be called unless and until the board of each such district or districts shall have adopted a resolution in favor of such consolidation and a copy thereof, certified by the clerk, has been filed with the county superintendent."

Accordingly, when there is included in the proposed consolidated district, territory of a district or districts maintaining a graded elementary or secondary school, or both, or any part of any such territory, the resolution approving such consolidation must be adopted prior to the calling of the election.

It then will be further noted that under Section 122.20, as amended, it provides that the resolution approving the consolidation may be conditioned upon the districts or parts of the districts included in the proposed consolidation assuming their proportionate share of its bonded indebtedness. If that condition is included, the voters will pass upon the two separate questions.

We next find that Section 122.22, as amended by Section 4 of C. 706, provides that, if a majority of the vote cast at the election be for a consolidation, the county superintendent within ten days after receiving a certificate of the results of the election shall make an order giving effect to such vote. We next find that when Section 122.22 was amended there was inserted a provision which at first blush raises some confusion as to the time that the consolidation becomes effective. As now amended, it includes the following proviso:

> "provided that, in the case of consolidation of one or more districts, or parts of districts, maintaining only an ungraded elementary school or schools with a school district or districts maintaining a graded elementary or secondary school or schools, or both, no such order shall be made unless and until a certified copy of a resolution, adopted by the school board of the district maintaining such graded elementary or secondary school or schools, or both, favoring consolidation has been filed with said county superintendent. If the certified copy of the resolution filed with said county superintendent under Minnesota Statutes, Section 122.20, is conditioned upon the assumption of a proportionate share of the bonded indebtedness and the election for such assuming has failed, then such order shall not be made unless and until such district or districts shall adopt and file another resolution favoring such consolidation without condition."

It will thus be noted that the first part of the proviso states that the order shall not be made until a certified copy of the resolution giving the approval by the district maintaining the graded elementary or secondary school shall have been filed. It is our opinion that, if the resolution of approval required under Section 122.20 was not conditioned upon the assumption of indebtedness and the vote for consolidation is favorable, then the consolidation is completed by the superintendent making his order within ten days after receiving the certificate of the results. Furthermore, if the resolution of approval referred to under Section 122.20 included a condition providing for the assumption of the bonded indebtedness, and the vote was favorable both on the questions of consolidation and on the question of assumption of indebtedness, then the consolidation likewise becomes effective when the county superintendent files his order as required under the first part of Section 122.22. In other words, in neither of those cases would it be necessary that the board or boards of the districts maintaining graded elementary or secondary schools file a second certified copy of a resolution of approval.

If, on the other hand, the original resolution filed under Section 122.20 was conditioned upon the assumption of indebtedness and the vote was favorable for consolidation but not favorable to the assumption of indebtedness, then, under Section 122.22, as amended, it would be necessary that the board of the district maintaining the graded elementary or secondary school adopt a new resolution favoring such consolidation without condition, and that resolution would have to be filed before the superintendent of schools could issue his order.

Questions 2 and 3 will be considered jointly.

It will be noted that M. S. 1949, Section 122.23, provides in part:

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

In an opinion of this office dated March 15, 1950, it was held that when the consolidated district contains more than one school maintaining a graded elementary or high school, the foregoing provision of Section 122.23 would not be applicable and that, accordingly, an election would haye to be held.

That then brings us to a consideration of L. 1951, C. 706, Section 8, Subds. 5 and 6. It will be noted that Subd. 5 provides that the school board of each district included in the new enlarged district shall continue to maintain school therein until July 1st. Subd. 6 provides that the newly elected school board of the enlarged district will plan for the maintenance, and so on, of the new district for the next school year. The last sentence of Subd. 6 states: "These provisions shall apply also to the school boards of districts which have been enlarged by additional territory through consolidation or dissolution-annexation procedures." In opinions of this office dated Novem-

ber 8, 1951, and August 23, 1951 (our file 166f-7), fact situations were considered under which, when the consolidation was completed, the district included only one district maintaining a graded elementary or high school. These opinions then stated that, in view of the fact that under Section 122.23 the board in the district maintaining the graded elementary high school would conduct the business of the new district until the time of the next election, there would be no newly elected board, and that accordingly the provisions of C. 706, Section 8, Subds. 5 and 6, were not applicable.

In the case here before us, however, the provisions of Section 122.23, as we have heretofore stated, are not applicable and a new election must be called. Accordingly, it is our conclusion that, in this case, the provisions of C. 706, Section 8, Subds. 5 and 6, are applicable. Therefore, when the consolidation is completed, the school boards of each district included in the consolidation will continue to operate the schools until July 1st. The newly elected board will then take over on July 1st.

DONALD C. ROGERS,
Assistant Attorney General.

Commissioner of Education. 166-F-3
February 7, 1952. 166-F-7

41

Detachment and annexation proceedings — "Vacant and unoccupied" land intervening—M. S. A. 122.15.

Facts

A landowner, whom we will call "A," wishes to have his land detached from a school district in which it is situated and annexed to another district which adjoins the district in which such land is now located. A forty-acre tract of land owned by B lies between A's land and the common boundary of the two districts. You state that the intervening land is not cropped, but you do not say that it is "vacant and unoccupied" (the words of the statute). A has petitioned to have his land detached from the district wherein it is now located and attached to the adjoining district.

Questions

"In your opinion can the Commissioners set his farm over without including the unoccupied farm, or must they place both of these farms in the other district?

"In our second case the land which lies between the petitioner's land, the district to which he is petitioning is cropped by the owner or by a renter. In this case can the Board of Commissioners set the petitioner's farm into the district he desires without setting the unoccupied land into the new district?

"A third question is, must a school district be contiguous? If they must be, what should we do in this county with those which are not?"

Opinion

The petition was not submitted to the Attorney General for inspection. If it conforms to the requirements of M. S. A. 122.15, and if the intervening land is (1) vacant or unoccupied, or (2) if the owner of the intervening land is unknown, then, upon compliance with all the requirements of this section, the county board may make an order detaching the land owned by A and B from the school district where now located and attaching it to the adjoining district. The land owned by A cannot be so detached without also detaching B's land and attaching both tracts to the adjoining district.

In the second case mentioned, you do not say that the land intervening is vacant or unoccupied. You say that it is cropped. It should be easy to learn who owns the land. It is only when the owner of the intervening land is unknown, or where the land is vacant, that A can petition to detach and annex as provided in Section 122.15. This section is not authority to detach and annex A's land without, at the same time and in the same proceeding, including B's land. It is my opinion that such an order is without authority of law.

The last question is answered by M. S. 1949, 122.03. All school districts shall be composed of adjoining territory. If it has been attempted to disregard this law, consideration should be given to the facts in each case. No wholesale remedy is suggested.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.
June 27, 1951 166-C-9

42

Election—Voters unable to reach polls due to weather conditions—Mere fact that elements prevent a large turnout at election on question to build school does not vitiate election—Election can be called in independent district only when board elects to do so—M. S. 1949, Section 125.06, Subd. 2.

Facts

Because of a heavy snowstorm on the date of the election on January 22nd, it was impossible for a number of farmers to get out to vote due to the fact that the roads were blocked. The superintendent of schools at Ada states that 805 votes were cast at the election—524 in favor of the bond issue and 269 against the bond issue—and that there are some 130 votes

from the rural area of the district, and the population of Ada is 2,251. Objection to the election has been made by certain voters who were unable to get in to town to vote because of the weather conditions.

Opinion

1. When an election has been duly called there is no authority for the postponement of that election. It has been held that " * * * elections are determined by the majority of the ballots cast, and are not to be set aside on account of the meagerness of the vote, without distinct and circumstantial allegations of error, fraud, violence or illegality **affecting the results." Augustin v. Eggleston,** 12 La. Ann. 366, 367 (La. 1857).

2. Under M. S. 1949, Section 125.06, Subd. 2, the school board is authorized to erect a schoolhouse when it has been authorized to do so by the voters at a regular meeting. In an independent school district it is the school board itself which must first determine whether or not it desires to proceed with the erection of the schoolhouse, and the matter is submitted to the voters only after the school board has taken that action. There is no other manner in which an election may be called.

DONALD C. ROGERS,
Assistant Attorney General.

Commissioner of Education.
February 1, 1952 187-A-6

43

Finances—Bond issue—Debt limit—In determining debt limit under M. S. 1949, Section 475.51, Subd. 5, as amended by L. 1951, C. 422, there cannot be included 25% of full and true value of property exempt from local taxation as referred to in M. S. 1949, Section 128.22.

Question

"May the School District of Proctor use 25% of the railroad property as assessed by the Railroad and Warehouse Commission as a basis for issuing bonds?'

Opinion

It is our understanding that the superintendent's inquiry goes to the question as to whether or not the school district in determining its debt limit under the provisions of M. S. 1949, C. 475, as amended, may include in its assessed valuation 25% of the full and true value of property which is exempt from local taxation because taxes are paid thereon under gross earnings tax law as referred to in M. S. 1949, Section 128.22. This question is answered in the negative

The debt limit of the district is established by M. S. 1949, C. 475, as amended by Laws 1951, C. 422. Section 475.51, Subd. 5, states: " 'Assessed values' means the latest valuation for purposes of taxation, * * * ". Referring now to M. S. 1949, Section 128.22, which relates to gross earnings aid, provides under Subd. 1 that:

> "When the properties of any school district in this state are made up, to the extent of at least 20 per cent in value, of property which is exempt from local taxation because taxes thereon are paid into the state treasury under the provisions of the gross earnings tax law, such district shall receive annually a refund from such gross earnings taxes in the amount that would be produced by a tax on such tax exempt property at the current tax rate for school purposes in the school district. **For the purposes of determining the amount of this refund** the value of such exempt property shall be set at 25% of its full and true value except that in no case shall the assessed value of said exempt property for this purpose exceed such an amount as when added to the assessed value of all other property in the school district exceed $2,500 per resident pupil unit. In the determination of the amounts to which the school districts shall be entitled in the distribution of any state aids that are based upon total valuation per pupil this valuation shall be included." (Emphasis added.)

This statute very clearly states that the value of the exempt property shall be set at 25% of its full and true value for the purpose of determining the amount of the refund, and secondly provides that it shall be included in the determination of the amounts to which the school district shall be entitled in the distribution of any state aid. It is limited to those purposes. We find no basis for sustaining the contention that the valuation of that property could be included within the definition of assessed value as found in Section 475.51, Subd. 5, as amended.

DONALD C. ROGERS,
Assistant Attorney General.

Commissioner of Education.
July 24, 1951. 159-A-5

44

Finances — Bond issue — Money realized from bond issue for buildings and equipment in independent school district may be supplemented by other available funds, keeping intact sinking fund and maintenance fund.

Facts

In January, 1952, the voters of the district gave an affirmative vote on the question

"Shall Independent School District Number 32 issue bonds in the amount of $275,000 for the purpose of building and equipping a high school addition with facilities for industrial arts, agriculture and music, plus a six classroom Elementary Building complete with play room, kitchen, cafeteria and office space?"

The board invited bids for the building construction. The low bid received was $266,335.00. I am not informed that any bid was accepted. Bids for equipment have not been received. It is estimated that the required equipment will cost $30,000.00. The architect's fee, based on the $266,335.00 bid will be $15,983.10.

The superintendent of the district states:

"We will have in our treasury at the end of the fiscal year about $67,000, of which $5,539.81 has been raised for capital outlay by taxes, income tax aid, and the $15.00 per pupil unit collected from non-resident elementary pupils. We anticipate an income of $2,500 from the $15 per pupil for non-resident secondary pupils and about $2,500 from income tax during the next year."

He further reports these assets of the district:

Bond proceeds	$275,000.00
Capital Outlay Fund	5,539.81
Anticipated as stated above	6,020.00
Surplus on hand as stated above	67,000.00
Total	$353,559.81

The superintendent submits the

Questions

1. May the district spend available funds for equipment that are not realized from bond issue?

2. May the district designate a major portion of next year's levy (expected to be about $58,000) as capital outlay and use the $67,000 now on hand for maintenance?

Opinion

The essence of your question is this: For what purposes may the money mentioned be spent?

The proceeds of the $275,000 bond issue may be spent only for the purposes for which the people authorized the issuance of the bonds. But it appears from the foregoing statement of facts that $275,000 is a sum insufficient to pay for what the district wishes to buy. So we consider whether the money mentioned outside of the bond issue proceeds may be added to the $275,000.00, to make the sum required to be spent for the building program, plus equipment.

The capital outlay fund may be spent for the purpose of buildings or equipment but not for maintenance or operating expense. The $67,000 mentioned appears to be surplus which may be used for any purpose where the board sees the need for it. So without giving consideration to anticipated receipts, the two last mentioned items added to $275,000.00 make $347,539.81 available for the disbursements anticipated to be made, to pay for construction of buildings, architect's fees and costs of equipment amounting in all to $312,318.00.

No part of the $275,000 proceeds of the bond issue, or the capital outlay bond mentioned should be spent for maintenance. It appears to me that the $67,000 surplus and other moneys mentioned may be spent for any legitimate purpose to meet the needs of the district.

In my opinion the board may do such budgeting as it sees fit. This does not mean that it is permanently bound by the budget figures. They are a guide for the transaction of business, but not inflexible, should the board in its judgment decide to modify the budget by increasing some items and decreasing others. In making such changes in the budget, care should be exercised to avoid changing budgeted figures for maintenance because of M. S. 127.05 and the sinking fund must never be used for any other purpose.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education
June 10, 1952. 159-B-2

45

Finances — Bonds lost — Bonds which have been lost may not be redeemed upon the owner thereof filing a bond—M. S. 1949, Section 475.70 authorizes the issuance of duplicates for lost bonds.

Facts

X, a former resident of Koochiching County, owned two unredeemed bonds, issued by an unorganized school district, which matured in 1940. The bonds are negotiable and had not been registered. X lives in Europe, and during World War II these bonds were destroyed.

Question

May the unorganized school district accept a bond from X and cause payment for the two lost bonds to be made?

Opinion

We are unaware of any statutory provision permitting the school district to redeem lost bonds upon the owner thereof filing a bond with the school district. Your inquiry is therefore answered in the negative.

We direct your attention to M. S. 1949, Section 475.70, which permits the issuance of duplicate bonds to replace bonds which have been lost. That provision applies to a school district. (See M. S. 1949, Section 475.51, Subd. 2.) Even though there is a compliance with that section, and duplicates of lost bonds are issued, there still remains the question of whether they should be paid, in view of the statute of limitations. See **Batchelder v. City of Faribault**, 212 Minn. 251, 3 N. W. (2d) 778.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Public Examiner.
July 29, 1952. 40-A-6

46

Finances—Building fund—School board, without a vote of the people, may not transfer a surplus in the treasury to a building fund for buildings to be erected in the future. But when authorized by a vote of the people, the board may do so—M. S. 1949, 125.06, Subd. 2, 127.04.

Facts

It is contemplated that the requirements of the school district in the future will call for additional school buildings. The school board is interested in establishing a fund to provide the money for such buildings when needed.

Presently, there is a surplus of about $17,000 in the treasury. This surplus "was originally earmarked for current school expenditures." I presume that this means that when the taxes were levied from which the $17,000 was produced, the budget, at the time of the levy, contemplated that the money would be needed for expenses of operation and maintenance of the schools in the district. But it has been found that this $17,000 is a surplus over current needs and the needs anticipated for the current or coming school year.

Questions

1. Is it legal to set aside a portion of this money into a sinking fund for building purposes?

2. May a certain amount of money be so earmarked simply by motion and majority vote of the board of education when the school budget is approved for the tax levy?

Opinion

Nothing in this opinion contemplates a sinking fund. That term as generally used refers to the fund that is set up under the provisions of M. S. 1949, 475.66, as amended by L. 1951, C. 422, Sec. 7. A sinking fund is for the purpose of providing for the payment of principal and interest on bonds which have been issued by the district. What is contemplated herein is not a sinking fund.

In my opinion the contemplated action cannot be taken by the school board without authority therefor having first been granted by a vote of the people.

> "When authorized by the voters * * * , it (the school board) may * * * erect, lease, or purchase necessary school houses, or additions thereto; * * * ." **M. S. 1949, 125.06, subd. 2.**

So, it appears that as a prerequisite to the right of the school board to erect additional schoolhouses, the authority of the voters must be first obtained. The facts here considered do not contemplate that the voters have authorized the erection or acquisition of additional housing, so, under the present facts, it is not shown that the board has authority to acquire such additional housing. When it has no such authority, it seems to follow that it has no authority to provide money to accomplish a result which the voters have not authorized.

M. S. 1949, 127.04 provides in part:

> " * * * In independent districts no tax in excess of eight mills on the dollar shall be levied for the purposes of school sites and the erection of school houses."

This has been held to be a limitation upon the powers of a school board rather than a grant of power to a school board. That is, it is a limitation of power on the part of the school board, but not a limitation upon the power of the voters. **Oliver Iron Mining Co. v. Independent School District No. 35,** 155 Minn. 400, 193 N. W. 949.

The opinion in this case (p. 404 of the Minnesota report) states:

> " * * * Hence we construe the limitation quoted as one upon the board so that, for the purposes stated, it may not levy in any one year more than 8 mills on the dollar of the taxable property in the district. But we do not think this a limitation upon the power of the electors of the district to raise funds through loans or bonds to erect needed school houses or equip the same."

It follows that the first question should be answered that, in the absence of authority from the voters, the school board may not, upon its motion, establish a building fund for buildings to be acquired or constructed which have not been authorized by the vote of the people.

This also answers the second question.

But, if the people authorize it, then the board may take such action. See opinion of the Attorney General, 1924 Report, No. 126, file 159-B-2.

CHARLES E. HOUSTON,
Assistant Attorney General.

Public Examiner.
September 20, 1951. 159-B-2

47

Finances—Sinking fund—Bonds—Sinking fund created at time of issuance of bonds by tax levy — Consolidation of school district with other districts after bonds issued — Sinking fund unaffected and can be used only for retirement of bonds.

Sinking fund — How invested—M. S. A. 475.66, L. 1951, C. 422, Section 7.

Facts

"Independent School District No. 162, Goodhue County, Minnesota, is in the process of becoming a consolidated school district. This present school district has outstanding $18,500.00 of non-callable bonds maturing $1,500 annually, and a special fund set aside for payment of these bonds as they mature. This fund is sufficient to meet all maturities with interest.

"In addition to this special fund District No. 162 will have a cash balance of upwards of $30,000 which is to become the property of the new consolidated district.

"During the process of consolidation the Board of District No. 162 was advised that the special fund set aside for the sole purpose of retiring existing bonds can remain for that purpose."

You comment:

"We assume that if the school consolidation law permits the establishment of this fund it also designates the method, or methods, of handling the fund so that it will be used as specified in the Resolution of the school board which established it."

Questions

" * * * now that Independent School District No. 162 will cease because of the merger into a consolidated district, how must this special fund be disposed of to assure that it serves its purpose?

"Can the school board deposit the fund with a bank or trust company as a restricted deposit for the sole purpose of meeting the bond maturities, plus interest?

"If this fund cannot be left with a trustee for administering it as intended, then, if this earmarked fund is left with the new consolidated school district, will future school boards be obligated to use it only as specified in the present Resolution in the school records, or could a future school board return the fund to its general fund for other use?"

Opinion

The status of the fund is unchanged by the consolidation.
M. S. A. 475.66 (L. 1951, C. 422, Section 7) reads:

"There shall always be retained in any sinking fund sufficient cash to provide for the annual payments of principal and interest on the obligations for which the fund was created. Any surplus in any sinking fund above such amount may be invested under the direction of the governing body in any general obligation of the United States, the State of Minnesota or any of its municipalities.

"The obligations representing any such investment may be sold or hypothecated by the governing body at any time, but the money so received remains a part of such fund until used for the purpose for which the fund was created."

This section was formerly Section 475.30.

M. S. A. 475.26 provided for tax levies for payment of obligations and required the money thereby produced to be placed in a sinking fund and used only for payment of principal and interest on bonds. That section was repealed by L. 1949, C. 682, Section 26. So, after the effective date of the act, July 1, 1949, this section did not apply to bonds thereafter issued. But it is my opinion that if the bonds which you mention were issued before that date and if the sinking fund was created before July 1, 1949, then the law which was in force when the bonds were issued applies to the sinking fund created by tax levy as a part of the proceedings relating to the bond issue. Such fund was a part of the security of the bond issue of which the bondholders could not be deprived by subsequent legislation.

The school board may invest the sinking fund in bonds of the United States, the State of Minnesota or any of its municipalities. M. S. A. 475.66, L. 1951, C. 422, Section 7.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.
May 1, 1952. 159-A-17

48

Finances—Surplus fund—School building to cost a sum in excess of amount of bonds authorized may be paid from a surplus in the general fund only when the voters so authorize.—M. S. 1949, 125.07, subd. 1, 122.01, subd. 2.

Facts

"The school district has voted to construct an addition to the present school building. A bond issue of $35,000 has been issued for this purpose. Upon letting the bids for the construction, the bids totaled approximately $50,000. The school district has approximately $21,000 in the general fund, which has accumulated over several years."

Question

"Can the money in the general fund be used for the construction of the addition?"

Opinion

A common school district is a district, organized as such with a board of three members, in which the electors determine the length of the school term and the amount of the tax levy. M. S. 1949, 122.01, subd. 2.

> "The school board of every common school district shall submit to the annual school meeting an estimate of the expenses of the district for the coming year for a school term as determined by the board and for such other specified purposes as the board may deem proper and, if such meeting shall fail to vote a sufficient tax to maintain a school for such time, the board shall levy such tax; but no such school board shall expend any money or incur any liability for any purpose beyond the sum appropriated by vote of the district for such purpose, or levied by the board pursuant to this subdivision, or on hand and applicable thereto." **M. S. 1949, 125.07, subd. 1.**

So, we see that in a common school district, not the board, but the people levy the taxes. And the section last cited forbids the school board to spend any money or incur any liability beyond the sum appropriated by vote of the district **for such purpose**, or on hand and applicable thereto.

As I understand the facts, this surplus of $21,000 in the general fund was levied for maintenance in various years and the $21,000 is an accumulation of surpluses from year to year. But the people have not said that the money may be used to supplement the bond issue in paying for an addition to the schoolhouse in excess of the amount authorized by the bond issue for the purpose. It appears to me that correct procedure requires that at the next annual meeting, or at a special meeting called as authorized by statute

for the particular purpose, the people should by a vote authorize the board to expend a specific amount of this surplus to supplement the $35,000 realized from the bond issue for the completion of the contract for the addition.

CHARLES E. HOUSTON,
Assistant Attorney General.

Attorney for Common School District No. 11, Stevens County.
September 25, 1951. 159-A-18

49

Insurance — Purchase — Winona Special School District Board of Education does not have authority to purchase health and accident insurance for employees. State ex rel. Jennison v. Rogers, 87 Minn. 130.

Questions

1. "Can the Board of Education purchase insurance for all employees for medical and hospitalization purposes at no expense to the employee, said insurance being purchased as supplemental compensation to the employees of the Winona Public School system?
2. "If such a payment is legal, would the employees have to pay withholding tax and retirement benefits based upon the premium paid for insurance by the Board of Education in addition to their total money wages?"

Opinion

Question 1 is answered in the negative. Accordingly, consideration need not be given to question 2.

The Winona School District is a special school district created and operating under the provisions of Special Laws of 1878, Chapter 155, as amended by Special Laws 1879, Chapter 65, Special Laws 1887, Chapter 85, and Special Laws 1891, Chapter 332. We have examined the powers therein specifically delegated to the board. They do not include the right to purchase the referred to insurance.

It is true that there is authority to the effect that a board of education is authorized to purchase group insurance by virtue of its implied powers. See **Nohl v. Board of Albuquerque** (N. Mex. 1921), 199 Pac. 373.

The right of a municipal body to grant pensions, purchase insurance, etc., is now generally recognized, and the courts have held that the expenditures for those purposes are not an improper expenditure of public funds.

The majority rule holds, however, that a municipal body or a school district is not authorized to make expenditures of the nature here considered

without special authorization by the legislature. This general principle was enunciated in the case of **State ex rel. Jennison v. Rogers**, 87 Minn. 130, 91 N. W. 430.

In an opinion of this office dated March 22, 1928 (file 159b-4), this office concluded that there was no statutory grant of power sufficient to authorize a board of education to pay the premium or any part thereof of group insurance for the benefit of teachers. That opinion construed the statutory provisions pertaining generally to the powers of school boards. We deem the conclusion reached in that opinion applicable to the construction of the special laws relating to the Winona school district.

Accordingly, we conclude that, absent a special authorization by the legislature, the Board of Education of the Winona School District does not have the authority to purchase the referred to insurance.

DONALD C. ROGERS,
Assistant Attorney General.

Commissioner of Education.
March 26, 1952. 154-B-4

50

Liability — Responsibility for torts of agents in the discharge of a governmental function—M. S. 1949, 126.02.

Roads—Snow removal—School district may contract for snow removal on bus routes—M. S. 1949, 125.065, subd. 7.

Facts

"For the purpose of removing snow from the route travelled by buses owned by the school district and used for the purpose of transporting school children to and from school, said school district owns a snow plow. It has entered into an agreement with the townships through which the school bus routes go whereby the school district removes the snow from the bus routes as necessary and the townships in turn pay to the school district an agreed price for such snow removal. The payment for snow removal as aforesaid is upon an hourly basis and in keeping with the price usually charged in this vicinity for such work."

Questions

1. Is the school district, or are the members of the board, responsible for damages for personal injury or property damage by reason of negligence in the operation of a snow plow on the school bus route?

2. Is the school district, or are the board members, responsible for damages for personal injury or property damage by reason of negligence in the operation of a snow plow upon roads not traveled by the school bus?

Opinion

A school district, by M. S. 1949, 125.065, subd. 7, is authorized to enter into a contract with another political subdivision of the state, or with an individual, for the removal of snow from roads used for regular bus routes transporting pupils to and from school either within or without the district. You will observe in reading this section that the school district is not specifically authorized to operate snow plows. But an opinion of the Attorney General, File 159A-5, February 7, 1948, stated that a school district which operates a bus has power to borrow money to buy a snow plow.

In 26 Minn. Law Review 293 may be found material of interest on governmental liability for torts, an article by Orville Peterson, attorney for the League of Minnesota Municipalities.

Published in the 1948 Report of the Attorney General as Opinion No. 35, is found reference to the books on this subject of governmental tort liability for property damage. There is some question whether liability for property damage is parallel to liability for personal injury.

M. S. 1949, 126.02 reads:

> "An action may be brought against any school district, either upon a contract made with the district or its board, in its official capacity and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such board, whether the members of the board making the contract, or guilty of the act or omission complained of, be still in office or not."

But in considering this statute our court said in **Mokovich v. Independent School District No. 22**, 177 Minn. 446, 225 N. W. 292:

> "School districts are governmental agencies, with limited powers, created solely to exercise public functions, for educational purposes. They are arms of the state. G. S. 1923 (1 Mason, 1927), Section 3098, does not authorize suit against a school district to recover damages for personal injury caused by the negligence of its officers or agents in the performance of its governmental functions.
>
> "A failure by such district to perform a governmental function, or negligence in the performance thereof, is not actionable in such a case, whether it be termed a nuisance or mere negligence.
>
> "No distinction is made in this state as to liability for torts arising out of the performance of mandatory or permissive governmental functions of the school district."

Bohrer v. Village of Inver Grove, 166 Minn. 366, 207 N. W. 721, involved property damage caused by the act of defendant in depositing sand and dirt in a ravine, where by force of nature it was washed upon plaintiff's land. Upon the trespass theory, defendant was held liable in damages.

This leads to the conclusion that a school district is not liable in damages for an act of the district done in the discharge of a governmental function, resulting in personal injury. If members of the board act only in their official capacity, they would not be personally liable.

I see no authority in Section 125.065, subd. 7, whereby the school district may go into the business of plowing snow for compensation. Since the board is not authorized to make such contracts, it cannot properly be claimed that when it plows snow for others with machinery operated by men employed, it was engaged in a governmental function. The board in engaging in such unauthorized business is not in my opinion protected by any doctrine of governmental immunity and is in a hazardous business which may result in serious personal responsibility.

M. S. A. 471.42, to which you refer, authorizes a school district to carry insurance for the protection of employees by reason of claims for bodily injury, death or property damage made upon any such employee by reason of his operation of a motor vehicle while in the performance of his duties.

CHARLES E. HOUSTON,
Assistant Attorney General.

Attorney for School District No. 5 of Villard. 844-F-6
November 20, 1952. 377-A-11

51

Local improvements—Sewers—Assessments—Petition—Fourth class cities may levy special assessment against property benefited by improvement, including school district—School district, as an owner of property abutting the proposed improvement, constitutes an owner, and authorized to sign petition for the initiation of a proposed improvement—M. S. 1949, Section 471.60.

Facts

"A petition requesting the construction of sewers within the City of Moorhead has been presented to the City Council for action. This petition bears the signature of the Independent School District No. 2, which is within the City of Moorhead. If the property that is owned by the Independent District is included within this petition, then there is more than 51% of the property owners signing such a petition. If the Independent School District is not a proper signature upon the petition, then there is less than 51% of the property owners signing the petition. In order for the Council to pass upon this petition, it is necessary that 51% of the property owners who pay, sign the petition."

Question

"Will you please advise as to whether the Independent School District No. 2 is a proper signature upon the petition in order to determine whether 51% of the property owners have signed the petition?"

Opinion

As a general rule, assessment laws are understood to apply to private, not public, property, and, although such laws may be general in their terms, they do not apply to public property unless the intent so to apply them clearly appears. **State v. Board of Education,** 133 Minn. 386, 158 N. W. 635.

Your city operates under a home rule charter, and Section 142 thereof in part provides:

> "After this charter takes effect, all local improvements shall continue for the time being to be made under the laws and ordinances applicable thereto. The council shall prepare and adopt a comprehensive ordinance, prescribing the procedure which shall determine all matters pertaining to the making of local improvements thereafter, and such ordinance shall supplant all other provisions of law on the same subject and may be amended only by a three-fourths vote of all the aldermen. Such ordinance shall provide for such notice and hearing in the ordering of improvements and the making of assessments therefor as shall be necessary to meet constitutional requirements. Such ordinance shall also require a petition of a majority in number and interest of the owners of property to be assessed for such improvement, or improvements, for the initiation thereof."

Pursuant to this charter provision the city adopted Ordinance No. 173, relating to local improvements; Section 1 thereof reads as follows:

> "Procedure: The City Council of the City of Moorhead shall have the power to lay and maintain various types of pavement, gutters and curbs, sewers and sidewalks upon any of its streets, avenues or alleys, with any material which the Council may deem suitable; and the Council may, upon a petition for an improvement signed by 100 per cent of the owners of real property abutting on the proposed improvements, proceed with the improvement without the publication of a notice and the holding of a hearing; where the petition has more than 50 per cent of the real property signed for and less than 100 per cent, the Council shall thereupon instruct the City Clerk to secure a complete list of the property owners, and publish a notice of hearing in the official newspaper at least once each week for two successive weeks, stating the kind of improvement proposed, that the council will hear objections, if any, to the improvement in the Council Chambers in the City Hall at a time and date to be fixed by the Council. After the hearing, if the Council deems it advisable to proceed with the improvement, it shall so designate by resolution, and proceed in the manner hereinafter in this ordinance provided."

It will be noted that the ordinance refers to "the owners of real property abutting on the proposed improvement" without any restriction as to whether such owners should be individuals, corporations, or political subdivisions of the state. The restriction to qualify as an owner relates to the ownership of real property abutting on the proposed improvement.

It is our opinion that Independent School District No. 2, if it is an owner of real property abutting on the proposed improvement, may join in signing the petition for the improvement and should be considered an owner when considering and determining whether the requisite number of property owners have signed the petition.

Furthermore, and as bearing upon our conclusion, consideration has been given to M. S. 1949, Section 471.60; the first paragraph thereof reads as follows:

> "Any city, village, or borough however organized, may levy special assessments against the property of a school district, except one operating under the home rule charter of any city of the first class, or a county benefited by an improvement to the same extent as if such property were privately owned. If the amount of any such assessment is not paid when due, it may be recovered in a civil action brought by the city, village, or borough against the school district or county owning the property so assessed."

This office, in an opinion dated March 15, 1940 (our File No. 396-e), construing the above statute in conjunction with the term "owners of not less than thirty-five per cent in frontage of the real property abutting the street upon which the improvement is to be made" (Mason's Minnesota Statutes 1927, Section 1815), reached the conclusion heretofore stated.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Moorhead City Attorney.
November 27, 1951. 622-A-19

52

Property — Eminent domain — When school district may take possession of property condemned—M. S. 1949, Section 117.15. Superseding Opinion October 8, 1935, No. 183—1936 Report, file 817-f.

Question

After the commissioners' award has been filed, when is the school district entitled to take possession of the real estate?

Opinion

A school district is an agency of the state. Accordingly, the provisions of M. S. 1949, Section 117.20 apply. The terms of paragraph (3) of that section make clear that the payment of damages ascertained is not prerequisite to the assertion of rights on the part of the school district, since the obligation to pay damages ultimately determined will be presumed.

On page 305 of the opinion in the case of **State ex rel. v. Erskine,** 165 Minn. 303, 206 N. W. 447, the principle of law which I believe is applicable here was stated in the following words:

> " * * * as soon as the new road was established and the award of damages made, the county had a right to enter upon relator's land and construct the road without prepayment of the damages * * * ."

It is therefore my opinion that, as condemnation proceedings have been initiated for the acquisition of land for school purposes and an award has been filed therein, the school district is now entitled to take possession of the real estate under consideration.

The opinion of October 8, 1935, File 817-F, No. 183 in the 1936 Report, is hereby superseded.

J. A. A. BURNQUIST,
Attorney General.

Commissioner of Education.
March 21, 1952. 817-F

53

Property—Leased—Right of school district to remove buildings on property leased by district discussed. Case differentiated from holding in Miller v. Common School District No. 99, 231 Minn. 248, 43 N. W. (2d) 102.

Facts

A school district leased a strip of land from a farmer and erected a schoolhouse on the land. Rental was in the amount of $2.00 per year. Some of the rental has been paid and some has not. The school district has now closed the school and the school board desires to dispose of the building. The owner of the land claims that the building belongs to him. It appears that there was no written agreement or lease ever executed. From such information as you have been able to secure, it appears that an oral agreement was made providing for the rental of $2.00 per year, but that nothing was said as to what would happen to the schoolhouse if the lease was ever terminated.

Question

"The question is, does the school district have a right to sell and remove the building or can the land owner claim the building at this time?"

Opinion

A categorical answer cannot be given.

If we here dealt with a situation involving the granting of a license or permission to use the land, the question would be controlled by the case of **Merchants' National Bank of Crookston v. Stanton,** 55 Minn. 211, 56 N. W. 821, in which it was held, citing from the headnote, that:

> "Where buildings are erected by one having no interest in the land on which they stand, by the permission or license of the owner of the land, an agreement will be implied (in the absence of any other facts or circumstances tending to show a different intention) that the buildings shall remain the personal property of him who erects them."

In 22 Am. Jur. "Fixtures," Section 63, p. 778, the general rule is stated:

> " * * * As a general rule, a building on land is considered as a part of the realty, or, at least, it is so presumed; and the burden of proof is upon the party who claims that it is personal property to show that it retains that character."

This general rule, however, is modified when the question to be determined is one which arises under a landlord-tenant relationship.

> "In accord with the general exception favoring tenants, which permits them to remove improvements placed upon the leased property, with respect to buildings erected by a tenant, the rules are more favorable to the tenant than to persons in other relations to the owner of the realty; the presumption is in favor of the right of a tenant to remove buildings which he has placed on the leased property for his own purposes. A lessor and lessee may, of course, enter into an agreement that a building erected by the lessee shall remain the property of the lessee and may be removed by him on the expiration of his term. Independent, however, of any agreement, the intention of the lessee has much to do with the question; and if his intention is that the building shall remain his personal property and that intention is made known and his acts are consistent therewith, the building may remain his personal property, unless its mode of annexation is such that it cannot be moved."

22 Am. Jur. "Fixtures," Section 65, p. 782.

An agreement that a building affixed to land should remain personal property may be shown by evidence of the subsequent admissions and dealings of the parties. **Searle v. Roman Catholic Bishop,** 89 N. E. 809 (Mass. 1909).

In the case of **Hayward v. School District No. 9 of Hope Tp.**, 102 N. W. 999, 1,000, 139 Mich. 539 (1905), the court considered a fact situation where the school district had leased the land for fifty years under a written lease. The school district had built a schoolhouse and later discontinued school. Both the lessor and the lessee claimed title to the building. The court, referring to the lease, said at page 1,000:

> " * * * This writing does not in express terms give defendant the right to remove the schoolhouse. Neither does it provide that the schoolhouse shall be the property of the owner of the land. If the rights of the parties are determined by commonlaw principles, the schoolhouse was defendant's property, for it is settled in this state that the tenant owns buildings erected by him on leased land, 'and in furtherance of the purpose for which the premises were leased'."

It will be noted that in the case of **Miller v. Common School District No. 99**, 231 Minn. 248, 43 N. W. (2d) 102, the court held that where a school building was erected on land conveyed to a school district for school purposes only, subject to conditions of reversion to the grantor should such use be discontinued, and title to the land reverted to the grantor's heir, the district was not entitled to remove the building. It will be noted in that case, however, that the court stated that the defendant, the school district, had relied on the case of **Hayward v. School District No. 9 of Hope Tp.**, supra, and differentiated the cases by pointing out that the **Hayward** case involved the right of a tenant under a lease, not a grantee upon condition subsequent, to remove a building.

We have discussed the authorities with the hope that they may be of assistance to you, and believe that they indicate that there is a reasonable basis for asserting the school district's right of ownership to the building.

DONALD C. ROGERS,
Assistant Attorney General.

Scott County Attorney.
January 21, 1952. 622-i-16

54

Property—Sale—Part of description of property omitted on ballot—Authority of school board to convey real estate granted by voters under M. S. 1949, 125.06, subd. 2.

Facts

Since 1915 the Independent School District of Eveleth has owned certain residence property commonly known as 804 Jones Street. The property is correctly described as Lots 3 and 4, in Block 46, Central Division No. 1 of the City of Eveleth in St. Louis County, Minnesota, according to the cer-

tified plat thereof on file and of record in the office of the register of deeds of that county. The school district has no need for this property. At the annual school election held in May, 1952, the voters, by a vote of 1,863 to 820, voted by ballot to authorize the school board to sell the duplex residence located at the above address, but the ballot gave the description of the property as Lot 4 in Block 46 of the division mentioned instead of Lots 3 and 4 in that block.

Question

Upon the basis of these facts is the school board now authorized to convey title to both lots?

Opinion

The school district owns the property. The only question is whether the voters by authority of M. S. 1949, Section 125.06, have authorized the board to convey all of the property mentioned which the district owns. The property is identified in the manner which people usually understand, by giving the street and number in the city. The common understanding of that description would be that the property so identified constitutes one unit, and I believe it was so understood. It is also described by lot and block, which is the proper way to describe it, but only part of the property was thus described. I am of the opinion that no one was misled by the description since the unit was described as a duplex residence at a certain location. The question is not whether the description omitting one lot would have conveyed the title if it had thus been described in the deed. The question is limited to granting authority to the school board, and I believe that it was sufficient for that purpose

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.
August 13, 1952. 622-i-8

55

Property—Sale—When meeting of common school district votes to sell school property it is mandatory that board sell the same. State v. Anderson, 164 Minn. 134. Case of independent district distinguished—M. S. 1949, Section 124.10.

Facts and Question

"At their Annual School Meeting some weeks ago the members of the School District present voted, by a vote of 14 to 11, to sell the school building, which had been formerly used by this district as a schoolhouse. For the past few years the students in this District have been transported to Adrian. I am not certain exactly how the proposition

was worded, but we have been advised that the proposition voted on at the meeting was in its effect mandatory that the building be sold. In view of this, the question has arisen as to whether the Board is now obligated to go ahead and sell the building."

Opinion

We have been orally advised by your office that the said School District No. 69 is a common school district. Based upon that fact, we advise you that it is mandatory upon the board to carry out the instructions which have been given to them by the action of the annual meeting. This is in accordance with the ruling of the supreme court in the case of **State ex rel. vs. Anderson,** 164 Minn. 134, 204 N. W. 925. In that case the annual meeting had voted to build a new schoolhouse. The board refused to do so. The court held that it was the duty of the board to carry into effect such instructions, and that mandamus would lie to compel the board to carry out the mandate of the voters.

We call your attention to an opinion of this office dated April 17, 1929, No. 222, 1930 report, file No. 622-G. It will be noted that in that opinion it was held that it would not be mandatory upon the board in an independent district to build a schoolhouse even though the electors had so voted. The opinion discusses the difference that exists between the powers of a board in an independent district and that of a board in a common school district. Among other things it will be noted that under M. S. 1949, Section 124.10, it is the annual meeting of the common district which votes the funds for the maintenance of the school and all other purposes, and it has given to the annual or special meeting the power to direct the board to make designated improvements to school property.

DONALD C. ROGERS,
Assistant Attorney General.

Commissioner of Education.
August 9, 1951. 622-i-8

56

Property—Schoolhouse—Removal—Where district builds schoolhouse under mere license from owner of property, building may be removed upon termination. Case of Miller v. Common School District No. 99, 231 Minn. 248, 43 N. W. (2d) 102 differentiated.

Facts

"Under Chapter 421, Laws of 1947, as amended by Chapter 666 of the Laws of 1949, many Common school districts in Renville County have consolidated with larger districts, and as a result thereof, a question has arisen as to the ownership of the school buildings situated and

located upon the school site of the old Common school district, and as to the right of the newly organized district to take possession of such school houses and sell and dispose of them, after being granted authority to do so by the electors of the district at the annual election

"We do know however, that in many of the disputed cases, when the school district was established, the land owner offered a small tract of land for use as a school site in order to have the school near his home. There was no Deed of Conveyance, and not even an agreement by which one could spell out a leasehold. The most that can be said is that the school district was given permission, or a license if you want to call it that, to use the particular tract of land for a school site. Many of these Common school districts accepted these offers and, years ago, proceeded to either construct or move a school house onto the school site. The offer and the acceptance of the right of use of the tract of land for a school site was an **oral one**, and there was no understanding as to how long the school district was to have the use of the tract of land. No agreement was made or had as to what the result would be should the school be closed, or the school building, which was erected or moved onto the premises, be removed or the school district discontinued. There was no creation of a reversionary interest and no reservations made. The most that can be said, and we will have to assume that to be the fact for the purpose of this question, is that the owner orally gave or donated a tract of land to the school district for school purposes.

"No claim is made by the school district to the title of any such tracts of land, but a claim is made by the school district that it is entitled to the legal ownership of the school building and other structures located upon the land, and that it has the right to remove and dispose of such structures by sale."

Questions

"I would appreciate an opinion from your office as to whether or not, on the basis of the above stated facts, the newly organized school district is entitled to remove the school buildings from the present sites and, or, to sell and dispose of the buildings. Particularly are we interested whether or not the school district has the right to sell and dispose of the school building as against the claim of the present owner that the school buildings revert back to him with the land.

"Would your opinion be different if there was an original **oral** agreement or understanding between the land owner and the school district when the schoolhouse was constructed or moved onto the school site, that if the use of the school building was ever discontinued for school purposes, it would revert back to the owner with the land."

Opinion

In the facts stated by you, you refer generally to situations relating to various school districts. Accordingly, no categorical answer can be given and the questions you ask are discussed only in a general manner.

Furthermore, our discussion is governed by the fact that you state that no claim is made by the school districts to the title of any of the lands involved.

It is our opinion that it can be properly concluded that the school district had a mere license to use the property. An extended consideration of the subject of unwritten agreements for the use of land is found in 14 Rocky Mt. Law Rev., pp. 153-165 and pp. 294-314.

In the case of **State v. Riley** et al., 213 Minn. 448, 7 N. W. (2d) 770, it was held that a licensee has a reasonable time to remove the building after the revocation of a license. See also **Wilson v. St. P. M. & M. Ry. Co.**, 41 Minn. 56, 42 N. W. 600, 4 L. R. A. 378. Difficulty may arise under the present fact situation in view of the fact that it might be contended that actually there is not here present a revocation on the part of the fee owner. It is our opinion, however, that under authority of the case of **State v. Riley**, supra, the school district would have the right to remove the buildings. In arriving at this conclusion we have considered the authority of the case of **Miller v. Common School District No. 99, Lyon County** et al., 231 Minn. 248, 43 N. W. (2d) 102, wherein the court held that a grantor conveying land, the title to which was to revert to him upon the happening of a condition specified in the conveyance, was entitled to a building permanently affixed thereto at the time of the reversion. We differentiate that case from the present facts on the grounds that we here consider only a license rather than a conveyance.

DONALD C. ROGERS,
Assistant Attorney General.

Renville County Attorney.
July 24, 1951. 622-J-20

57

Property—Schoolhouse—Renting—School board may not rent space in public school building to music teacher for purpose of permitting private instruction to pupils in the public school nor may it rent piano for such purpose.

Compulsory attendance—School board may not excuse pupils from attendance at public school to enable him to take private piano lessons—M. S. 1949, 132.05.

First Problem

Facts

"The petitioner (Mrs. I. L. D.) is a private instructor of instrumental music (Piano). Her private students pay on a fee basis for this instruction and it is given at present on the basis of a schedule which does not conflict with the existing day school program.

"The petitioner's request is to rent rooms equipped with school pianos in the Lincoln and Junior High School, or either, in which to give these private piano lessons to students attending in these buildings.

"The petitioner further requests that these students taking private lessons with her — 'be excused for a piano lesson one-half hour only once a week.'

"Independent School District No. 40, through its regular staff and special teachers, provides instrumental instruction to students on an individual, group, and non-fee basis. It **does not, however,** provide piano education for any of its students so as not to interfere with the activities of private instructors offering this service within the community."

Questions

1. "May the school board rent to the music teacher for her use in private instruction space in the school buildings and the use of a school piano?

2. "Does such non-school use constitute the expenditure of tax money for private purposes contrary to law?"

Opinion

School districts are public corporations with limited powers, organized as a part of the educational system of the state, to establish and administer public schools with prescribed territories. In **State v. School District No. 70,** 204 Minn. 279, 283 N. W. 397, our Supreme Court said:

" * * * We must look to the statutes to determine the extent, nature, and character of the powers of defendant. It is well settled that school districts are governmental agencies established by legislative authority to perform the duties of educating the children of the state. The legislature may clothe them with such powers as it deems wise and regulate the manner of the exercise of such powers."

In **School District No. 7 v. Thompson,** 5 Minn. 280 (Gil. 221), it was said that a school district is a municipal corporation, created for a special purpose, and its powers expressly limited by statute. Their acts within the scope of their authority and in the performance of the duties devolved upon them by the letter of the statute, are presumed to be valid and binding upon the district. But when they step outside of the duties prescribed by statute, and engage in acts not expressly authorized by the power creating or appointing them, they must show affirmatively that their authority has not been transcended. And it is therein further stated:

" * * * And the doctrine is now well settled, in regard to all corporations, that they have only such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any other. As they are mere creatures of law, established for special

purposes, and derive all their powers from the acts creating them, it is perfectly just and proper that they should be obliged strictly to show their authority for the business they assume, and be confined in their operations to the mode and manner, and subject matter prescribed. 2 Kent Com. 350; 13 Pet. 587."

No authority is to be found in the statutes authorizing the rental of the space and personal property described in the facts aforesaid. Use for other than for school purposes is provided in M. S. 1949, 125.06, subd. 7. The use proposed does not come within that section.

This renders unnecessary any answer to the second question.

Second Problem

Facts

"The petitioner further requests that these students taking private lessons with her — 'be excused for a piano lesson one-half hour only once a week.'

"As a matter of dental hygiene and health education, students are excused for dental appointments when these cannot be arranged for at out-of-school hours. This is considered part of the health education and examination procedure."

Question

"Can the school board legally 'release' or 'excuse' students from regular school curriculum activities for private music lessons?"

Opinion

The law relating to compulsory attendance of pupils at public schools is found in M. S. 1949, 132.05. The exemptions from such attendance are found in subd. 3. The reasons for which a child may be excused from attending school are expressly stated. The purpose stated in the question is not among those found in the statute which specifies the legitimate exemptions.

Under subd. 1 of this section the child is required to attend the public school, or a private school, in each year during the entire time the public schools of the district in which the child resides are in session. Subd. 2 of the same section states that a school to satisfy the requirements of compulsory attendance must be one in which all the common branches are taught in the English language from textbooks written in the English language and taught by teachers whose qualifications are essentially equivalent to the minimum standards for public school teachers of the same grades or subjects. Private instruction in music alone does not satisfy the requirements of that subdivision. In my opinion the question requires a negative answer.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education. 622-A-6
September 25, 1952. 169

58

Pupils—Fees—Students at a public school cannot be required as a condition to attendance to pay a fixed fee which will entitle him to privileges. The pupil having no obligation to attend games and entertainments, be a member of certain organizations, to buy insurance and to avail himself of certain facilities offered cannot be required to pay therefor—M. S. 125.06, subd. 8, 128.082, subd. 7, 132.01, 132.05, 132.07.

Facts

"It has come to my attention that a certain secondary school in Minnesota proposes to charge pupils a flat fee of $5.00, which would be compulsory on every pupil in such school. This fee would be charged for services and activities having an estimated value as follows:

Game admissions	$2.10
Class dues	.50
Locker fee	.50
Group accident benefit plan	.25
Class play	.30
Music program	.30
Assemblies	.30
Speech activities	.25
Reserve fund recreation and parties	.50
	$5.00

"It is conceivable that some pupils might not elect to avail themselves of some of these services and activities although, as above described, they would be compelled to pay for them."

Questions

"Is there any legal authority for a school board to make it compulsory for a pupil to pay fees such as above described?

"Is there any legal authority for a school board to charge pupils the following fees:

"1. A flat charge for towels to be used by pupils after their physical education classes.

"2. A laboratory fee, the purpose of which is to defray the expense of any breakage of laboratory equipment. The fee is fully refunded if no breakage occurs.

"3. A charge for not bringing in a library book on time.

"4. A charge for the privilege of taking an examination which is a part of the regular school course.

"5. A charge for providing workbooks, which are required in the regular class work, supplementing textbooks which are provided free.

"6. A charge for the school paper."

Opinion

M. S. 1949, 132.01 requires that admission to all public schools shall be free to all persons between the ages of five and twenty-one years in the district where such pupils reside. Unless excused, such pupils are compelled by law to attend such school. Sections 132.05, 132.07. No school board can lawfully require such pupils to pay such fees conditioned to their **attendance required by law at a free school.**

There is no obligation on the part of the school board to furnish towels for pupils. If the district has a rule under which towels are made available to pupils, and the use is optional, no one can complain. But the district cannot require a pupil to use district towels. He may use his own.

An opinion of the Attorney General, June 11, 1947, file 169, relates to schools in the City of St. Paul, where the school district operates under a city charter. The subject was considered whether the school board had authority to require deposits, from pupils financially able to pay, to insure the return in good condition of textbooks furnished to the pupils by the district. That opinon states that rules and regulations in reference thereto must be reasonable and not in violation of the law requiring free textbooks. That was based upon 56 C. J. 853, Sec. 1092, **Segar vs. Board of Education,** 317 Ill. 418, 148 N. E. 289, 67 A. L. R. 1194.

School districts which receive state aid are required by M. S. A. 128.082, subd. 7, to furnish free textbooks. So no rule should require the payment of book rental. This deposit is in the nature of security. It must be reasonable and if the pupil is unable to pay it, he cannot be denied the use of books.

The same file contains an opinion dated June 6, 1940, No. 58, 1940 report, which applies to the Minneapolis schools, which are governed by special law. That opinion states that " * * * there appears to be no statutory or charter authority enabling the board of education to make compulsory assessments against pupils to create a fund through collection of so-called 'laboratory fee' for the purposes and under the conditions hereinabove mentioned." The opinion further states there is no objection to a voluntary contribution of laboratory fees. But the inference is that they cannot be compelled.

M. S. A. 125.06, subd. 8, relating to powers of a school board, provides that "it may make rules and regulations respecting the protection of the property of the district, and prescribe penalties for breach thereof to be recovered, for the use of the district, as penalties in other cases, **before a justice of the peace,** and change or repeal such rules." (Emphasis added.) It is observed this does not say "require deposits" and it is further noted

it does not provide the school system shall enforce the penalties, but that the justice of the peace shall do so. The school officers are not made prosecutors, triers of fact, and enforcers of penalty, all in one.

Another opinion dated June 1, 1942, file 169, upon whether grades of students could be withheld if fees were unpaid, said: "Our public school system does not permit of this species of coercion."

Pupils may be required to return library books within a limited time. They may be disciplined for failure to do so. But a school district is not an institution calculated to impose fines and penalties. It is to furnish education. I am not clear as to what is meant by the word "workbooks" in the fifth subdivision of your question. I assume they are something consumed by the pupil, used in his class work. I do not offer a definite answer to that question. We must always keep in mind that in public schools, education is free and that the school board shall not require an unreasonable expenditure of money on the part of the pupil.

No pupil can be required to subscribe to the school paper and, consequently, he cannot be required to pay for one.

CHARLES E. HOUSTON,
Assistant Attorney General.

Public Examiner.
June 24, 1952. 169

59

Religious instruction—School Board may permit display of Ten Commandments on walls of public schools for purpose of moral instruction as distinguished from sectarian or religious teaching—M. S. 1949, Section 131.14.

Question

"Would it be legal to display the Ten Commandments Document on the walls of our public school classrooms?"

Opinion

M. S. 1949, Section 131.14, provides that the teachers in all public schools shall give instruction in morals.

For centuries the Ten Commandments have been regarded as the fountain of moral obligations and teachings. The law of Minnesota with reference to religious instruction in our public schools is established in the case of **Kaplan v. Independent School District of Virginia**, 171 Minn. 142, 214 N. W. 18.

By reason of what is said by the court in that opinion and if the ruling therein is followed, our Supreme Court would, in my opinion, hold that a

school board may, in the exercise of its discretion, legally and constitutionally permit a display of the Ten Commandments on the walls of our public school classrooms for the purpose of moral instruction as distinguished from sectarian or religious teaching.

J. A. A. BURNQUIST,
Attorney General.

Commissioner of Education.
June 24, 1952. 170-F-2

60

Tax levy—Tax on agricultural lands and personal property having a taxable situs on farms, and on nonagricultural lands—M. S. 1949, Section 127.05, subds. 1 and 4, as amended by L. 1951, ch. 549.

Facts

The questions that you have submitted involve construction of Laws 1951, C. 549, amending M. S. 1949, Section 127.05, subds. 1 and 4, which reads as follows:

"Section 1. Minnesota Statutes 1949, Section 127.05, Subdivision 1, is amended to read:

"127.05. Subdivision 1. The rate of taxation of agricultural lands for school maintenance in any school district of the state maintaining a graded elementary or high school and in unorganized territory shall not exceed by more than ten per cent the average rate for school maintenance on similar lands in common school districts of the same county; provided such county has 20 or more common school districts; nor shall such rate exceed one-half the rate for school maintenance on nonagricultural lands in the same school district or unorganized territory in counties having less than 20 common school districts. Provided in any consolidated school district or a district formed under the provisions of Minnesota Statutes 1949, Sections 122.40 through 122.56, or both, maintaining a graded elementary or secondary school, the rate of taxation of agricultural land and personal property having taxable situs on farms shall not exceed one-half the rate for school maintenance on other taxable property in the same school district.

"Sec. 2. Minnesota Statutes 1949, Section 127.05, Subdivision 4, is amended to read:

"127.05. Subd. 4. If the total funds received from state aid plus the proceeds from the maximum levy on agricultural land and a 40-mill levy on all other property subject to taxation are not sufficient to maintain the school, the school board may make an additional levy which

shall be uniform on all property. This additional levy shall be within existing limitations, if any, upon the total levy of said district. Provided in any consolidated school district or a district formed under the provisions of Minnesota Statutes 1949, Sections 122.40 through 122.56, or both, maintaining a graded elementary or secondary school, when the total funds anticipated to be received from state aid plus the revenue anticipated to be received from a tax levy as provided in subdivision 1 for agricultural land and personal property having taxable situs on farms, plus revenue anticipated to be received from at least a 50-mill levy on all other property will not produce sufficient revenue to maintain the school, an additional levy for school maintenance shall be made which shall be uniform on all taxable property subject to limitations imposed by law."

Question 1

"May the school board of a school district maintaining a graded elementary or high school make a tax levy for school maintenance at a rate in excess of 40 mills on other than agricultural lands under the provisions of Minnesota Statutes 1949, Section 127.05, Subd. 1, as amended by Laws of 1951, Chapter 549, Section 1?"

Question 2

"May the school board of a consolidated district or a reorganized district formed under the provisions of Minnesota Statutes 1949, Sections 122.40 through 122.56, or both, maintaining a graded elementary or secondary school make a tax levy for school maintenance at a rate in excess of 50 mills on other than agricultural lands and personal property having a situs on such lands under the provisions of Minnesota Statutes 1949, Section 127.05, Subd. 1, as amended by Laws of 1951, Chapter 549, Section 1?"

Question 3

"If questions (1) and (2) are answered in the negative, must all levies for school maintenance, in such districts, in excess of 40 and 50 mills respectively be made in accordance with the provisions of Minnesota Statutes 1949, Section 127.05, Subd. 4, as amended by Laws of 1951, Chapter 549, Section 2?"

Your three questions, numbered 1, 2, and 3, pertaining to the construction of the above quoted L. 1951, C. 549, will be answered in the order in which they have been submitted. Unless otherwise noted, the sections herein cited are those of M. S. 1949.

Answer to Question No. 1

Under Section 127.05, first sentence of subd. 1, there are limitations on the rate of taxation on agricultural lands for school maintenance in an unorganized territory and in school districts maintaining a graded elementary

or high school, provided such school districts are not consolidated or reorganized under Sections 122.40 through 122.56, or both. In such districts in a county where there are 20 or more common school districts, the rate of taxation for school maintenance on agricultural lands shall not exceed by more than 10 per cent the average rate for school maintenance on similar lands in common school districts in the same county. The rate for school maintenance in the above designated districts should be applied equally on agricultural and nonagricultural lands in counties of 20 or more common school districts unless the maximum rate authorized on agricultural lands, when also applied to nonagricultural lands will not produce a sum sufficient for school maintenance. In that case the rate on nonagricultural lands may exceed the authorized maximum rate on agricultural lands. In such circumstances the only limitation provided by L. 1951, C. 549, on the rate which may be applied on nonagricultural lands is the amount needed for school maintenance unless the school board exercises its option authorized in the first sentence of Section 127.05, subd. 4, hereinafter referred to.

In a county having less than 20 common school districts the districts referred to in the last part of the first sentence of Section 127.05, subd. 1, are limited to a rate for school maintenance on agricultural lands which shall not exceed one-half the rate on the nonagricultural lands in the same district or unorganized territory. The last mentioned limitation is binding unless the school board exercises its option given to the board under the provisions of the above cited first sentence of Section 127.05, subd. 4.

The first sentence of Section 127.05, subd. 4, as amended by L. 1951, C. 549, applies only to the tax rates referred to in the first sentence of Section 127.05, subd. 1. In the first sentence of subd. 4 it is provided that "If the total funds received from state aid plus the proceeds from the maximum levy on agricultural land and a 40-mill levy on all other property subject to taxation are not sufficient to maintain the school, the school board may make an additional levy which shall be uniform on all property." If the school board fails to exercise such option the limitations on the rate to be applied on agricultural lands will be those fixed in the first sentence of Section 127.05, subd. 1, and the tax rate on nonagricultural lands will be in an amount limited only by the total sum needed for school maintenance less receipts from state aid and the proceeds from taxes levied on agricultural lands, subject, of course, to general limitations imposed by law, if any.

Answer to Question No. 2

In a district consolidated or reorganized under M. S. 1949, Sections 122.40 through 122.56, or both, maintaining a graded elementary or secondary school the rate of taxation on agricultural land and personal property having taxable situs on farms shall not, under M. S. 1949, Section 127.05, subd. 1, as amended by L. 1951, C. 549, exceed one-half the rate for school maintenance on other taxable property in the same district.

However, the last proviso of Section 127.05, subd. 4, as amended, contains the provision that, if in a school district which has been consolidated or reorganized as therein provided "the total funds anticipated to be re-

ceived from state aid plus the revenue anticipated to be received from a tax levy as provided in subdivision 1 for agricultural land and personal property having taxable situs on farms, plus revenue anticipated to be received from at least a 50-mill levy on all other property will not produce sufficient revenue to maintain the school, an additional levy for school maintenance **shall be made** which shall be uniform on all taxable property." (Emphasis supplied.)

It therefore appears that if in such consolidated or reorganized districts the amount needed by the school for maintenance will not be produced from a tax rate of 25 mills on agricultural lands and personal property having a taxable situs on farms plus double that rate, namely, a rate of 50 mills on other property, and the anticipated state aid receipts, the additional amount needed to maintain the school in question shall be provided by spreading the tax therefor uniformly on all property of the school district. Before the last proviso of the act becomes effective, the rate of not less than 50 mills must be applied on nonagricultural property.

It will be noted that in the first sentence of Section 127.05, subd. 4, a similar provision, applicable only to districts referred to in the first sentence of Section 127.05, subd. 1, as herein construed, the words "**may** make an additional levy which shall be uniform on all property" are used, while in the last provision of the act, applicable only to districts referred to in the last sentence of Section 127.05, subd. 1, occur the words "an additional levy for school maintenance **shall** be made which shall be uniform on all property." (Emphasis supplied.)

Answer to Question No. 3

Your third question is, I believe, answered by what was said in answer to your first and second questions.

All levies by the school board, must, of course, be within the existing limitations, if any, upon the total levy of the school district in question.

Any former opinion inconsistent herewith is hereby superseded.

J. A. A. BURNQUIST,
Attorney General.

Waseca County Attorney.
November 6, 1951. 519-M

61

Tuition—Residence—Attendance of pupil at school in non-adjoining district —payment of tuition by district of residence—M. S. 1949, Section 132.02 not applicable under facts stated: Section 125.06, Subd. 12 considered.

Facts

"X, school child, resides in District A, more than two miles from the school house, and approximately one mile from the school house in District B, an adjoining district. District A is conducting school, District B is not, but is transporting to District C. X has never attended B, but decides to do so, desiring to attend school at District C."

Inquiry

"Is District A required to pay (to either District B or C) the tuition charge?"

Opinion

There are two sections of M. S. 1949 that I believe should be considered in answering your question. One of them is Section 132.02. The first subdivision of that section reads as follows:

> "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."

Section 132.02 is not applicable unless (1) the school children involved reside outside the limits of an incorporated city or village of this state, (2) reside more than two miles by the nearest traveled road from the school house in the district where they reside, (3) the proposed school or school house to be attended is in an adjoining district, (4) is nearer to the residence of the children than the school house in the district where the children reside, and (5) transportation is not furnished by the home district.

Unless all the conditions above enumerated exist, Section 132.02 would not be applicable. The facts that you have stated do not show that all of them do exist, but I assume from such facts as you have stated that the school or schoolhouse proposed to be attended by the school child in question is not in a district adjoining that of the pupil's residence.

If that assumption is correct, it is my opinion that Section 132.02 does not apply to your situation and that the provision of Subd. 2 of that section making it mandatory on the part of the pupil's district to pay the tuition to the board of the adjoining district is not applicable. Therefore, there is no statutory requirement in Section 132.02 that District A shall pay tuition to either District B or District C.

The other provision to which I wish to refer is Section 125.06, Subd. 12, which reads as follows:

"It [the school board] may, by majority vote, provide for the instruction of any resident pupil in another school district when inadequate room, distance to school, unfavorable road conditions, or other facts or conditions make attendance in his own district unreasonably difficult or impractical, in which case such district shall pay to the district so attended the tuition agreed upon or charged, and may provide transportation; provided, that such pupil shall continue to be a pupil of the district of his residence for the payment of apportionment and other state aids."

If the person whose school child is involved in the matter concerning which you inquire is the owner of any land in what you refer to as District C, Subd. 11 of Section 125.06 should also be given consideration in this opinion. However, as your statement of facts does not disclose such ownership in District C, I shall assume for the purposes of this opinion that it does not exist.

Under Subd. 12 of Section 125.06, it is apparent that the school board of a district in which a pupil resides may, when the board, in the exercise of reasonable discretion, finds the conditions and facts as required by the subdivision to be such as to make attendance in his own district unreasonably difficult or impractical, provide instruction for such pupil by agreeing to pay to the district to be attended the tuition agreed upon by the board of that district and to pay to such district for transportation furnished by it or otherwise provide the same for such pupil.

Any previous opinion of this office inconsistent herewith is hereby superseded.

J. A. A. BURNQUIST,
Attorney General.

Wadena County Attorney.
October 4, 1951. 180-d

TEACHERS

62

Contract—Termination: L. 1951, C. 332, Section 1, by granting teacher right of hearing before final action of board, does not change requirement of M. S. 130.18 that contract must be terminated before April 1st; all six steps in termination enumerated in request for opinion must be completed before April 1st of contract year.

Facts

"In order for a school board to terminate a teacher's contract under M. S. A. 130.18 it is our opinion that the following actions must be taken by the school board:

"1. The school board must call a meeting for the announced purpose of considering teachers' contracts.

"2. The school board must take action indicating that they propose to terminate the teacher's contract before the end of the current school year.

"3. The school board must notify the teacher in writing and state its reason for the proposed action to terminate the teacher's contract.

"4. If the teacher wishes to have a hearing, she must make a request to the school board for such a hearing within ten days after she receives the written notice from the school board indicating their proposed action.

"5. If the school board receives a written request from the teacher for a hearing, the school board must grant such a hearing.

"6. After the school board has conducted the hearing, they take final action."

Question

"Must all of these six steps be completed before April 1st of the year in which the contract is in force?"

Opinion

The legislature provided in L. 1937, C. 161, Section 1, more than 15 years ago, that any teacher's contract therein referred to must be terminated by the school board before April 1st of each year although the termination was not to take effect until the end of the school year.

It is obvious that the purpose of providing for the termination of a teacher's contract prior to April 1st was to enable the teacher and the school board to know of the termination of the contract before that date for their mutual benefit.

As the words of the amendment enacted by L. 1951, C. 332, Section 1, are not explicit, the intention of the legislature may be ascertained by considering the old law, which provides for the termination of a teacher's contract before April 1st of each year, and the object to be attained by the 1951 amendment. M. S. 1949, Section 645.16 (4) and (5).

It appears clear that the purpose of the amendment is to provide for a notice to the teacher of the proposed termination by the board of such contract and reason therefor and to give the teacher opportunity for a hearing before the board's final action and not to extend the time for such action. Above cited C. 332, Section 1, retains the requirement for termination of a teacher's contract by the board before April 1st. To construe the amendment so as to permit a hearing and the extension of the time for terminating a contract to a later date than required under the old law and

thereby to eliminate the advantage of that requirement would, I believe, be giving the amendment a meaning contrary to the legislative intent, as such construction would, in effect, wipe out one of the most important and useful provisions of the original act.

The amendment, unless the phraseology is so explicit as to require it, should not be construed so as to result in the weakening of the advantageous requirement that a teacher's contract must be terminated before April 1st. Obviously, the intent of the enactment of the 1951 amendment was not to deprive a teacher of any present rights, but to provide an additional benefit for those in the teaching profession. To carry out such intent the law must be construed to require final action by the board before April 1st.

As the teacher is given by the 1951 amendment ten days after the receipt of the notification of proposed termination of the contract within which to request a hearing, the legislature must have intended that the school board's notice to the teacher shall be given far enough in advance prior to April 1st so that the teacher shall have ten days within which to request a hearing and the board sufficient time before April 1st to hold the hearing and take final action prior to that date.

To construe the act otherwise than as above suggested would create a situation where the teacher or the board could demand that a date for the hearing be set at any time after April 1st and by such action attempt to supersede the law as it existed prior to 1951. As hereinabove stated, it is my conclusion that the requirement of the termination of a teacher's contract prior to April 1st was not intended to be changed by the enactment of the 1951 amendment.

It is, therefore, my opinion that all the six steps to which you refer in your communication must be completed before April 1st of the year in which the contract is in force. Any previous opinion or portion thereof inconsistent herewith is hereby superseded.

J. A. A. BURNQUIST,
Attorney General.

Commissioner of Education.
June 26, 1952. 172-C

ELECTIONS

BALLOTS

63

Absent voters—Outside territory of the United States — (1) Persons other than members of the "armed forces," as defined in M. S. 1949, Section 203.17, cannot cast absentee ballots outside the territory of the United

States, exclusive of Alaska and the so-called island possessions. (2) Whether person is member of armed forces is fact question.

Facts

"Inquiry has been directed to this office on behalf of workers now employed outside the territorial jurisdiction of the United States, who are qualified voters of this state, as to their eligibility to obtain and cast absentee ballots for 1952 elections, while so employed outside the continental United States."

Question

"In view of the provisions of Sections 203.09, 203.15 and 203.16, may such voters receive and cast absentee ballots?"

Opinion

Minnesota has two separate statutory provisions relating to absentee voting. The first provision refers generally to voters and is found in M. S. 1949, Sections 203.01 to 203.14, while the second act, which is found in Sections 203.15 to 203.28, relates only to absentee voting by members of the armed forces.

As it relates to voters generally, your question is answered in the negative. Section 203.09 requires that persons voting under that law must mark and mail the ballots at any place within the territorial jurisdiction of the United States, exclusive of Alaska and the so-called island possessions of the United States.

Whether or not the individuals referred to would qualify to vote under the provisions of the law relating to voting by members of the armed forces is a fact question which must be determined in each case. That law has no limitation such as contained in Section 203.09, and allows voting within and without the United States under Section 203.15. Section 203.17 defines the term "armed forces" as follows:

> "The term 'armed forces' as used in Sections 203.15 to 203.28 shall refer to and include the Army and Navy of the United States, or the Merchant Marine of the United States, or the American Red Cross, the Society of Friends, the Women's Auxiliary Service Pilots, the Salvation Army, the United Service Organizations and all other persons connected in any capacity with the Army or Navy of the United States."

If the person employed outside the territorial limits of the United States belongs to any of the organizations stated, or is connected in any capacity

with the Army or Navy of the United States, then such party may vote outside the territorial limits of the United States. If he does not come within the definition, then he may not do so.

DONALD C. ROGERS,
Assistant Attorney General.

Secretary of State.
May 6, 1952. 639-c

CANDIDATES

64

Name—Designation—(1) When 2 village trustees are to be elected, all candidates run against each other and voters vote for 2; (2) Candidate can place word "incumbent" after his name only when 2 candidates with same surname are on ballot; (3) Candidate for village clerk may withdraw at any time before filing expires and after filing time expires if withdrawal is made prior to printing of the ballots—M. S. 1949, Section 412.021, as amended by L. 1951, C. 378; M. S. 1949, Section 205.70

Facts

"The Village of Madelia at the general election in December, 1951, voted to adopt Plan 'A' of Village Government. The Clerk then resigned, the Village appointed a new Clerk, and the old clerk was then appointed a member of the council for the unexpired term of the former clerk. There are now two members of the council that are up for election on December 2, 1952."

Questions

"1. Should candidates file for one of the two offices that expire and should they designate which office they are filing for?

"2. Where more than two candidates file for office do all of the candidates run against each other, should the ballot designate 'vote for 2' and list all of the names in order, and should the two receiving the highest number of votes be declared elected?

"3. May the ballots that are printed designate the incumbents as such?

"4. After filing for the office with the Village Clerk may the candidate withdraw his name

A. Before the time for filing expires;

B. After the time for filing expires and before the ballots are printed?"

Opinion

Question 1 is answered in the negative.

Question 2 is answered in the affirmative. There is no statutory provision which requires that the trustees run for separate terms. While it is not directly pertinent to this question, it is significant that under the Village Code, M. S. 1949, Section 412.021, as amended by L. 1951, C. 378, reference is made to the election of officers when a village is first incorporated. In referring to elections under the Optional Plan A, B, or C, Subd. 2 of said section provides in part:

> "No candidate for trustee shall run for a particular term but the number of years in the term of each successful candidate shall be determined by his relative standing among the candidates for the office, the longest term going to the candidate receiving the highest number of votes."

It is our opinion, in the absence of any statutory provision requiring that each trustee run for a separate office, that then all candidates should run against each other and the voters be directed to vote for two.

A candidate for office does not have the right to place the word "incumbent" after his name merely by virtue of the fact that he is a candidate for reelection. The only time a candidate is permitted to place upon the ballot descriptive matter is when the provisions of M. S. 1949, Section 205.70, become applicable. That statute provides in part:

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

Question 4-A is answered in the affirmative.

In respect to question 4-B, after the time for filing has expired, a candidate may withdraw at any time prior to the making up of the ballot by the clerk.

DONALD C. ROGERS,
Assistant Attorney General.

Madelia Village Attorney.
November 24, 1952. 472-C

JUDGES AND CLERKS

65

Eligibility — Soldier receiving World War I pension is eligible to serve as election judge as limitation under Section 205.51 runs only to individuals receiving compensation from the United States as an officer or employee thereof.

Facts

A soldier from World War I was receiving a pension check in the amount of $60.00 per month for non-service connected disability.

Question

Whether or not this individual is qualified to serve as an election judge under the provisions of M. S. 1949, Section 205.51.

Opinion

Your inquiry is answered in the affirmative. The pertinent part of the statute provides:

> "No person **while receiving compensation from the United States, * * * as an officer or employee thereof,** shall be eligible to serve as a judge or clerk at any election in this state where the laws provide for the payment of compensation to such judges and clerks for their services as such; * * * " (Emphasis supplied.)

This office has construed the statute as forbidding a person who receives compensation as an officer or employee from serving as an election judge. A veteran receiving a pension payment is not deemed to be an officer or employee and, accordingly, the limitation of this statute does not apply to him, and the distinction is made upon this basis rather than upon a determination as to what constitutes compensation.

DONALD C. ROGERS,
Assistant Attorney General.

Pine County Attorney.
April 4, 1951. 183-i

REGISTRATION

66

By mail—From outside the limits of the United States—M. S. Section 201.17, Subd. 2.

Voters — Residence of wife who has not lived in the State if husband is qualified voter therein.

Question

"1. Can a qualified voter register by mail from outside the continental limits of the United States?"

Opinion

M. S. 1949, Section 201.17, Subd. 2, provides for the registration by mail of the name of "any person entitled to vote at any election who is absent from the district" of which he is a resident.

There appears to be no prohibition against registering by mail the name of such qualified voter even though he is outside the continental limits of the United States if his application is filled out, signed and sworn to by him before an officer authorized to administer oaths and the registration cards are signed and also sworn to before such an officer as provided in Subd. 3 of Section 201.17.

Therefore, it is my opinion that by complying with the provisions of above cited Section 201.17, a qualified voter may register by mail from outside of the continental limits of the United States. The answer herein made to your question is intended to cover only the right of the voter in question to have his name entered upon the election register of the district of his residence.

Question

"2. Can a woman acquire residence in Minnesota by marriage to a registered voter of Minnesota without actually having resided in the State?"

Opinion

In answering this question, it is assumed that the husband of the woman to whom you refer is a qualified voter in the State of Minnesota and in the precinct in question. It is also assumed that his wife has been married to him for more than six months prior to election, and has not during such period pursued a course of conduct evidencing that the domicile of her husband is not her legal residence.

It is a rule of law that the domicile of a husband is generally the domicile of his wife. That is the holding of the Supreme Court of the State of Minnesota in the case of **Williams v. Moody,** 35 Minn. 280. However, in some of the more recent decisions courts throughout the country have at times qualified the old rule if in their opinion the facts in the cases passed upon require such modification.

Our Supreme Court has not passed upon the application of the rule to residence voting qualification of a wife. Until it shall render a decision requiring a negative answer to your question, it is my opinion that under the facts hereinbefore assumed a woman married to a registered voter of Minnesota for the length of time necessary to become a qualified voter,

although she has not actually lived in Minnesota, would, provided she is otherwise qualified, be justified in stating under oath to registration and election officials that her legal residence is that of her husband.

J. A. A. BURNQUIST,
Attorney General.

Secretary of State. 639-i
June 18, 1952. 490-J-2

67

Permanent-School Districts — Permanent registration requirements made under M. S. 1949, C. 201, not applicable to election in school district except in cases where school district has joined with municipality in a combined system as provided by M. S. 1949, Sections 201.25 and 201.26.

Facts

Joint Independent Consolidated School District No. 142 of Hennepin County comprises all of the township of Bloomington, plus a small farm in Scott County. The town of Bloomington has ordered all of its voters to register before the next township election, which will be held in March, 1952. A special election of the school district will be held on November 5, 1951.

Question

Will voting at the special school election be limited to registered voters or may any qualified voter in the district be eligible to vote?

Opinion

The voting at the school election will not be limited to registered voters. We assume the registration referred to is being made under the provisions of M. S. 1949, C. 201, as amended. It will be noted that M. S. 1949, Section 200.02, which defines an election, excludes an election in any school district. Accordingly, the provisions relating to the registration of voters as found in C. 201 does not apply to an election in a school district. This statement is made subject, however, to the qualification that certain school districts may join with a municipality for the creation of a combined system of permanent registration under the provisions of Sections 201.25 and 201.26.

DONALD C. ROGERS,
Assistant Attorney General.

Attorney for Joint Independent Consolidated
School District No. 142 of Hennepin County.
October 31, 1951. 187-A-9

68

Re-Registration — Change of name — When registered voter's name is changed, Commissioner of Registration must notify voter that she must re-register, and after that notice is given, such voter may not vote until she has re-registered—M. S. 1949, Section 201.15. Opinion Oct. 30, 1940, file 183-R, modified.

Facts

"The city of Red Wing requires registration of voters pursuant to Chapt. 201 M. S. A. A duly registered female voter married ten days before the election. She did not move from the precinct but was denied the right to vote because her married name did not appear on the register."

Question

"Can she be denied the right to vote under the circumstances stated?"

Opinion

You state that the registered voter referred to did not move from the precinct in which she was registered, and in arriving at our conclusion we do not consider any question of change of residence.

The original permanent registration law was enacted by Laws 1923, C. 305. In an opinion of this office dated February 9, 1925, our file 183-R, 1926 Printed Report No. 182, this office held that under the then statute there was no provision requiring a registered female voter who married subsequent to her registration and assumed the name of her husband, to re-register under such surname as a prerequisite to voting. However, by Session Laws 1925, C. 390, Section 6 of the said C. 305, Laws 1923, was amended and the amendment added is in bold face type in the following quoted provision:

"(2) If a woman:

The information requested shall be the same as for males with such additional information as may be necessary to determine the qualifications of the applicant for registration. **Provided, that whenever, after such original registration, any change of name shall occur due to marriage or divorce, such applicant shall not be allowed to vote until she has re-registered; and after such re-registration the Commissioner of Registration shall remove the previous registration card from the file.**"

This provision was carried into Mason's Minnesota Statutes 1927, as Section 385, and remained in effect until the enactment of the codification of the election law by Laws 1939, C. 345.

It will be noted that the amendment above quoted referred only to women, and referred only to change of name by marriage or divorce. It will further be noted that the amendment specifically provided that the applicant would not be allowed to vote until she had re-registered.

In the recodification of the election code, the provision of the statute above quoted was not re-enacted. The only reference to re-registration is found in M. S. 1949, Section 201.15, which provides:

> "On or before January 1, April 1, July 1 and October 1, each year, the clerk of the district court in each county in the state shall report to the commissioner of each municipality in his county the name and address of each person, 21 years of age or over, residing in such municipality whose name shall have been changed, during the three months next preceding the date of the report, by marriage, divorce, or any order or decree of such court. Upon receipt of such report, the commissioner shall examine the original and duplicate registration lists and ascertain whether or not such person has re-registered under such changed name; and, if no re-registration be shown by these lists, the commissioner shall, by mail, notify such voter that it is necessary for him to re-register under such changed name in order to vote at an election."

Again, it will be noted that the present provision, Section 201.15, refers to all voters, male or female, and refers to those whose names may be changed not only by marriage and divorce but also by any order or decree of such court. There is not contained therein any specific provision that the person whose name is changed shall not be allowed to vote until he has re-registered. Instead this statute provides that the commissioner of registration, at the time specified in the statute, shall ascertain whether or not certain persons have re-registered under their changed name, and that if there be no re-registration, then the commissioner shall by mail notify such voter that it is necessary for him to re-register under such name in order to vote at an election.

It is our conclusion that where a registered voter's name has been changed he is not barred from voting until such time as the commissioner of registration has notified him by mail of the necessity for him to re-register, and that it is the giving of such notice that sets the time beyond which the individual cannot vote without re-registering.

The opinion of this office dated October 30, 1940, our file 183-R, in so far as it is in conflict with this opinion, is modified.

J. A. A. BURNQUIST,
Attorney General.

Goodhue County Attorney.
November 24, 1952. 183-R

VOTERS

69

Residence—Legal—School districts: Change in boundary line—An order for change in the boundary line between districts does not become effective until sixty (60) days after copies of the order are mailed, and voters in one district transferred to the other district by the order do not become residents of the latter district until sixty (60) days after the mailing of the order. Right to vote determined by Art. VII, Section 1 of the Constitution—Laws 1945, Ch. 252.

Facts

Proceedings have been held pursuant to Chapter 252, Laws 1945 (not coded), and by order of the County Board, Itasca County, Minnesota, mailed March 16, 1951, certain territory was transferred from School District No. 1 to Independent School District No. 9. The annual election in and for Independent School District No. 9 will be held May 15, 1951.

Question

Are legal voters residing in the territory transferred to Independent School District No. 9 entitled to vote at said election?

Opinion

Your question is answered in the negative. Qualification of legal voters is determined by Art. VII, Section 1, of the Minnesota Constitution. In respect to residence, it 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."

The said Chapter 252, Section 5, provides that the county board, if the petition be granted, shall make an order setting forth the changes provided for, etc. It then provides:

> " * * * A copy of such order shall be filed with the auditor and a copy mailed to the clerk of each of the districts affected. **The change set forth in such order shall become effective 60 days after mailing such notice * * * ".** (Emphasis added.)

We conclude that said underscored provision of Section 5 is controlling. You state that copies of the order were mailed March 16, 1951. The order does not become effective until 60 days thereafter. Accordingly, legal voters

who resided in School District No. 1 at the time of the making of the order would not become residents of Independent School District No. 9 until 60 days after March 16, 1951.

DONALD C. ROGERS,
Assistant Attorney General.

Attorney for Hibbing Ind. School Dist. No. 9.
April 18, 1951. 187-A-9

70

Residence—Legal—School districts—Dissolved—Voter otherwise qualified, residing in school district dissolved which is attached to adjoining district, within thirty days previous to election may vote at such election —M. S. A. 122.28, Minn. Const. Art. VII, Section 1.

Question

When a school district is dissolved and the territory thereof is attached to an adjoining district (M. S. A. 122.28), may the voters, who resided in the dissolved district, vote at an election in the district to which the territory of the dissolved district was attached, the election being held within 30 days after dissolution?

Opinion

Minn. Const., Art. VII, Section 1, provides in part:

"What persons are entitled to vote:

"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."

I understand your question to involve the meaning of the words "of which he shall at the time have been for thirty (30) days a resident." It appears to have been the intent of the framers of the Constitution that a person who voluntarily moves from one voting district to another, within thirty days before an election, thereby disqualifies himself to vote at such election. It cannot have been the intent of this language to disfranchise a voter who has continuously resided on the same site more than thirty days before the election. The language must have been intended to prevent transients from voting. The voter mentioned in the question is not a transient.

It is my opinion that this language means that every person of the age of 21 years or upward, belonging to one of the classes mentioned, who resided in the state six months next preceding any election, shall be entitled

to vote at such election in the election district which embraces the site of his residence where he shall have theretofore been a resident more than thirty days.

CHARLES E. HOUSTON,
Assistant Attorney General.

Attorneys for Independent School District No. 14.
April 26, 1952. 187-A-9

71

Residence—Wife of soldier—When man enters service and wife lives with him outside of Minnesota, neither loses his residence for voting purposes —State Constitution, Art. VII, Section 3.

Facts

"A resident of one of the common school districts in our County was called into the armed service about two years ago. This man was married prior to entering the service. Shortly after entering the service he moved his wife and family to the camp at which he was located which was out of the State of Minnesota and stored his household goods and furnishings at a location here in Swift County. The soldier and his family have continued to reside out of Minnesota until just very recently when this soldier was discharged. Upon his discharge from the armed service he and his family returned to reside in the same school district in which he was residing at the time he entered the armed service. An annual meeting of the voters of this particular school district is going to be held the latter part of this month and at the time of this election this soldier and his wife will not have resided in that school district for thirty days nor in the State for six months since being discharged from the service. Both the soldier and his wife were eligible voters at this school district prior to the soldier entering the service."

Questions

"1. Will the soldier be eligible to vote at this coming annual school meeting?"

"2. Will the wife of this soldier be eligible to vote at this coming annual school meeting?"

Opinion

Article VII, Sec. 3, of the state constitution provides in part:

"For the purpose of voting, no person shall be deemed to have lost a residence by reason of his absence while employed in the service of the United States; * * * ".

We assume that the soldier while in the service did not at any time elect to establish a residence at any other place than at the place he was residing at the time he entered the service. If this assumption is correct, Question 1 is answered in the affirmative.

Generally speaking, the wife's place of residence is that of her husband, and if his residence continues to be at the place he resided when entering the service, her residence continues to be there even though she was temporarily absent from the state. Accordingly, Question 2 is answered in the affirmative.

DONALD C. ROGERS,
Assistant Attorney General.

Swift County Attorney.
June 19, 1952. 490-J-2

INSURANCE

CONTRACTS

72

Television repair contracts—(1) Issuing contract by manufacturer or dealer which provides for replacement of parts except those damaged from external causes, is a warranty and issuance of same does not constitute engaging in business of insurance. Renewal of such contracts differentiated. (2) Pure service contract issued by independent contractor does not constitute insurance. (3) Issuance of contract by independent contractor, which provides for replacement of parts, does constitute insurance—M. S. 1949, Section 60.02, Subd. 3.

Questions

1. May a television manufacturer, including a wholly owned subsidiary, for a consideration enter into a contract with the public whereby:
   a. It agrees that during a designated time it will maintain a television receiver in workable order.
   b. It agrees that during a designated time it will replace defective parts.
   c. May such contracts be renewed?
2. May a dealer enter into a contract under which he agrees
   a. That during a designated time he will maintain a television receiver in workable order;
   b. That during a designated time he will replace defective parts;
   c. May such contracts be renewed?

3. May an independent contractor, for a consideration, enter into a contract with the public under which he agrees

   a. That during a designated time he will maintain a television receiver in workable order;

   b. That he will agree during a designated time to replace defective parts.

Opinion

The word "insurance" is defined in M. S. 1949, Section 60.02, Subd. 3, as follows:

> " 'Insurance' is any agreement whereby one party for a consideration, undertakes to indemnify another to a specified amount against loss or damage from specified causes, or to do some act of value to the assured in case of such loss or damage."

Whether or not a person who issues a contract for the maintenance, repair, etc., of a television set is engaged in the business of insurance would in each case have to be determined by a consideration of the contract issued. We limit this opinion to a general consideration of the questions you have submitted.

A distinction must be made between a contract which is a pure warranty and a contract that might be deemed to be insurance. In the case of **State ex rel. Herbert, Atty. Gen., v. Standard Oil Co.**, Supreme Court of Ohio 1941, 138 Ohio St. 376, 35 N. E. (2d) 437, the court construed what was termed a "Warranty and Adjustment Agreement" which was issued by the Standard Oil Company in connection with the sale of tires. The company warranted that the materials and labor incorporated into the tire were of such quality that the tire could be expected to render proper service, and the company agreed that, if the tire failed to give satisfactory service within a specified time, it would replace or repair it. The court concluded that this was a pure warranty, and that the issuance thereof did not constitute engaging in the business of insurance. It held that the agreement was a mere representation that the tires which were being sold were so well and carefully manufactured that they would give satisfactory service under ordinary usage for a specified number of months, excluding happenings disassociated from imperfections in the tires themselves.

The court in that case distinguished the facts from those in the case of **State ex rel. Duffy, Atty. Gen., v. Western Auto Supply Co.**, Supreme Court of Ohio (1938), 134 Ohio St. 163, 16 N. E. (2d) 256. In this latter case the court had for consideration a contract under which the vendor of the tires guaranteed them against defects in material and workmanship, and also guaranteed them for a specified period of time against blowouts, cuts, bruises, etc. In this case the court held that the issuance of the agreement did constitute engaging in the business of insurance. The court said in part:

> "A 'warranty' promises indemnity against defects in the article sold, while 'insurance' indemnifies against loss or damage resulting from perils outside of and unrelated to defects in the article itself."

In the case of **State v. M. E. Bean,** 193 Minn. 113, 258 N. W. 18, the court construed a contract whereby the issuer of the contract obligated himself to perform certain acts for the party to whom the contract was issued. The issuing company agreed that, in the event the purchaser of the contract was injured and physically unable to do so himself, it would spend not to exceed $100 to enable the purchaser to communicate with relatives or friends. The company further agreed that, in the event the purchaser was arrested for wrongly causing injury to personal property by use of his automobile, it would furnish him a bail bond. The company also agreed to defend the purchaser against civil or criminal litigation resulting from the use of his automobile. The court held that this was a contract of insurance. It said in part:

> "The contract obligated the issuer to do not one but possibly several acts 'of value to the assured in case of such loss or damage.' The statute but declares the plain fact that rendition of services may be as much compensation for loss from a stated event as would be the payment of money."

In the case of **Ollendorff Watch Co., Inc., v. Pink,** Court of Appeals of New York 1938, 279 N. Y. 32, 17 N. E. (2d) 676, the court considered a fact situation where the vendor of watches gave the purchaser a certificate under which the vendor agreed to replace the watch if it were lost within one year from the date of purchase through burglary or robbery. The court held that this constituted a contract of insurance. It said in part:

> " * * * This goes further than a guaranty or warranty. For intance, a warranty would relate in some way to the nature or efficiency of the product sold—in this case, that the watch would work or was of a certain make and fineness. A warranty would not cover a hazard having nothing whatever to do with the make or quality of the watch. A guaranty is an undertaking that the amount contracted to be paid will be paid, or the services guaranteed will be performed. It relates directly to the substance and purpose of the transaction."

Answering question 1, it is our opinion that where the manufacturer of a television set issues to the purchaser a contract under which the vendor agrees for a stipulated reasonable time to maintain a television receiver in workable order and replace parts, that that constitutes a warranty and does not constitute engaging in the business of insurance within the intendment of the insurance laws of this state, assuming that the warranty does not include an agreement to replace parts which might be damaged from external causes.

As to question 2, we believe the conclusion we have reached in question 1 is likewise applicable when the dealer at the time of sale issues the warranty. In making the sale the dealer assumes the responsibility for the quality and efficiency of the television set.

Different considerations arise, however when we consider the renewal of an agreement issued by the manufacturer or the dealer. It is our opinion that such renewal agreements would fall in the same category as an agreement issued by an independent contractor.

If an independent contractor enters into an agreement with the owner of a television set, under which he agrees merely to furnish service for a specified consideration, it is our opinion that entering into that agreement would not constitute the engaging in the business of insurance. If, however, the independent contractor enters into an agreement under which he agrees to replace tubes, that agreement involves the elements of contingency, hazard, or risk. The independent contractor under this type of agreement agrees to furnish the parts contingent upon events wholly fortuitous as to them. It is therefore our conclusion that the issuing of this type of contract constitutes the engaging in the business of insurance.

DONALD C. ROGERS,
Assistant Attorney General.

Commissioner of Insurance.
June 17, 1952. 850-i

LIQUOR

INTOXICATING

73

Apple juice — Fermented apple juice beverage containing in excess of 3.2 alcohol by weight is intoxicating liquor and subject to the provisions of M. S. 1949, Sections 340.07 to 340.40.

Facts

Recently a fermented apple juice beverage has been introduced into this state for sale, under the trade name of "Apple Vat 36." A sample of the product was obtained and analyzed for us by a chemist who reported the content to be 5.35 per cent of alcohol by volume and "a good apple cider flavor."

Question

Is the apple juice beverage in question intoxicating liquor within the purview of M. S. 1949, Sections 340.07-340.40?

Answer

M. S. 1949, Section 340.07, Subd. 1, provides in part as follows:

"The terms 'intoxicating liquor' and 'liquor' when used in sections 340.07 to 340.40 mean and include ethyl alcohol and include **distilled, fermented, spirituous, vinous, and malt beverages containing in excess of 3.2 per cent of alcohol by weight.** * * * "

Since the apple juice beverage in question contains 5.35 per cent of alcohol by volume, it contains approximately 4.28 per cent of alcohol by weight. Thus it contains in excess of 3.2 of alcohol by weight.

It is therefore our opinion that the apple juice beverage in question comes within the definition of intoxicating liquor and liquor as defined in Section 340.07, Subd. 1.

Consequently, it should be sold and distributed as intoxicating liquor subject to all the provisions of M. S. 1949, Sections 340.07-340.40.

IRVING M. FRISCH,
Special Assistant Attorney General.

Liquor Control Commissioner.
September 12, 1951. 218-K

74

Club—Bingo—Playing bingo on licensed premises or in any room adjoining licensed premises for the sale of intoxicating liquor is violative of M. S. A. 340.14, subd. 2.

Facts

The city of Detroit Lakes has issued three club licenses for the sale of intoxicating liquor.

Questions

1. May the game of bingo be conducted by a club licensed to sell intoxicating liquor?

2. May the game of bingo be conducted in the same building but not in the same room by a club licensed to sell intoxicating liquor?

Opinion

Both of these questions may be conveniently considered together.
M. S. A. 340.14, subd. 2, so far as pertinent, in part reads as follows:

"No licensee shall keep, possess, or operate, or permit the keeping, possession, or operation of, on the licensed premises, or in any room adjoining the licensed premises, any slot machine, dice, or any gambling device or apparatus, nor permit any gambling therein, * * *."
The bingo statute, Section 614.054, in part reads as follows:

"The game 'bingo' as defined herein shall not be construed as a lottery or as gambling within the meaning of Minnesota Statutes 1941, Sections 614.01 to 614.09 * * * ."

Section 340.14 is not included in the sections relating to bingo. Consequently, the game of bingo may not be played on any licensed premises for the sale of intoxicating liquor, or in any room adjoining such licensed premises.

Except as prohibited by Section 340.14, subd. 2, a club which is qualified under and complies with the requirements of Section 614.054 may operate a game of bingo as defined in Section 614.053.

One of the prohibitions contained in said Section 340.14, subd. 2, and about which you have inquired, is that the game of bingo may not be played in any room or rooms adjoining the licensed premises for the sale of intoxicating liquor. This query presents a question of fact. We are not advised as to the location of the licensed premises nor the room or rooms wherein the game of bingo is proposed to be conducted. Neither are we advised as to the means of access or communication between such licensed premises and such room or rooms. These matters all involve questions of fact, and we do not pass upon questions of fact.

In Weiss v. Sprayregren, 103 N. Y. S. 801, 198 Misc. 938, the meaning of the term "adjoining room" was before the court for consideration. In construing this term the court in substance said that where a justice of the peace held court in his own clothing store on occasion, which store had its own public entrance and was wholly independent of adjoining building in which restaurant which also served intoxicating liquor was located, and where there were no doors or openings giving access from the clothing store where court was held to the restaurant where intoxicating liquor was served, that the place in the clothing store where the justice held court was not an "adjoining room" within the statute prohibiting the justice's court from being held in such room.

The reasoning of the court in the New York case cited furnishes a yardstick which can be applied to the facts in the instant case in determining whether the room or rooms wherein the game of bingo is to be played constitutes an adjoining room to the licensed premises, which would be violative of Section 340.14, subd. 2, supra.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Detroit Lakes City Attorney.
May 14, 1952. 733-G

75

Licenses—Towns—M. S. 1949, Section 368.01, which gives towns certain village powers, does not authorize towns to issue licenses for the sale of intoxicating liquors or non-intoxicating malt liquors.

Questions

1. May a town in Hennepin County limit the hours of liquor sales establishments by ordinance or by resolution, and provide for a misdemeanor? Would fines be payable to the town treasury or to whom?

2. May such towns impose license fees, and regulate such sales?

3. May such towns enact ordinance prohibiting further use of the real estate or premises, for liquor sales, in event of conviction of operators of liquor sales place of violation of any liquor laws, in other words, prohibit the use of the premises for liquor purposes?

Answer

The authority of villages to issue licenses for the sale of intoxicating liquor is based upon M. S. 1949, Section 340.11, which provides for the issuance of such licenses by municipalities under certain conditions. The definition of "municipality" as relating to intoxicating liquor is set forth in Section 340.07, Subd. 3, as follows:

"The term 'municipality' means any city, village, or borough."

Section 368.01, which gives certain towns certain village powers, does not include any power given to villages in reference to the licensing of the sale of intoxicating liquors.

It is therefore our opinion that no license may be issued for the sale of intoxicating liquor in any town in the State of Minnesota whatsoever, even though it may come under the provisions of Section 368.01. From this it follows that all three questions must be answered in the negative.

The licensing of the sale of non-intoxicating malt liquor in towns is provided for in Section 340.01. The licenses must be issued by the Board of County Commissioners. The only power that a town board has in reference thereto is to consent or refuse to consent to the issuance of such license in their town. Any restrictions thereto other than that specifically provided by statute can only be effective when adopted by a resolution of the Board of County Commissioners.

IRVING M. FRISCH,
Special Assistant Attorney General.

Orono Town Attorney.
July 27, 1951. 217-B-8

76

Liquor store—Building—Purchase—Contract for deed—City of the fourth class may buy building for municipal liquor store on contract for deed, providing that the deferred payments are to be made only out of the profits of the municipal store.

Facts

"The City of Wabasha operates under a home rule charter and is a city of the 4th class. On September 19, 1950, the City entered into a contract for the purchase of certain realty here in the City of Wabasha for the purpose of operating and maintaining a Municipal Liquor Store.

"You will note that the purchase price is $30,000.00, and the times when the payments are to be made. You will particularly note that it is expressly provided in the contract that the payments for the property 'are to be made exclusively from the profits of the Municipal Liquor Store to be operated by the second party and are not to be paid from the General or any other fund of the City of Wabasha, Minnesota, and that the full faith and credit of the City of Wabasha is not pledged or obligated for the payments herein to be made by said second party.'

"The City went into possession of this property on or about October 1, 1950."

Question

"Did the City of Wabasha have authority to enter into such a contract, taking into consideration the terms and conditions of the payments to be made by it?"

Answer

In an opinion of this office dated July 13, 1948, 218 R, it was held that a village may buy a building for a municipal liquor store on contract for deed, providing the deferred payments are to be made only out of the profits of the municipal liquor store.

M. S. 1949, Section 340.07, Subd. 5, and 340.11, Subd. 10, which authorize the establishment of municipal liquor stores in villages and cities of the fourth class, make no distinction between villages and cities in regard to the acquisition of real property for municipal liquor store purposes.

It is therefore our opinion that the City of Wabasha has the authority to enter into a contract for the purchase of realty whereby the payments are to be made solely from the profits derived from the operation of its municipal liquor store.

IRVING M. FRISCH,
Special Assistant Attorney General.

Wabasha City Attorney.
December 20, 1951. 218-R

77

Sale — Adult pupils or students — Provision of Section 340.73, Subd. 1, prohibiting the sale of liquor to pupils or students does not apply to adult pupils and students.

Facts

"X, who is twenty-six years of age and a student at Bemidji State Teachers College, presents himself at the Bemidji Municipal Liquor Store and purchases a bottle of whiskey there."

Question

"Under these facts, is the bartender who sells the liquor to X subject to prosecution for a gross misdemeanor under M. S. A. Section 340.73, Subd. 1?"

Answer

M. S. 1949, Section 340.73, Subd. 1, provides as follows:

> "It shall be unlawful for any person, except a licensed pharmacist, to sell, give, barter, furnish, or dispose of, in any manner, either directly or indirectly, any spirituous, vinous, malt, or fermented liquors in any quantity, for any purpose, whatever, to any minor person, or to any pupil or student of any school or other educational institution in this state or to any intoxicated person, or to any person of Indian blood who has not adopted the language, customs, and habits of civilization, or to any public prostitute."

The provision hereinabove relating to pupil or student is derived from L. 1872, C. 61, the wording of which was somewhat changed in Revised Laws 1905, Section 1534. The revision commission, however, did not intend by this change in verbiage to change the substance of the law relative to the sale of liquor to pupils and students. The statutory provisions relating to intoxicating liquor are contained in Chapter 16 of the Revised Laws of 1905. The report of the statutory revision commission in reference to this chapter is set forth in the index to the Revised Laws of 1905, pp. 14 and 15. The intention of the commission not to make any changes in the substance of the law is made clear in the following excerpt from its report:

> "It was found necessary to an orderly arrangement of the various laws relating to this subject to rewrite and rearrange the entire chapter. In doing this it is believed that, while the structure and arrangement have been radically changed, the substance of the law has been retained in all cases, except as here noted."

The provision relating to the sale of intoxicating liquor to students and minors is Section 16 of said chapter. Section 16 is not among the sections excepted.

The only case involving the construction of this provision is **State v. Richter,** 23 Minn. 81-84, in which our court said:

> "Chapter 61, Laws 1872, entitled, 'An act to amend chapter 16 of the General Statutes relating to the sale of intoxicating liquors,' expressly amends sections 1, 3, and 11 of said last-named chapter, adds two new sections, and declares 'all acts and parts of acts inconsistent with' such amendatory act as repealed. * * *

"Section 11, as amended, makes it 'unlawful for any person to sell or dispose of any spirituous, vinous, fermented, or malt liquors, in any quantity, to any minor person, pupil, or student in any public school, seminary, academy, or other institution of learning within the state, or to any intemperate person or habitual drunkard,' and declares such offense a misdemeanor, * * * .

" * * * There is no such repugnancy, however, if we regard the sentence, 'a minor person, pupil, or student in any public school,' etc., as here used, as an elliptical one, the true meaning of which is made apparent by supplying the omitted words. Reading the sentence with the ellipsis supplied—'a minor person' (who is a) 'pupil or student'—while violating no grammatical rule, accords with the obvious intention of the legislature in amending the section in this particular. * * * **As respects students who have reached the full legal age of discretion and responsibility, no good reason occurs why any discrimination of this character should be made between them and other adult persons. The law recognizes both as alike possessed of the same legal rights, and subject to like responsibilities.** If the latter require no statutory restraints to prevent them from becoming inebriates, the former, by reason of superior educational advantages, would seem to stand in still less need of legislative aid in their behalf. The conclusion which we reach, then, is that Section 10 applies to minor persons of all classes, without reference to business or occupation, while Section 11, as amended, applies only to students under age, in attendance upon some public school, college, or other institution of learning, and intemperate persons or habitual drunkards. * * * "

The foregoing supreme court decision requires that your question be answered in the negative.

IRVING M. FRISCH,
Special Assistant Attorney General.

Bemidji City Attorney.
June 5, 1952. 218-J-12

78

Sale—Minors—May enter premises licensed for the sale of intoxicating liquor in which its sale thereof is not its primary business.

Facts

"(1) A drug store of the usual type is licensed to sell intoxicating liquor, off-sale. The liquor is sold from a counter or shelves located in the drug store proper and not partitioned off from the regular drug store retail sales activities. Soft drinks and ice cream products are sold in the same establishment. Bus and taxi stops are nearby."

Question

"(a) Must all minors under 21 years of age be excluded from said establishment, regardless of whether such minors are accompanied by a parent, guardian, or adult spouse and regardless of whether such minor is in uniform and a member of the Armed Forces of our country?"

Answer

No. The applicable statutory provision is M. S. 1949, Section 340.731 (Laws 1949, C. 415, Section 1), which provides as follows:

"It shall be unlawful for (1) a minor to enter any premises licensed for the retail sale of alcoholic beverages or any municipal liquor store for the purpose of purchasing, or having served or delivered to him or her, any alcoholic beverage containing more than one-half of one per cent of alcohol by volume or

"(2) a minor to consume any alcoholic beverage, on premises licensed for the retail sale of alcoholic beverages, or any municipal liquor store, or to purchase, attempt to purchase or have another purchase for him or her any alcoholic beverage; or

"(3) any person to misrepresent or mistate his or her age, or the age of any other person for the purpose of inducing any licensee or any employee of any licensee, or any employee of any municipal liquor store, to sell, serve or deliver any alcoholic beverage to a minor."

Section 617.60 (Mason's Minnesota Statutes 1927, Section 10140) never was applicable in any case where the primary business of the licensee is other than the sale of liquor. This is in accordance with an opinion of this office dated March 19, 1942 (file 218-J-12).

It is therefore no violation of law for a minor to go into a drug store licensed for the "off sale" of intoxicating liquor when his purpose is to have a prescription filled, make a purchase of an article other than a bottle of intoxicating liquor, buy himself a soft drink, ice cream or wait for a bus or taxi.

Question

"(b) May the licensee's son, a minor, or any other minor work in such drug store where intoxicating liquor is sold?"

Answer

In accordance with an opinion of this office dated March 2, 1943 (file 218-J-12), it is not unlawful to employ a minor in a drug store where the "off sale" of liquor is only incidental to and carried on in the same store with the main business.

Question

"(c) Must such licensee exclude from the premises of the drug store minors who come in, whether with or without a parent, guardian, or adult spouse, to wait for a taxi or bus?"

Answer

Such licensee need not exclude from the premises of the drug store any minor irrespective of whether he is accompanied by a parent, guardian or adult spouse so long as he is not there for the purpose of purchasing intoxicating liquor.

IRVING M. FRISCH,
Special Assistant Attorney General.

Faribault City Attorney.
February 5, 1952. 218-J-12

MILITARY

CIVIL DEFENSE

79

Local organizations—Villages authorized to establish and may appropriate and expend funds therefor as provided by L. 1951, Ch. 694, Title II, Section 206.

Facts

"The Village owns and maintains a Village Hall but none of the Village Officers or employes are stationed at the Village Hall except as their duties may occasionally require them to be in the hall in transacting Village business and this occurs very infrequently. The Village appointed a Village Marshal who acts without compensation. The same person who is Village Marshal has also been appointed Director of Civilian Defense. A levy for Civilian Defense purposes was made as provided by law. The Director of Civilian Defense acts without compensation. The Marshal is in business in the Village and lives at the rear of his place of business. The phone will be located so that any person desiring to use it could have access to it either by going through the place of business or by calling at the home. The Council voted to have installed at the home of the Director of Civilian Defense and Village Marshal, a Village telephone for use of this officer and for use by the Village and its other officers, with the understanding that the Marshal will contact so far as possible, any Village officer or employee when incoming calls are received on Village business."

Question

"Is it legal under these circumstances for the Village to pay the regular telephone rental charge for this phone?"

Opinion

Laws 1951, Chapter 694, Title II, Section 205, subd. 1, provides in substance that each political subdivision of the state, which includes villages, is authorized and directed to establish a local organization for civil defense in accordance with the state civil defense plan and program, and to appoint a director of civil defense. In the instant case, the council has, pursuant to this statute, established a local organization for civil defense, and has appointed the village marshal as the director. The council has made a levy for civil defense purposes.

A telephone has been installed at the home of the director of civil defense, who is also the village marshal, for his convenience and use, which is also available for the use and convenience of village officers in the conduct of the business of the village.

Section 206, subd. 1, of the above act provides in substance that each political subdivision shall have the power to make appropriations for the ordinary expenses of such political subdivision for the payment of expenses of its local organization for civil defense.

From the facts presented it appears that the telephone installed at the home of the director of civil defense is used in part for village business and in part for civil defense purposes. Under these circumstances we believe that it would be proper for the council to apportion the rental charges upon an equitable basis so that the village would pay out of village funds its proportionate share based upon the use of the telephone for village purposes, and the balance would be paid out of the funds appropriated and available for civil defense.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Virginia Village Attorney.
February 7, 1952. 835-A

80

Loyalty oath — Unless the Director of Civil Defense or a duly designated subordinate is a notary public, he is without authority to administer the loyalty oath prescribed by L. 1951, C. 694, Title IV, Section 403.

Facts

Attention is directed to Advisory Bulletin No. 104 of the Federal Civil Defense Administration, Washington 25, D. C., which announces that under the terms of Public Law 268, 82d Congress, approved March 5, 1952, Subsection 403 (b), the Director of Civil Defense of any state and any subordinate civil defense officer within such state designated by the director in writing shall be qualified to administer the loyalty oath required by the Federal Civil Defense Act of 1950. In connection therewith, you ask substantially the following

Question

Is it necessary that the Minnesota Civil Defense Act of 1951 be amended so as to enable the Director of Civil Defense to administer the loyalty oath required by Title IV, Sec. 403 of the state act (L. 1951, C. 694)?

Opinion

L. 1951, C. 694, Title IV, Sec. 403, reads in part as follows:

> "No person shall be employed or associated in any capacity in any civil defense organization established under this act who advocates or has advocated a change by force or violence in the constitutional form of the Government of the United States or in this state or the overthrow of any government in the United States by force or violence, or who has been convicted of or is under indictment or information charging any subversive act against the United States. Each person who is appointed to serve in an organization for civil defense shall, before entering upon his duties, take an oath, in writing, before a person authorized to administer oaths in this state, * * * ."

The Director of Civil Defense is not authorized to administer oaths under existing state law. Neither is any subordinate civil defense officer appointed pursuant to the state act authorized to administer such oaths. If the state director or a subordinate civil defense officer is a notary public, he may administer the loyalty oath required by the foregoing section of the state law; but he may not do so by virtue of the office he holds in the state civil defense organization.

The legislature may by appropriate amendment to the Minnesota Civil Defense Act of 1951 authorize the state director and his subordinates to administer the loyalty oath. We believe the foregoing answers your inquiry.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Director, Civil Defense.
April 1, 1952. 835-A

Editorial Note: See L. 1953, c 745.

VETERANS PREFERENCE

81

Public employee — Under facts submitted a Minnesota resident entering armed forces of the United States through National Guard unit of adjoining state is entitled to veteran's preference under M. S. A. Section 197.45 et seq.

Facts

A is a World War II veteran. He was born in Minnesota and has resided in the state continuously ever since. He now is a resident of the City of St. Paul where he has lived for less than five years.

Prior to World War II and while residing in East Grand Forks, Minnesota, he enlisted in the North Dakota National Guard. When the North Dakota National Guard was federalized for World War II, he was ordered to active duty and reported therefor from his home at East Grand Forks. Upon discharge from the federal service he returned to Minnesota.

Minnesota received credit under the selective service system for the services performed by A in the armed forces of the United States.

Question

Under the facts stated, is A entitled to veteran's preference to public employment in the City of St. Paul?

Opinion

M. S. A. Sections 195.45 to 197.47 is the Veterans' Preference Law. Sec. 197.45, Subdivision 1, reads in part as follows:

> "The word 'veteran' as used in this section and section 197.46 means any man or woman honorably discharged from the army * * * of the United States of America and the allied nations of England, France, and others were engaged in war against the Imperial German Government and its allies, and the war between the United States of America and its allies, and Germany, Japan, Italy and their allies, who is a citizen of the United States, and has been a resident of the state of Minnesota and of the county, city, * * * to which application is made for five years immediately preceding his application, **or who enlisted from the state of Minnesota.**" (Emphasis supplied.)

Subd. 2 of said Section 197.45 confers upon veterans, as defined in subdivision 1, preference in public employment.

Applying the foregoing statutory provisions to the facts as set forth in your letter, in our opinion, A is a veteran entitled to preference in employment to a public position within the City of St. Paul. This view is in accordance with that expressed by your office in its opinion to the Civil Service Bureau of the City of St. Paul dated October 20, 1952.

In the absence of being furnished statements of facts, we are unable to express any views concerning the application of the Veterans Preference Law to the other questions submitted with your letter as embodied in one of the enclosures. We think the Veterans Preference Law can only be applied to specific facts. In the absence of such facts, we are unable to apply the law.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Corporation Counsel, City of St. Paul.
December 5, 1952. 310-L

82

School employee—Employee who was a veteran is entitled to appointment to fill a vacancy in school district organization over a non-veteran employee of said district with greater seniority. Agreement between school district and local union C.I.O.—M. S. 1949, Section 197.45.

Facts

The school district has adopted a personnel policy pursuant to an agreement entered into between said school district and a local union of CIO. Said policy is set forth in resolutions of the school district prescribing rules and regulations regarding wages, hours and working conditions with respect to certain employees of the school district. The rules as adopted include the following:

> "It shall be the policy of the Board of Education to fill vacancies by promotion wherever possible. All other considerations being equal, preference shall be given to the senior employees in the same category next below that in which the vacancy occurs."

On September 1, 1950, at the request of the employee, the school district appointed N. L. as the head custodian at the Lincoln school, he having been previously employed by the district as a bus driver for approximately fourteen years. In 1943 this school district employee notified the school district in writing that he was a war veteran as defined by M. S. 1949, Section 197.45, and entitled to all the rights and benefits conferred by the Veterans Preference Law as it related to appointment, employment and promotion.

F. K., a non-veteran, is employed as a custodian at the Lincoln School and has been employed by the school district for about 19 years. He is complaining through the representative of the union to which he belongs that he was by-passed by the school district in considering the appointment of the head custodian at the Lincoln School on September 1, 1950, to which N. L. was appointed.

Question

Under the facts submitted, was the veteran or the non-veteran entitled to the appointment as head custodian at the Lincoln School?

Opinion

We assume, as did your inquiry, that the position of head custodian at the Lincoln School is within the purview of the Veterans Preference Law (M. S. 1949, Section 197.45 et seq.). There are no facts contained in your letter or correspondence attached thereto indicating the contrary.

The question before us concerns the application of this Veterans Preference Law by which the school district is bound, regardless of any rules which it may have adopted relating to the promotion of its employees.

When a vacancy occurred in the position of head custodian at the Lincoln School in September 1950, a qualified veteran applying for said position was entitled to the appointment as against a non-veteran applying for the same. See following opinion, No. 83.

For the reasons expressed in said opinion as applied to the facts which you have submitted, we think that the school board at Chisholm, Minnesota, acted in accordance with law in appointing N. L., a qualified veteran, to the position of head custodian at the Lincoln School, instead of F. K., a non-veteran.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Commissioner of Education.
October 2, 1951. 85-F

83

School Employee — Appointment Veteran or non-Veteran.

Facts

A vacancy occurred in one of the positions in the school garage. Two persons applied for such position; one, a veteran within the meaning of M. S. 1949, Section 197.45, the other a non-veteran. Both applicants at the time the vacancy occurred were employees of the school district, the non-veteran, however, having a greater seniority than the veteran.

The position in the school garage is one within the purview of the Veterans Preference Law (M. S. 1949, Section 197.45, et seq.) and not within the exceptions to that law as contained in the last sentence of paragraph 1 of M. S. 1949, Section 197.46.

You state that the school district has a contract with the local union of the CIO which provides in part that promotions among school district employees are to be based upon seniority. The non-veteran, a member of said union, claims that on the basis of the contract provision, he is entitled to the appointment to the vacant position in the school garage. The veteran claims that he is entitled to appointment to the vacancy in the school garage by reason of the Veterans Preference Law. Both men are qualified to perform the duties of the position applied for in a reasonably efficient manner.

Question

Under the facts stated, who is entitled to appointment to the vacancy in the school garage, the veteran or the non-veteran?

Opinion

In so far as is applicable to the facts presented, M. S. 1949, Section 197.45, Subd. 2, reads in part as follows:

> "That in every public department and upon all public works in the State of Minnesota and the counties, cities, towns, villages, school districts, and all other political subdivisions and agencies thereof, honorably discharged veterans shall be entitled to preference in **appointments, employment** and **promotion** over other applicants therefor, * * * " (Emphasis supplied.)

We do not have before us the document which is referred to as a contract between the union and the school district. We note that you do not assume to pass upon the validity of the contract. The question before us concerns the application of the state Veterans Preference Law by which the school district is bound regardless of the form in which it acts, whether it be by adopting rules relating to promotions of its employees or by attempting to contract with reference thereto.

Under the facts submitted, one of the applicants to the position in the school garage is a veteran as defined in M. S. 1949, Section 197.45, and has been a resident of the State of Minnesota and the school district to which application is made for five years immediately preceding his application and in addition, is capable of performing the duties of the position applied for in a reasonably efficient manner. He therefore is entitled to be appointed to the position applied for over the non-veteran. See **State Ex Rel. Meehan v. Empie**, 164 Minn. 14, 204 N. W. 572, and the other cases annotated under M. S. A., Section 197.45 et seq. In so far as any action is taken by the school district relating to the appointment or promotion of persons to school district positions, which is contrary to the terms of the Veterans Preference Law or any other provision of law, such action is invalid.

The correspondence before us in connection with your letter refers to the case of **State Ex Rel. Evens v. City of Duluth**, 195 Minn. 563, 262 N. W. 681. That case related to two civil service employees of the City of Duluth, both employed in the same grade of service, one a veteran, the other a non-veteran, with the non-veteran having been so employed for many more years than the veteran. It became necessary for the city to lay off one of such employees by reason of lack of funds. The court sustained the layoff of the veteran on the ground that the Veterans Preference Law does not prohibit the application of seniority principles in accomplishing a reduction of force. See also **State Ex Rel. Boyd v. Matson**, 155 Minn. 137, 193 N. W. 30.

The ruling in the **Evens** case, supra, has no application to the facts presented in your letter.

We therefore concur in the conclusions expressed in your opinion of August 10, 1951, to the superintendent of schools of Independent School District No. 8, that under the facts stated herein, the veteran is entitled to the appointment to fill the vacancy in the school garage.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Attorney for school district No. 2, Marble, Minnesota.
October 1, 1951. 85-F

MUNICIPALITIES

BIDS AND CONTRACTS

84

Advertising—Equipment—Village water and light commission—Required to advertise for bids before entering into contract for purchase of equipment involving an expenditure of $500 or more—M. S. 1949, Section 412.331, 412.351, 412.361, 412.311, 412.901.

Facts

"The Village of Blooming Prairie, Minnesota, has a water, light, power, and building Commission, pursuant to Chapter 453, Minnesota Statutes Annotated."

Question

"Whether or not the Commission should advertise for bids in entering a Contract for the purchase of a Diesel engine, the purchase price being less than $50,000.00," but "approximately $30,000.00."

Opinion

The question is answered in the affirmative.

The Village Code was enacted by L. 1949, C. 119. It is now coded as M. S. 1949, Sections 412.011-412.921. It became effective July 1, 1949. L. 1949, C. 119, Section 112. It applies to every village in the state, irrespective of the law under which it was originally incorporated. M. S. 1949, Section 412.901.

M. S. 1949, Section 412.331 expressly provides:

" * * * Any water, light, power and building commission now in existence in any village shall hereafter operate as a public utilities commission under Sections 412.321 to 412.391."

Prior to July 1, 1949, the water, light, power and building commission of the Village of Blooming Prairie, having been created pursuant to M. S. 1945, Section 453.01, operated pursuant to the provisions of M. S. 1945, C. 453. However, since July 1, 1949, the commission has been, and now is, operating as a public utilities commission, not under M. S. 1945, C. 453, but under M. S. 1949, Sections 412.321-412.391.

The general powers of the commission are prescribed by M. S. 1949, Section 412.351. Its specific powers are enumerated in M. S. 1949, Section 412.361. In subd. 1 of the last cited section it is expressly stated:

" * * * The provisions of Section 412.311 relating to advertisement for bids shall apply to contracts of the public utilities commission."

M. S. 1949, Section 412.311, in its part here material, provides:

" * * * Every contract for the purchase of merchandise, materials **or equipment** or for any kind of construction work undertaken by the village which requires an expenditure of $500 or more shall be let to the lowest responsible bidder, after ten days' public notice."

The former opinions of the Attorneys General to which your inquiry refers, in so far as they held that a village water, light, power and building commission operating under M. S. 1945, C. 453, was not required to advertise for bids before entering into contracts for the purchase of equipment, are rendered inapplicable to the situation presented by you by the change of the law hereinabove noted and effected by the enactment of the Village Code.

LOWELL J. GRADY,
Assistant Attorney General.

Blooming Prairie Village Attorney.
January 24, 1951. 707-A-15

Editorial Note: Section 412.311 amended by L. 1953, C. 735, S. 5; Section 412.361, Subd. 3 amended by L. 1953, C. 735, S. 6.

85

Bidder—Lowest responsible bidder—Construction of bridge—Cities organized under Sp. L. 1879, C. 57, Section 64, thereof which requires contracts in excess of $50.00 to be awarded to lowest responsible bidder modified by L. 1949, C. 352, coded as M. S. A. Section 465.61.

Facts

The City Council contemplates constructing a bridge. The labor will be performed by its employees. The council intends to purchase the items of material necessary for the construction of the bridge. The aggregate cost of such material would exceed $500, but the cost of separate units of material, if segregated and purchased separately, would not exceed $500 per unit.

The City of St. Charles operates under the provisions of Sp. L. 1879, C. 57, and there are submitted these

Questions

"1. Would it be necessary for the council to advertise for bids for the items of materials?

"2. Should the council decide to let the entire contract, would it be necessary to advertise for bids?"

Opinion

Both questions will be considered together and likewise answered. Section 64 of the above special laws reads as follows:

"All work for the city, exceeding fifty dollars, shall be let by contract to the lowest responsible bidder; due notice shall be given of the time and place of letting such contract, and every contract so made shall be commenced within one week of the acceptance of the proposal, unless the city council shall determine otherwise. Provided, they shall have power to reject all unreasonable bids."

The word "work" as used in said section should be construed so as to include internal improvements by the city such as the bridge under consideration. See **Chippewa Bridge Co. v. City of Durand,** 122 Wis. 85, 99 N. W. 603, 606. Unless the provisions of Section 64, supra, have been modified or amended by subsequent legislation, then the provisions thereof are controlling in the instant case.

L. 1949, C. 352, coded as M. S. A. 465.61, provides:

"Subdivision 1. Any city of the fourth class operating under a special law may purchase materials, supplies, or equipment and contract for the construction of public works without advertising for bids therefor whenever the amount involved does not exceed $500.

"Subd. 2. Any such city is not required by this section to advertise for bids in any case where it is not required to do so by any other law."

In construing the effect of this act upon the restrictions and limitations contained in Sec. 64, supra, consideration must be given to Sec. 76 of the Organic Act, which reads as follows:

"No law of this state contravening the provisions of this act, shall be considered as repealing, amending or modifying the same, unless such purpose be expressly set forth in such law."

Did the legislature, by the enactment of Sec. 465.61, expressly intend to lift the limitations with respect to the maximum amount of public work which could be performed by the city without awarding a contract therefor by competitive bidding? We believe that the legislative intent to do so is clear and manifest. This act is not of general application. It applies only to cities of the fourth class operating under a special law. The city of St. Charles comes within this category.

We therefore conclude that the city council may proceed under the provisions of said Sec. 465.61. Subd. 2 of this section should not be construed so as to supersede the provisions of any special law which permits the council to make contracts in excess of $500 without advertising for bids and awarding the same to the lowest responsible bidder. See **State v. Brown,** 189 Minn. 257, 248 N. W. 822, 249 N. W. 569.

Whether the council may segregate the various items necessary for the construction of the bridge into units so that each unit would be less than $500 and thereby avoid the necessity of advertising for bids, presents in part a factual matter upon which we do not pass. The general principle

of law is to the effect that such a course of action would be in effect a circumvention of the requirements of the competitive bids statute and therefore prohibited.

McQuillin, Municipal Corporations, Vol. 10, 3rd Ed., Section 29.33 provides:

> "In some jurisdictions, the necessity of competitive bidding depends on the amount involved in the contract to be let. If applicable, such a requirement must be observed in good faith by the acting municipal authorities. And where a municipality is prohibited from letting contracts involving an expenditure of more than a specified sum without submitting the same to competitive bidding, it cannot divide the work and let it under several contracts, the amount for each falling below the amount required for competitive bidding."

The answer to the first question must be resolved by testing the facts as the same may be found to exist to the general principles of law stated in the above quotation.

The second question is answered in the affirmative.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

St. Charles City Attorney.
April 29, 1952. 707-A-4

86

Bidder—"Lowest responsible bidder"—Construction of a sewer main—Council is not limited to financial responsibility of bidder—Other essential and favorable factors to city may be taken into consideration.

Otter Tail Power Co. v. Village of Elbow Lake, 234 Minn. 419.

Otter Tail Power Co. v. Village of Wheaton, 235 Minn. 123.

Facts

During the summer of 1952 the city advertised for bids for the construction of a sewer main. One of the benefited property owners agreed to pay one-half of the construction costs. This property owner and the city, and all other interested parties, desired to have the construction work completed at the earliest possible time, and at least before the fall of 1952. No time for the completion of the construction of the sewer was specified in the specifications nor in the call for bids. Only two bids were submitted, one being $366 higher than the other. The lowest bidder stated that he

could not complete the job until June 1, 1953, while the highest bidder agreed to complete the job by November 1, 1952. The council awarded the job to the highest bidder as it deemed such bid as being the most advantageous to the city. The work has been completed. The city has paid a part of the contract price. One-half of the construction cost has been paid by the property owner in accord with his agreement with the city.

Question

Was the city legally justified in accepting the bid of the highest bidder?

Opinion

We have not been advised as to whether any valid objections have been made or could now be made to the acceptance of the highest bid by the council. Both the city and the contractor are satisfied; the property owner who agreed to pay one-half of the construction cost has made such payment. The work has been completed, and partial payment has been made by the city to the contractor. In view of what has already been done by the parties in interest it may be that the question submitted is now a moot one.

The council was required to award the contract to the "lowest responsible bidder." In determining who was such "lowest responsible bidder" the council was not restricted nor limited to a consideration of the cost alone as expressed in dollars and cents in each of the bids submitted. The time in which the construction of the sewer was to be completed, if advantageous and beneficial to the city and other interested parties, is an element and a factor which was proper for the council to take into consideration in awarding the contract. See **Otter Tail Power Company v. Village of Elbow Lake,** 234 Minn. 419, 423, 49 N. W. (2d) 197; **Otter Tail Power Company v. Village of Wheaton,** 235 Minn. 123, 125, 128, 129, 130, 49 N. W. (2d) 804.

We think that the council was justified in taking into consideration the time element in which the construction of the sewer was to be completed, in awarding the contract.

Even though the action of the council in awarding the contract in the circumstances stated might be challenged and set aside, nevertheless the city would be obligated to pay for the benefits actually received. When a contract is let and performed in good faith without compliance with statutory provisions governing the letting of contracts, the municipality is liable for the benefits actually received, **Kotschevar v. Town of North Fork,** 229 Minn. 234, 243, 39 N. W. (2d) 107.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Montevideo City Attorney.
December 1, 1952. 707-A-4

87

Bids—Withdrawal—A bidder who submits a bid through material mistake may be relieved from such bid.

Facts

"The village of Pine City opened bids on the erection of a municipal liquor store. The matter has been laid on the table.

"One of the bids for refrigeration and plumbing was a bid for a little over $10,000.00, the next bid was a little over $17,000.00.

"After the bids were opened, the engineer called the $10,000.00 bidder. He claimed he made a mistake and forgot to include $8,300.00 for plumbing. The bid was not an itemized bid but was a lump sum bid pursuant to specifications which had been furnished the bidder previously.

"The bid complied with the law and the legal requirements.

"The advertising for bids provides that no bidder may withdraw his bid for a period of 30 days after the date set for the opening thereof.

"I am mindful of the law which provides that the lowest bid from a responsible bidder must be accepted. The company is a responsible company."

Question

"I would like to know whether or not the bidder can withdraw his bid when he has furnished the bid based on the advertising, furnished the bond and has made a bid based on the specifications which had been furnished to him?"

Opinion

The general principle of law which relates to relieving a bidder from his bid where a material mistake was made in submitting the same is stated in 43 Am. Jur. Section 63, as follows:

"As a general rule, equitable relief will be granted a bidder for a public contract where he has made a material mistake of fact in the bid which he submitted, and upon the discovery of that mistake acts promptly in informing the public authorities and requesting withdrawal of his bid or opportunity to rectify his mistake, particularly where he does so before any formal contract is entered into. This rule is but a particular application of the general rule granting equitable relief by way of rescission from unilateral mistakes relating to material features of a contract which are of such grave consequences as to make enforcement of the contract unconscionable. The fact that the bidder does not seek relief in equity before the acceptance of his proposal by asking reformation or cancelation of his bid does not defeat his right to equit-

able relief, if, before the bids were opened, he informed public authorities of the fact that he had made a mistake in his bids, and a bidder has been held entitled to relief when the mistake was discovered after the bid was accepted but before he was informed of the award, and he made immediate effort to withdraw his bid. One may, however, forfeit his right to relief by his failure to follow the rules and regulations set forth in the advertisement for bids as to the time when bidders may withdraw their offers."

And, in McQuillin Municipal Corporations, Section 29.67, the author states:

"The prevailing view seems to be that a bid may be withdrawn before acceptance, if proper notice of withdrawal is given. Thus inadvertent mistakes in a bid usually warrant the withdrawal of same before the bid is acted upon. It is also held that if a bidder has submitted a mistaken bid he may maintain a bill in equity for a reformation thereof, provided he files the same within a reasonable time."

Whether the bidder in the instant case comes within the aforesaid general rule so as to be entitled to relief from the bid which he submitted is primarily a question of fact upon which we cannot pass. The council should make such determination of the facts from all of the circumstances, and to which it should apply the above stated general principle of law in determining whether the bidder is entitled to be relieved from the bid which he has submitted.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Pine County Attorney.
October 31, 1952. 707-A

88

Highly skilled work—Court House clock—Repair of—M. S. A. 375.21, Subd. 1.

Facts

"Some time ago our Court House tower was struck by lightning and the large clock was seriously damaged. The company that has taken care of the clock for years gave an estimate of the cost to repair it which came over $4,000.00. The insurance adjuster accepted this estimate and settled with the County on this basis and the company is willing to repair the clock for that sum."

Question

"Under these circumstances, would the County Board be authorized to have this company repair the clock for that sum without advertising for bids?"

Opinion

I presume that you have in mind the requirements of M. S. A. 375.21, subd. 1, the first sentence of which reads:

> "In counties having less than 75,000 population, no contract for work or labor, or for the purchase of furniture, fixtures, or other property, or for the construction or repair of roads, bridges, or buildings, the estimated cost or value of which shall exceed $1,000, shall be made by the county board without first advertising for bids or proposals in some newspaper of the county."

It was stated in **Barnard v. County of Kandiyohi,** 213 Minn. 100, 5 N. W. (2d) 317, on page 102 that:

> "Where the contract is for personal service, as, for instance, the employment of an attorney, or an agent, or for the publication of official proceedings, or for the services of an architect, we have held that the section does not apply."

In the case of **First National Bank of St. Paul v. County of Cook,** 146 Minn. 103, 177 N. W. (2d) 1013, it was held that the section "requiring contracts for work or labor, when made by certain counties, to be let after advertising for competitive bids, has no application to a contract of employment under which the personal service of an agent is engaged."

There was also a similar holding in the case of **Krohnberg v. Pass,** 187 Minn. 73, 244 N. W. 329, which involved the personal services of engineers. The court there said that "The school district wanted these particular engineers. Why is not material." "Their work was similar to that of architects in that it was professional and personal."

The work of repairing the courthouse clock does not appear to be any less professional or personal.

If in repairing the courthouse clock the materials to be purchased do not exceed $1,000, the county may purchase those without bids and pay for same as a separate item to the repairers of the clock if the materials are furnished by them.

It is my opinion that the above quoted portion of Section 375.21, subd. 1, is not applicable to personal service contracts of the nature herein involved.

J. A. A. BURNQUIST,
Attorney General.

Morrison County Attorney.
August 23, 1952. 707-A-7

89

Purchases—Rule of Fair Trade Act, M. S. 1949, 325.08-325.14, does not apply to state as stated in opinion of 2/5/51, File 681A (applies equally to all subdivisions of state.)

Facts

On February 5, 1951, File 681A, the Attorney General rendered an opinion to the effect that a contract made under authority of M. S. 1949, 325.08, relating to the sale or resale of a branded or trade marked commodity, does not apply to a sale made to the state.

Question

Does the same rule apply in respect to cities, villages, counties, towns and school boards?

Opinion

"Counties, cities, etc., are political subdivisions of the state, and are included in the term 'state,' which is the concrete whole. State v. Levy Court, Del., 43 A. 522, 524, 1 Pennewil, 597." **40 W. & P. 6.**

"Whatever is done by such division, under and by virtue of the permission or mandate of the state only, is the act of the state quo ad hoc, and may reasonably and properly be designated as state action, at least indirectly * * * ." **State v. Levy**, supra.

A municipal corporation, in its public character, is a mere auxiliary to the state government in the business of municipal rule; a governmental agency—one of the governmental subdivisions or units of the state. Cities, villages, towns, school districts and counties are agencies of the state for the administration of the law. Dunnell's Digest, Sec. 6517. Municipal corporations are created to exercise the powers of government delegated to them. **State v. City of Fraser**, 191 Minn. 427, 434, 254 N. W. 776.

A municipal corporation is merely a department of the state, a political subdivision created as a convenient agency for the exercise of such governmental powers as may be entrusted to it. **Monaghan v. Armatage**, 218 Minn. 108, 112, 15 N. W. 2d 241.

It follows that the rule applied to purchases by the state is to be followed when the purchase is made by a city, village, county, town or school district.

CHARLES E. HOUSTON,
Assistant Attorney General.

Department of Business Research and Development.
April 9, 1951. 681-A

90

Specifications—Requirement that performance bonds should be purchased locally is not permissible in contracts for schools—M. S. 1949, Section 125.18, subd. 2, 574.26, 574.28, 574.29, 574.30.

Facts

"The school advertising for bids for the construction of a new school building at Warren and we are requested by local interests to specify in the bids that the successful bidder buy his bonds through local agents. The Construction Companies and our Architect tell us this is illegal. As we are not able to find any reference to such a question in our Laws pertaining to schools, we wonder if you could give us an opinion on the matter?

"The local agents, of course, are interested in the commission and I assume the Construction companies have their regular bonding agents."

Question

Would such a specification be legal?

Answer

The only statutory provision on the awarding of contracts relating to bonds for the faithful performance of contracts to repair or construct schools is contained in M. S. 1949, Section 125.18, Subd. 2, which provides as follows:

"Every such contract shall be awarded to the lowest responsible bidder, duly executed in writing, and the person to whom the same is awarded shall give a sufficient bond to the board for its faithful performance, and otherwise conditioned as required by sections 574.26, 574.28, 574.29, and 574.30. If no satisfactory bid is received, the board may readvertise."

No authority is therein given to the school board to specify from whom the bidder must obtain his bond.

It is therefore our opinion that the school board in question does not have the authority to specify in the bids that the successful bidder must buy his bonds through local agents.

IRVING M. FRISCH,
Special Assistant Attorney General.

Commissioner of Education.
August 18, 1952. 707-A-12

CIVIL SERVICE

91

Jury service — Witness fees — Leave of absence with and without pay of county employee serving as a juror or testifying as a witness discussed —L. 1941, C. 513, as amended.

Questions

Question 1

"May an officer or employee, other than an elective officer, who is called as a juror in either the state district, the federal district, a municipal court, or in any other court as a juror be paid his salary for such time as he is away from his work?"

Question 2

"Assuming an employee may be paid his salary for such time as he may be away from his work, may he also be paid jury fees by the county?"

Question 3

"Assuming such county employee serves as a juror in federal court, and assuming he may be paid his salary for such time as he is away from his work, may he retain the jury fees paid him by the federal government?"

Question 4

"May an employee of the county who is required by subpoena or otherwise to appear in any court to testify as to information he received as such employee be paid his regular compensation during the hours that he actually and necessarily is required to spend away from his employment (1) if the county is involved in the litigation, or (2) if the county is not involved in the litigation?"

Question 5

"May an employee of the county who is required by subpoena or otherwise to appear in any court to testify as to the affairs or business of others which is unrelated to the business of the county and when the county is not a party to the litigation be paid his regular compensation during the hours that he actually spends away from his work?"

Question 6

"Assuming questions 4 and 5 are answered in the affirmative, may such employee retain the witness fees paid to him?"

Opinion

These inquiries all relating to county officers and employees serving as jurors and as witnesses will be discussed under these two headings. Because the civil service commission has been created and maintained in Ramsey County under L. 1941, C. 513, as amended, we are assuming that the questions submitted all relate to officers and employees of the county in the classified service.

Jury Service

Jury service is a compulsory duty required of every citizen unless exempted therefrom by law. County officers are so exempt. See M. S. 1949, Sections 593.04 and 628.43. In Ramsey County a person is infrequently summoned for jury service and the amount of time he is required to devote thereto is not great. In most instances therefore a county employee serving on a jury on any given day could also devote considerable time to his usual duties on such day.

L. 1941, C. 513, Section 4, directs the civil service commission to frame, with the assistance of the civil service administrator, and subject to the approval of the county commissioners, rules and regulations for the classified service—such rules to provide amongst other matters for leaves of absence with or without pay. This authorizes, in our opinion, the promulgation of rules relating to jury service of Ramsey County employees in the classified service—rules which would permit an employee holding a position in the classified service, and upon the approval of his appointing authority, to be granted a leave of absence for service upon a jury. The rule may provide for leave of absence with pay or for leave under such other circumstances and conditions as the rule-making authority shall determine.

The provisions of state and federal law relating to jury service prescribe the fees to be paid a juror during the time he is so engaged. Neither the civil service commission nor the board of county commissioners is empowered to change or modify such federal or state statutory fees. However, it is for the civil service commission and the board of county commissioners in adopting and approving civil service rules to determine whether an employee in the classified service on leave for jury duty is granted such leave with or without loss of pay. It is likewise for such rule-making authority to determine in its rules, if it permits a leave with pay for jury duty, the conditions under which such leave with pay is granted.

In the absence of an appropriate rule governing jury service, as above indicated, we question the right of county employees to be paid their salaries when they are not performing the services for which they have been engaged. See **Nollet v. Hoffmann**, 210 Minn. 88, 297 N. W. 164, 134 A. L. R. 192.

County Officers or Employees as Witnesses

An employee of the county who is required by subpoena or otherwise to appear in any court to testify as to information received in his official capacity in litigation in which the county is a party is, in our opinion, engaged in county business. Under such circumstances, we think he should be paid his regular salary while so engaged. An appropriate civil service rule covering such a situation should provide for leave of absence with pay. A county employee testifying in a case in which the county is a party and being tried in the city in which he resides cannot be paid any witness fees. See M. S. 1949, Section 357.23, which reads as follows:

"No officer or employee of any city, village, or county in this state shall receive or be paid any sum as witness fees in any case in which the state of Minnesota, the county, the city, or the village, of which he is an officer or employee, is a party, if the case be tried in the city or village of which he is a resident."

See also opinion of December 5, 1925, to the county attorney at Dodge Center, Minnesota, our file 196-R-2.

An employee of the county who is required by subpoena or otherwise to appear in any court to testify as to information received in his official capacity in litigation between private litigants should by appropriate rule be granted leave to make the required court appearances. Such court appearances for the purpose of identifying official records or testifying as to official matters usually take very little time. Whether such leave should be granted with or without pay is a matter for determination by the rule-making authority of the county. Such an employee so testifying is not barred from receiving witness fees under M. S. 1949, Section 357.23, supra. Whether the witness fees which he receives are to be turned over to the county will necessarily depend upon the rule promulgated to cover such leave.

An employee of the county who is required by subpoena or otherwise to appear in any court to testify as to the affairs or business of others unrelated to the business of the county and when the county is not a party to the litigation, is not engaged in county business. Under such circumstances, it is not proper that such employee be granted leave with pay while he makes the required court appearances. An appropriate civil service rule covering such a situation would require the employee to take the time off as annual leave, as leave of absence without pay, or as a deduction from authorized accumulated overtime (if county civil service rules provide for accumulated overtime). An employee of the county testifying in private litigation unrelated to county business is entitled to witness fees therefor, the same as any other witness testifying in such litigation. The payment of such fees under such circumstances is not prohibited by M. S. 1949, Section 357.23.

We believe the foregoing answers your inquiries.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Ramsey County Attorney.
August 21, 1951. 120

92

Police—Chief—Appointment—Unless the provisions of M. S. 1949, C. 419, authorizing and establishing a police civil service are strictly complied with, the certification by the police civil service commission of a candi-

date for appointment as chief of police is void. State ex. Rel. Kos v. Adamson, 226 Minn. 177, 32 N. W. (2d) 281.

Facts

The village has a police civil service commission created and established pursuant to M. S. 1949, C. 419. The police force of the village consists of two policemen and a chief of police. Recently the office of chief of police became vacant. To fill the vacancy a written examination was given. No public announcement of the examination was made and the only ones notified thereof were the two policemen on the police force, both of whom are honorably discharged veterans of the armed forces of the United States. Prior to the giving of the examination, the chairman of the police civil service announced that the results of the written examination would control the commission's certification of an eligible to the village council.

The examination as prepared included 30 questions. However, only 29 questions were given. At the conclusion of the examination when it was discovered by the two civil service commissioners present and the person in charge of the examination that only 29 questions had been answered, the three decided that in scoring the examination a ten point credit would be given for the correct answer to question 1 and a five point credit would be given for correctly answering each of the other questions. In setting up the examination containing 30 questions, it was contemplated in scoring the examination that a five point credit would be given for each of the 30 questions answered correctly. M received the highest grade in the examination on the basis of each system of scoring the same.

The following day after the giving of the foregoing written examination, the police civil service commission met. Inasmuch as an oral examination had not been given the candidates, it decided that two of the questions in the examination calling for expressions of opinion should be rescored as a substitute for the omitted oral examination. The examination when rescored on this basis made candidate R the high man in the examination. The police civil service commission then certified candidate R to the village council for appointment to the office of chief of police.

Prior to the giving of the foregoing examination, the posted notice thereof as required by M. S. 1949, Sec. 419.06 (3) was not given. Neither was any consideration given to the moral character, sobriety, and integrity of the two candidates as required by M. S. 1949, Sec. 419.09. Nor was the notice of examination required by M. S. 1949, Sec. 419.10 given.

Questions

1. Is the procedure followed in giving the examination and in scoring the same so irregular as to invalidate the certification made by the police civil service commission to the village council?

2. If the answer to the first question is in the affirmative, what should the commission do to solve the problem?

Opinion

M. S. 1949, C. 419, requires a police civil service commission established under said chapter to promulgate a set of rules in conformity with Sec. 419.06 thereof which shall provide, among other matters, for public competitive examinations to test the relative fitness of applicants; public advertisements of all examinations at least ten days in advance in a newspaper in general circulation in the village and posting the advertisement for ten days in the village hall and at each station house; and promotion based on competitive examination and upon records of efficiency, character, conduct and seniority. Whether or not the police civil service commission of your village has adopted rules in conformity with Sec. 419.06 does not appear in your letter. Sec. 419.09 of said chapter requires that all examinations shall be impartial, fair and practical and designed only to test the relative qualifications and fitness of applicants to discharge the particular duties of the employment which they seek to fill. Applicants for positions of trust and responsibility are required to be especially examined as to moral character, sobriety and integrity and all applicants for positions requiring special experience, skill and faithfulness shall be especially examined as to those qualities. Sec. 419.10 requires that the notice of the time, place and scope of each examination shall be given by publication and posting specified in Sec. 419.06 and by mailing such notice to each applicant upon the appropriate list of the application register ten days in advance.

The statutory provisions referred to, according to your letter, were not complied with by the police civil service commission of your village. A proper notice of the examination was not given. Unless the rules of the police civil service commission limited the selection of a chief of police from a promotional register, the examination given was not a public competitive examination in that the public was never notified of the same and invited to participate therein. The examination given was not in conformity with Sec. 419.09 of the statutes and if a method of grading the examination was determined in advance, it was not followed.

The factual situation presented by you is similar to that discussed in **State ex Rel. Kos v. Adamson**, 226 Minn. 177, 32 N. W. (2d) 281. The syllabus of that case reads as follows:

> "The provisions of M. S. A. 419.01 to 419.18, authorizing the establishment of police civil service, are mandatory, and strict compliance therewith is required, with the consequence that a certification by the police civil service commission of a candidate for appointment as chief of police is void, where although the candidate's fitness had been determined by examination the commission had failed otherwise to comply with the civil service law, in that it did not grade and classify all the employes of the police department; keep a service register containing the service records and other data concerning such employes; keep an eligibility register; certify the candidate for appointment from such register; base the examination upon records of efficiency, character, conduct, and seniority, as well as upon competition; prescribe standards

of fitness and efficiency as a basis for the examination; determine in advance the subjects for examination and the manner of grading the examinations; or base the oral part of the examination upon objective standards rather than the subjective ones of the examiners."

By applying the principles of the **Kos** case to the facts submitted in your letter, it is our opinion that the certification of R by the police civil service commission to the village council for appointment to the office of chief of police is invalid. We therefore answer your first inquiry in the affirmative.

In response to your second question, we suggest the following:

1. If the police civil service commission has not adopted rules in conformity with M. S. 1949, Sec. 419.06, it should do so determining in such rules, among other matters, whether or not the office of chief of police be filled on a promotional basis.

2. That an examination be given to establish a list of eligibles for the office of chief of police in conformity with the statutory provisions as construed and interpreted in the **Kos** case, supra, and that compliance with the provisions of M. S. 1949, C. 419 be had in the manner indicated in said decision.

3. When a proper list of eligibles has then been established, the police civil service commission will be able to certify the proper person for appointment to the position of chief of police.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Coleraine Village Attorney.
March 3, 1952. 120

FINANCES

93

Bond issue — City Hall — Repairs — Where bond issue authorized for repair and alteration of city hall and for construction of addition thereto, council may not use all of the funds for accomplishment of only part of stated purpose.

Facts

"Last fall the Council for the City of Waconia determined that the City Hall required repairs and alterations, a garage was needed and a firebarn. Plans and specifications were obtained and an estimate of the cost arrived at. The question of issuing bonds to cover the estimated cost was then submitted to the voters. The ballot read as follows:

'Shall the City of Waconia, Carver County, Minnesota, issue and sell bonds in the aggregate amount of $55,000.00, the proceeds

thereof to be issued for the repair and alteration of the City Hall and for the construction of an addition thereto consisting of a fire barn and garage?'

"Since the election, which resulted in favor of a bond issue, bids have been received on the whole project and on the separate improvements. The lowest bid for the entire project far exceeds the amount of bonds approved and no other funds are available.

"The suggestion has been made that a bid for a part of the improvement be accepted, such as for the firebarn, which would approximately require all of the funds to be derived from the bonds. This gives rise to the question as to the right to use all of the funds from the bond issue for one portion of the improvement only and to abandon the rest. I have in mind that voters may have considered the need for repair to the present City Hall and the need for a garage, thus influencing a favorable vote for the project."

Question

"May the Council use all the funds from the bond issue for one of the projects included in the question submitted for a vote and abandon the remainder?"

Opinion

The question is answered in the negative.

Where the governing body of a municipality is authorized by a vote of the people, and only thereby, to incur a debt for a particular purpose, a debt cannot be incurred or the money expended for a different purpose.

See McQuillin, Municipal Corporations (3d), Vol. 15, Section 40.18, p. 288.

The electors have authorized the issuance of the bonds here involved and the use of the proceeds thereof "for the repair **and** alteration of the City Hall **and** for the construction of an addition thereto consisting of a fire barn and garage." The particular purpose authorized includes, not only the repair and alteration of the city hall, but also the construction of an addition thereto. The purpose is, nevertheless, single. The "repair and alteration of the City Hall" is as much a part of the purpose as is the "construction of an addition" to the city hall "consisting of a fire barn and garage."

If the council were to abandon "the construction of an addition" to the city hall and to expend the aggregate amount of the proceeds of the total bond issue authorized "for the repair and alteration of the City Hall" alone, it would appear that there would be a material departure from the terms of the vote authorizing the issuance of the bonds and that such action would involve a diverting of the funds to a purpose other than that authorized by the electors.

Since "the repair and alteration of the City Hall" has equal standing in the purpose clause with "the construction of an addition thereto consisting of a fire barn and garage," it would appear that, if the council were to abandon "the repair and alteration of the City Hall" and to expend the aggregate amount of the proceeds of the total bond issue authorized "for the construction of an addition" to the city hall "consisting of a fire barn and garage," that, likewise, would be a material departure from the terms of the vote authorizing the issuance of the bonds and that such action would involve a diverting of the funds to a purpose other than that authorized by the electors.

The electors authorized the expenditure of $55,000 to accomplish the purpose plainly stated on the ballot. Expending the amount thus authorized for the accomplishment of only a part of that purpose does not conform to the terms of the authority conferred by the voters.

In **Tukey v. City of Omaha,** 54 Neb. 370, 74 N. W. 613, it appeared that a proposition was submitted to the electors of the City of Omaha, and by them adopted, to issue bonds for the purpose of securing a site for a market place and erecting thereon a market house. The proposition contemplated the purchase of land for that purpose. It was there held that the erection of a market house on land already owned by the city, and used as a public park, was a substantial departure from the terms of the vote and was unauthorized. In the course of its opinion the Supreme Court of Nebraska said:

> " * * * That, when the governing body of a municipality is authorized by a vote of the people, and only thereby, to incur a debt for a particular purpose, such purpose must be strictly complied with, and the terms of the authority granted be strictly and fully pursued, is so well settled that it would be idle to cite authorities on the proposition."

LOWELL J. GRADY,
Assistant Attorney General.

Waconia City Attorney.
March 10, 1952. 59-A-7

94

Bond issue—Court House—Bonds to provide funds for restoring court house destroyed by fire must be submitted to the electors for approval— M. S. A., C. 475, Laws 1921, C. 117, superseded.

Facts

The courthouse was damaged by fire to such an extent that it is not suitable for a courthouse, and that it will be necessary to remodel and to rebuild the same.

Question

May the board of county commissioners, without a vote of the electors, issue bonds as provided by Laws 1921, Chapter 117, and use the proceeds for the purpose of restoring and rebuilding the damaged and destroyed courthouse?

Opinion

For the purpose of this opinion we assume that the courthouse has been damaged or destroyed by fire to such an extent so as to become, in the judgment of the board of county commissioners, unsuitable or insufficient for courthouse purposes, and that it will be necessary to issue bonds so as to provide funds to restore or to rebuild the same.

The answer to the question presented necessitates a determination as to whether L. 1921, C. 117, is still in effect so that the county board may proceed thereunder.

Chapter 117, supra, was an act to amend sections 1934 and 1939 of the General Statutes of Minnesota 1913, as amended by Ch. 22 of the Session Laws of Minnesota 1921 (see title of act). The material part of this act, so far as pertinent to the question considered, provides:

> "Section 1934. The board of commissioners of any county of the state of Minnesota which does not already own a county court house, or of any county where the court house has become so damaged or destroyed by fire, tornado or cyclone as to become in the judgment of the county commissioners of such county unsuitable or insufficient for court house purposes, is hereby authorized and empowered to issue the bonds of said county to such an amount as in its judgment may be necessary, but not exceeding three per cent of the assessed valuation of its real and personal property, as fixed by the last preceding assessment for general taxation, for the purpose of building a county court house in said county; provided that if said bond issue does not exceed one per cent of the assessed valuation of such county then such bond issue may be authorized by a majority vote of said board, but if such bond issue shall exceed one per cent of such assessed valuation, then said bond issue must be authorized by a unanimous vote of said board; provided, further, that in any case bonds of such a county shall not be issued in excess of three per cent of the assessed valuation of such county under the provisions of this act."

We have made a rather extensive and thorough examination of General Statutes 1923, Mason's Minnesota Statutes 1927 and all supplements thereto, Minnesota Statutes 1941, 1945, and 1949, and we find that said Chapter 117 has not been included in any of the aforementioned statutes.

Chapter 117, supra, might be designated as a general law of special application. Its applicability is by specific language contained therein limited to any county which does not already own a courthouse, or any county where the courthouse has become so damaged by fire, tornado or cyclone so

as to become, in the judgment of the county board, unsuitable or insufficient for courthouse purposes. When either of these events exist, then the county board is authorized and empowered to issue bonds as in said act provided without first submitting the question to the electors for their approval. This grant of authority to the county board to issue bonds for the purposes authorized by said law without first submitting such question to the electors for their approval is inconsistent with all subsequent legislation relative to the same subject matter, to which we shall now direct attention.

The first general law relative to the issuance of municipal obligations enacted subsequent to Chapter 117, supra, is L. 1927, Ch. 131.

By Section 1 (A) of this law the word "Municipality," as defined, includes counties. (B) of the same section provides:

> "The word 'Obligation' shall mean any bond, certificate of indebtedness, warrant or order, authorized by law, issued by a municipality; provided, that the following obligations are excepted from the provisions of this Act as to the issuance thereof; * * * ."

Bonds to be issued by a county for courthouse purposes are not within the class of excepted obligations under this act. Bonds issued under the provisions of Chapter 117, supra, are therefore subject to the provisions of said Ch. 131.

Section 4, Ch. 131, supra, provides:

> "No obligations subject to the provisions of this Act as to the issuance thereof, except obligations issued to pay judgments lawfully rendered or for refunding obligations at maturity or at their optional or callable dates or to fund outstanding warrants heretofore issued shall be issued without the approval, first obtained, of the majority of the electors voting on the Question of issuing such obligations, * * * ."

The provisions of the last mentioned section are inconsistent and in conflict with the provisions of Ch. 117, supra, which permit the issuance of bonds by the board of county commissioners without first submitting the question to the electors for their approval.

Section 11, Ch. 131, supra, being the repealing clause, in part provides:

> "The provisions of all laws pertaining to the issuance and payment of obligations that are subject to the provisions of this Act as to the issuance thereof, insofar as the provisions of said laws are inconsistent with the provisions hereof, are hereby repealed."

In our opinion Section 11 above should be construed, for the reason that Ch. 117 is inconsistent with the provisions of Ch. 131, as specifically repealing Ch. 117 insofar as the same authorizes and empowers the county board to issue bonds without submitting the question of the issuance thereof to the electors for their approval.

M. S. 1949, Section 375.18, which enumerates the general powers of the board of county commissioners in part provides:

> "To erect, furnish, and maintain a suitable courthouse and jail, but no indebtedness shall be created for such purpose in excess of five mills on each dollar of assessed valuation."

There is no express authority granted to the board of county commissioners to issue bonds for the purpose of building a courthouse or rebuilding a courthouse, which has been damaged by fire, without a vote of the people.

Laws 1949, Ch. 682, coded as M. S. A. Ch. 475, subd. 2 of Section 475.51, thereof includes counties within the term "municipality." Section 475.59 provides:

> "When the governing body of a municipality resolves to issue bonds for any purpose requiring the approval of the electors, it shall provide for submission of the proposition of their issuance at a general or special election or town or school district meeting. Notice of such election or meeting shall be given in the manner required by law and shall state the maximum amount and the purpose of the proposed issue."

And Section 475.72 provides that any officer who fails to comply with any of the provisions of Sections 475.51 to 475.75 shall be guilty of a misdemeanor.

Although Ch. 117, supra, is not enumerated as one of the laws expressly repealed by Ch. 682, Section 26, we are of the opinion that the positive requirements relative to the issuance of bonds to the effect that the question of such issuance must be first submitted to the electors is of such an inconsistency with the grant of power to the county board under Ch. 117 that a repeal by implication of Ch. 117 necessarily follows.

In conclusion, it is our opinion that Ch. 117, supra, has been expressly repealed by the provisions of L. 1927, Ch. 131, Section 11, and has been impliedly repealed by L. 1949, Ch. 682, coded as M. S. A. Ch. 475.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Pine County Attorney.
July 18, 1952. 37-B-1

95

Bond issue—Parking—Meters—Profits—Issuance of municipal bonds payable solely out of net revenue from parking meters for the acquisition of equipment for street lighting is permissible without first submitting the proposition to the vote of the electors—M. S. 1949, Sections 475.51, Subd. 8, 475.52, Subds. 1, 2, 475.58, Subd. 1 (4).

Facts

"The City of Eveleth, a Home Rule Charter City, desires to purchase a white way system for Grant Avenue in Eveleth. It is proposed that the estimated cost of $28,000 be paid by the proceeds from bonds to be sold as revenue bearing bonds from the net proceeds of the City of Eveleth's parking meters. The net revenue of said parking meters is approximately $4,000 per year."

The revenue certificates proposed to be issued, if issued, shall be payable solely out of the net revenues of the parking meters of the city and will not in any portion constitute general obligations of the City of Eveleth.

Question

May the City of Eveleth issue revenue certificates for the purposes stated which shall be payable solely out of the net revenue of the parking meters of the city without first submitting the proposition of the issuance of such revenue certificates to a vote of the electors of the city?

Opinion

We answer this question in the affirmative.

M. S. 1949, Section 475.52, Subd. 1, authorizes any city not governed by a home rule charter to issue bonds or other obligations "for the acquisition or betterment of public buildings, * * * **streets**, sidewalks; for any utility or other public convenience from which a revenue is or may be derived; * * * ." "Betterment" includes lighting. See M. S. Section 475.51, Subd. 8.

M. S. Section 475.52, Subd. 2, authorizes any city governed by a home rule charter to "issue bonds for any purpose enumerated in subdivision 1 unless forbidden by its charter; * * * ." The issuance of bonds or other obligations for the acquisition of equipment for lighting the streets of the City of Eveleth is not forbidden by the home rule charter of the City of Eveleth.

M. S. Section 475.58, Subd. 1, so far as here material, provides:

"* * * no obligation shall be issued without first obtaining the approval of a majority of the electors voting on the question of issuing the obligation, except an obligation issued:

"* * *

"(4) payable wholly from the income of revenue-producing conveniences; * * *."

See opinion dated May 24, 1949 (59-A-53), the ruling of which is correctly summarized in Vol. 26, M. S. A., 1951 C.A.P.P., p. 118, note 10, in the following language:

"Under Litchfield charter restrictions, city may not issue general obligation bonds of city for purpose of defraying cost of oiling streets without first submitting proposition to a vote of electors even though indebtedness were made payable from parking meter receipts."

The conclusion of the May 24, 1949, opinion cited was controlled not only (1) by the peculiar language of the charter of the City of Litchfield involved therein, but also (2) by the circumstance that the obligations there proposed to be issued were intended to be general obligations of the city pledging the city's full faith and credit for the payment thereof, although it was intended to pay the general obligations so to be issued from parking meter receipts. That is not the situation here considered. The revenue certificates proposed to be issued by your city are not to be general obligation bonds of the city but are proposed to be revenue certificates payable solely out of the net revenue of the parking meters. However, in writing the May 24, 1949, opinion hereinabove cited, this writer made the observation that "while parking meters may be revenue-producing, they are not 'conveniences' within the meaning of C. 475, as amended."[1] The observation referred to was unnecessary to the conclusion of the opinion in which it appeared. This writer is now convinced that the construction suggested by that observation is too restricted and he is authorized to say that the quoted paragraph of the May 24, 1949, opinion appearing in footntote (1) is withdrawn from that opinion.

As will be observed from that portion of M. S. Section 475.52, Subd. 1, quoted in the first paragraph hereof, bonds or obligations are authorized to be issued "for **any utility** or **other public convenience** from which a revenue is or may be derived." While this language is found in the purpose clause of the public indebtedness code, it nevertheless clearly appears therefrom that the legislature recognized that there are, or may be, several types of "public conveniences" from which revenue is or may be derived other than public conveniences embracing the traditional concept of a utility. And, it is fair to assume that in using the phrase "revenue-producing conveniences" in Section 475.58, Subd. 1 (4) above quoted, the legislature intended to mean and include all public conveniences from which revenue is or may be derived, whether the public convenience involved embraced the concept of the traditional utility or not. Accordingly, I am of the view that the phrase "revenue-producing conveniences" as used in Section 475.58, Subd. 1 (4), has no less restricted meaning than the phrase "any utility or other public convenience" appearing in Section 475.52, Subd. 1. This construction is implicit in the opinions of the Attorney General, March 20, 1950, May 15, 1950, August 2, 1951, file 218-R, and July 25, 1950, file 234-B.

In the situations considered in two of the three opinions last cited the proceeds of the obligations proposed to be issued were intended to be used directly for the acquisition or for the betterment of the revenue-producing

[1]The observation above quoted was contained in that paragraph of the May 24, 1949, opinion reading as follows: "While parking meters may be revenue-producing, they are not 'conveniences' within the meaning of C. 475, as amended. I believe that the phrase 'revenue-producing conveniences' as used in C. 475 means and refers to such established utilities and facilities as a public water works system, public lighting, heating, or power systems, or any combination thereof, from which a revenue is derived."

convenience involved, whereas here the proceeds of the obligations are intended to be used not directly for the benefit or in connection with the revenue-producing convenience involved, but for a different purpose. This difference, however, I do not consider to be controlling. The statute does not require, in order to come within the exception of Section 475.58, Subd. 1 (4), that the proceeds of the obligations payable wholly from the income of revenue-producing conveniences must be used directly in connection with the acquisition, expansion or betterment of the revenue-producing convenience from which the certificates are to be wholly payable. If the revenue warrants are payable wholly from the income of the revenue-producing convenience, they are within the exception involved. The use of the net revenue of parking meters for a street lighting system is a proper one.

In **McQuillin Municipal Corporations**, 3d Ed., Vol. 9, Section 26.168, we find this general statement:

> " * * * Excess revenue from parking meters may be expended to maintain and improve streets and highways, including streets on which the meters are not located. Or the excess revenue may be used to acquire, construct, improve, maintain and manage parking areas."

The use of the net revenue from parking meters for improving the streets by lighting the same is a legitimate use of the net revenue from parking meters. Cf. **Hendricks v. City of Minneapolis**, 207 Minn. 151, 290 N. W. 428.

In this view I am of the opinion that parking meters constitute a species of "revenue-producing conveniences" within the meaning of Section 475.58, Subd. 1 (4).

We have considered the provisions of Section 79 of your city charter authorizing the issuance of bonds of the type therein specified subject to the limitations therein stated. Revenue certificates payable solely out of the revenues of a revenue-producing convenience are not within the scope of that section, but neither that section nor any other section of your home rule charter to which our attention has been directed forbids the issuance by the city of revenue bonds of the type here involved.

That a municipality in this state may issue revenue certificates payable solely out of the revenues of a revenue-producing public convenience admits of no doubt. See **Otter Tail Power Company v. Village of Elbow Lake**, 234 Minn. 419, at p. 429, 49 N. W. (2d) 197, and cases therein cited.

Since revenue certificates of the type here considered are not within the scope of Section 79 of your charter, nor their issuance forbidden thereby, we are of the view that the limitation of Section 79 of your charter to the effect that no bonds shall be issued unless the issuance thereof is authorized by resolution or ordinance passed by a majority vote of all members of the council and approved by the voters is inapplicable to these revenue certificates payable solely out of the net revenue of the parking meters.

Accordingly, if the proposed revenue certificates are to be payable solely out of the revenues of the parking meters, they may be issued by the council without submitting the proposition for the issuance thereof to the electors.

LOWELL J. GRADY,
Assistant Attorney General.

Eveleth City Attorney. 59-A-53
October 3, 1952. 59-A-7

96

Bond Issue—Road maintenance equipment—Town—Notice of sale must be made in the two newspapers specified in M. S. 1949, Section 475.60—Excess presently in bond fund resulting from levy for road and bridge bonds issued in 1946 under M. S. A. 475.26 cannot now be used for purchase of road maintenance equipment.

Facts

"The Town Board has been authorized by the voters of the Township to issue bonds and borrow money for the purpose of purchasing equipment for road maintenance."

You refer to M. S. 1949, Section 475.60, dealing with the manner of sale of bonds issued under the Public Indebtedness Code. The last cited section, in its parts pertinent to your inquiry, provides that "all obligations shall be sold at public sale after notice given at least ten days in advance by publication in a legal newspaper having general circulation in the municipality and ten days in advance by publication in a daily or weekly periodical, published in a Minnesota city of the first class, which circulates throughout the state and furnishes financial news as a part of its service."

Question

"Whether the word 'and' indicates an alternative or choice or whether it indicates that publication must be made in the two newspapers."

Opinion

The publication must be made in the two newspapers specified in the statute.

The statute is clear. It is not ambiguous. The legislative intention is manifest. In these circumstances, there is neither necessity nor justification for construing the word "and" to mean "or." See **State v. Kelly**, 218 Minn. 247, at 266, 15 N. W. 2d 554.

Additional Facts

"In the year 1946, Cannon Falls Township voted $41,000.00 road and bridge bonds which were issued and made payable at the rate of $5,000.00 each year beginning in 1949. The bonds were issued without option of prior payment. Taxes have been levied to retire these bonds and the result has been that more money has come in than has been actually necessary for the required payments. This has resulted in a cash balance in their bond fund.

"As above indicated, the Township has now voted to issue bonds for the purchase of road equipment and I am wondering whether or not there is any way in which the Township can use the money in the present bond fund for the purchase of this road equipment. I have in mind the question of whether or not the Township could issue bonds for the purchase of the road equipment in accordance with the authority given by the electors and place such road equipment bonds in the other bond fund and take out cash from that fund."

Question

May the township "use the money in the present bond fund for the purchase of this road equipment?"

Opinion

The answer is "No."

The tax levy to provide the funds for the payment of the principal and interest of the $41,000 issue of bonds involved was made under M. S. A. 475.26[1]. That statute provided that the governing body of any municipality issuing obligations of the kind here involved must, before the issuance thereof, "levy for each year, until the principal and interest are paid in full, a direct annual tax in an amount not less than five per cent in excess of the sum required to pay the principal and interest thereof, when and as such principal and interest mature." That statute further provided for the certification of such levy by the recording officer of the municipality involved to the auditor of the county in which the municipality was located. The statute then specifically provided:

" * * * The amount of funds so certified shall be set aside by the governing body and used for no other purpose than for the payment of the principal and interest of such obligation."

The purchasers of the obligations issued by the township in 1946 have a right to rely upon full compliance of this specific requirement of the law on the part of the officials of the issuing municipality.

LOWELL J. GRADY,
Assistant Attorney General.

Attorney for Town of Cannon Falls.
March 2, 1951. 43-B-4

[1]See comparable provision in existing statute, M. S. 1949, Section 475.61.

97

Bond issue—Village hall—(1) Where authorized bonds for addition to and betterment of village hall, council could not construct new building on separate site without approval of electorate. (2) If question is submitted asking for approval of erecting new building in lieu of addition to present hall and same is defeated, council may still proceed with previous authorization.

Facts

The Village of Richfield now has a building known as the village hall, used for administrative offices, and attached to the building and forming a wing on the rear of the building is a garage used for storage of village equipment.

Additional administrative offices are needed. In August, 1951, preliminary plans were prepared which provided for adding another story to the garage portion and for some changes in the existing office arrangement. At a village election held in September, 1951, the voters affirmatively approved the following question:

> "Shall the Village of Richfield borrow money and issue the negotiable coupon bonds of the Village in the amount of not to exceed $50,000.00 for the purpose of providing money for the addition to and betterment of the village hall of this village?"

Prior to the election, village officials issued public statements and spoke at public meetings explaining the proposal to be voted upon in terms of adding the new story to the existing structure. Bids were received. No action was taken in respect to awarding the contracts. The bonds have been sold and delivered. The question now arises as to whether the village might build a new structure more economically than a second story on the garage portion of the existing structure, and the council is further considering the advisability of building an entirely new wing attached to the present village hall.

Questions

"1. In view of the form of the question voted upon and the foregoing facts, could the village council use the proceeds from the sale of bonds for the building and equipping of an entirely new structure **separate** from the present village hall without first holding an election and obtaining a vote of authorization pursuant to M. S. A. 475.65?

"2. Similarly, could the village council use the bond proceeds to build an entirely new wing on the present village hall without first holding an election and getting voter approval?

"3. If the answer to either of the foregoing questions is in the negative, and if an election were held, but the authority not granted by the electorate, could the village council then expend such proceeds for addition to the present structure in the manner originally proposed?"

Opinion

Question 1 is answered in the negative. The voters authorized an addition to and betterment of the present village hall. The granting of that authority would not authorize the building of an entirely new and separate structure on a different site.

Question 2. This question is answered in the affirmative. The adding of a new wing, as proposed, would constitute an addition to the present village hall and fall within the authorization which the voters have granted.

Question 3. We believe the problem raised by this question can be met by properly forming the question that would be submitted to the voters in the event another election is held. In view of our answers to questions 1 and 2, the additional election would be necessary only if the council desires to proceed with the erection of the new and separate structure. In such event, we would suggest that the question submitted to the voters be stated in the following form:

> "Shall the village council of Richfield be authorized to use the proceeds of $50,000 received from the issuance of bonds authorized at the village election on .... September, 1951, for the purpose of constructing a new structure in the same vicinity as the present village hall, in lieu of using the same for the purpose of providing an addition to and betterment of the village hall, which purpose was authorized at the election held September ...., 1951?"

We believe that, if there is submitted to the voters a question in this general form, then the voters will be asked whether or not the council will be permitted to build the structure in lieu of the original purpose, and that if a negative vote is cast the council would still have the authority to proceed under the original authorization.

DONALD C. ROGERS,
Assistant Attorney General.

Richfield Village Attorney.
January 7, 1952. 44-B-2

98

Certificates of indebtedness—Jails—Construction—Sheriff and jailer's residence—Certain counties to issue and sell certificates of indebtedness not exceeding $200,000 for the purpose of constructing and equipping a county jail construed so as to not include apartment for personal use of jailer or sheriff—Laws 1951, Ch. 256.

Facts

Itasca County, pursuant to Laws 1951, Chapter 256, has issued and sold certificates of indebtedness in the sum of $200,000. The plans for the county jail to be financed by such certificates provide for a jailer's or sheriff's

apartment on the main floor. You make reference to M. S. 1949, Section 641.01, which authorizes the county board to provide a residence for the sheriff.

Question

May the proceeds from the certificates of indebtedness be used for the construction of a county jail which includes an apartment for the jailer or sheriff?

Opinion

We shall assume that Laws 1951, C. 256, is applicable to your county, and that the certificates of indebtedness in the sum of $200,000 have been issued in accord with the provisions of this act, which in part read as follows:

> "Section 1. Any county in this state having more than 90 full and fractional congressional townships, and having an assessed valuation of more than $12,000,000, and having less than 50,000 inhabitants, may issue and sell certificates of indebtedness for the purpose of constructing and equipping a county jail. The amount of the certificates of indebtedness issued in any county shall not exceed $200,000. The certificates of indebtedness shall not be included in computing the net indebtedness of any county."

Section 641.01 has been held to be a mere grant of power to the county board to provide a residence for the sheriff adjoining and connected with the jail, but imposing no mandatory duty to do so. Opinion of Attorney General dated July 8, 1925, File 390-A-17. The salary of the sheriff is fixed by law. The reasonable value of the rental of premises which may be furnished by the county for the use of the sheriff is not a part of his salary. Opinion No. 213, 1942 Report, file 390-A-17.

The legislature, by the enactment of Chapter 256, supra, has provided a special method of financing the cost of the construction and equipping of a county jail by issuing and selling certificates of indebtedness which are not to be included in computing the net indebtedness of the county (Section 1). This act also provides that such certificates shall be payable solely out of the county building fund established under M. S. Section 373.25 (Section 2), and Section 4 of this act provides for an annual tax levy sufficient to pay the principal and the interest accruing on such certificates in each year.

In the event that the county should finance the cost of the construction of a county jail, and also a residence for the use of the sheriff, adjoining and connecting with such jail, as authorized by Section 641.01, supra, and issue bonds to finance the cost thereof, then the provisions of M. S. Chapter 475, and amendatory acts, would control.

It will be observed that the title to said Chapter 256 reads in part:

"An Act relating to the construction and equipping of a county jail" and that same language appears in Section 1 of the act. Thus we find from the title and the body of the act that the use of the proceeds from the

sale of the certificates of indebtedness is restricted to "the construction and equipping of a county jail." No provision is made therein authorizing the use of the proceeds of such certificates for the purpose of providing or financing an apartment in such county jail for the personal convenience and accommodation of the jailer or members of his family.

We have not been advised as to the nature of the apartment to be incorporated in the county jail for the use of the jailer or the sheriff, which you state has been provided for in the proposed plans for the county jail. If it is an apartment in the accepted meaning and understanding of that term, it would be for the personal convenience of either the jailer or sheriff and members of their family, similar to the residence of the sheriff, and in our opinion would not be within the purview of said Chapter 256. If the legislature had intended to permit the county to make provision in the county jail, in the act under consideration, for an apartment to be used for the personal convenience of the officer in charge of the county jail, and his family, it could have done so in plain language as it did in Section 641.01.

We believe that under Chapter 256, supra, it would be permissible to provide the necessary room and facilities within the county jail for the use of the jailer or the sheriff to transact the public business of their respective offices, and such an arrangement would be incidental to the county jail. Such a room or facility would provide the means for safekeeping the records and the files which are kept by the sheriff in the performance of his official business.

We have not found any authority which holds that an apartment for the personal use of the person having charge of a county jail, and the members of his family, constitutes a part of the county jail.

The court in **U. S. v. Greenwald,** 64 Fed. 6-8, said, in substance, that a county jail is a place of incarceration for the punishment of minor offenses and the custody of transient prisoners where the ignominy of confinement is devoid of the characteristics which an imprisonment in a penitentiary carries with it and which is regarded as a part of the punishment, which obviously does not characterize nor is it descriptive of an apartment or the residence of either a jailer or a sheriff.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Itasca County Attorney.
August 22, 1951. 127-B

99

Claims—Compromise—Ditch contracts—County commissioners—Authorized to compromise claims arising out of contracts for repairing county ditch.

Facts

The county board duly advertised for bids for repairing a county ditch. A contract was made with the lowest bidder, the amount of such contract being $12,913.00, which was premised upon a unit price, including 3,222 trees at $2.00 for each tree, according to the specifications which in part provide:

> "Bids will be received on the basis of cubic yards of excavation, and unit price per tree or, equipment hour, or flat rate per station. The County Board to determine which form of bid to accept. If let by the station, all expense of moving to and from the job, building roads, all cleaning, grubbing, and all other incidental expense shall be included in the unit price per station bid.
>
> "The number of cubic yards shall be as shown in the Engineers' report unless the length is changed, in which case a proportionate increase will be estimated.
>
> "Tree removal will be paid for on the basis of a four-inch tree, or larger, measured four feet above the ground. The total number of trees shown on the estimate shall be the final number unless the length of the work is changed, when the increase will be added to the final estimate."

The report of the engineer in part provides:

> "The following is an estimate of the probable cost of repair:

Estimated cu. yards of excavation—32,771 at 15c	$ 4,915.65
Estimated trees—3,222 at $1.50	4,833.00
Leveling spoil banks, estimated—32,771 c. y. at 10c	3,277.10
Total	$13,025.75"

During the performance of the contract it was discovered that the engineer had determined in 1947 by count that there were 3,222 trees, and in 1950 he made another count and found that there were 5,604 trees. Due to an error in the specifications, advertisement for bids, and the contract, the tree count of 1947 was used instead of the tree count of 1950. You have stated that "In making the bid we understand that the contractor relied upon the 3,222 trees as being the 1950 count and that was the understanding of the contractor and the engineer when the contract was executed. The County Board would now like to compromise the dispute which has arisen by paying an additional sum of $1,500.00 to the contractor."

Question

May the county board compromise the dispute which has arisen by the payment of an additional sum of $1,500.00 to the contractor?

Opinion

We shall assume that all the requirements of law were observed when the contract for the repair of the county ditch was made and entered into by the county. We shall consider only the question as written.

The object and purpose of plans and specifications are stated in McQuillin Municipal Corporations, 3rd Edition, Section 37.68, as follows:

> "The plans and specifications are for the purpose of enabling bidders (when the work is to be let on competitive bidding), to make intelligent bids, to insure competition by making the requirements of the proposed improvement definite and certain, to prevent favoritism and corruption in letting the work, and to give the owners of property who must pay for the improvement notice that they may protest, if they desire to do so; accordingly, the plans and specifications must contain all the information necessary to enable prospective bidders to prepare their bids, by setting forth with sufficient detail the nature of the work to be done, and of the material to be furnished."

Upon the facts submitted it appears that the engineer made an error by using his 1947, instead of his 1950, tree count. This error, according to his figures, results in the difference between 5,604 and 3,222, or 2,382 trees which, upon the unit price of $2.00, amounts to $4,764.00. Obviously, the contractor in bidding used the tree count of 3,222, according to the specifications which were erroneous. His bid was upon a unit price of $2.00 per tree. The contract was made and entered into upon a unit price according to the engineer's estimate, as above quoted.

We are unable to give a definite meaning or interpretation to that part of the contract which reads as follows:

> "The total number of trees shown on the estimate shall be the final number unless the length of the work is changed, when the increase will be added to the final estimate."

Does this mean that if the length of the ditch excavation is changed, or if the length of the work required for tree removal is changed in excess of these units, according to the specifications and the bid, that such excess will be added to the final estimate? This language is susceptible of different interpretation and construction, and considering the contract in its entirety, together with the error made by the engineer as hereinbefore stated, the claim of the contractor for additional payment is a matter for the consideration of the county board. The county board is the business and managing agent of the county. Broad powers are granted to the board to administer the business of the county. M. S. 1949, Section 375.18. The county board, in the exercise of good faith and honest judgment, may compromise and settle the claim of the contractor for payment in excess of the amount as provided for in the contract. See **County of Mahnomen v. Klyver**, 180 Minn. 423, 230 N. W. 891; **In re Appeal of County Attorney of Rice County**, 175 Minn. 298, 220 N. W. 946; **Oakman v. City of Eveleth**, 163 Minn. 100, 203 N. W. 514.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Chippewa County Attorney.
August 20, 1951. 107-B-5

100

Funds—Depositories—For public money, qualification by bond or depositor's security, fiscal agents named to pay public obligations not authorized by law to perform duties by treasurer of state or governmental subdivisions.

Facts

"The various counties, cities, villages, boroughs, towns, and school districts of the State of Minnesota, from time to time, avail themselves of the services of a Fiscal Agent to handle the payments for them, of principal and interest on their indebtedness as it becomes due. The common practice is for the counties or municipalities to make a deposit with the Fiscal Agent in advance of the maturity date of the indebtedness. Bonds and interest coupons presented to the Fiscal Agent by the holders are paid from the moneys so deposited."

Question

"Does M. S. A. Section 118.01, or any other law require that public moneys, deposited with a Fiscal Agent for the purpose of meeting principal and interest of indebtedness as it matures, be secured by a depository's corporate or surety bond or by collateral for the amount of such deposit as exceeds the insurance afforded by the Federal Deposit Insurance Corporation?"

Opinion

M. S. 1949, 118.10, exempts certain depositories of the state, counties, villages, towns, school districts and cities from furnishing depository bonds for deposits in a sum less than the amount for which the depository is insured in respect to each deposit. This opinion applies only to the sum deposited in excess of such insurance.

The treasurers of the state, counties, villages, towns, and school districts are disbursing agents of the state and for such governmental subdivisions respectively. The statutes define their duties as such. M. S. A. 7.01, 385.07, 412.141, 367.16, 125.28, and see laws and charters relating to cities.

In each case where it is claimed that a fiscal agent has the powers of the treasurer of the state or any of the government subdivisions mentioned, the law showing such authority must be consulted. I know of no such law. But where there is law giving authority to another to perform a treasurer's duties, the person or agency so authorized cannot lawfully become a depository of public money, except upon qualifying by furnishing the depository

bond or security which the law requires for depositories. M. S. 1949, 118.01, 118.05. And as in Section 118.01 required, such depository must be in this state.

CHARLES E. HOUSTON,
Assistant Attorney General.

Public Examiner.
June 9, 1952. 140-F

101

Funds—Distribution—Fees—Trailer coach parks—The words "county-wide relief within the county" as used in L. 1951, C. 428, Section 4, subd. 2, relating to the distribution of the $1.50 monthly fee collected from each occupied trailer coach refers to county operating under the county system of poor relief.

Facts

"The Village of Crystal has tendered to the county auditor the sum of $14.75 representing the amount allocated to the County of Hennepin under provisions of Laws 1951, Ch. 428, Sec. 4, Subd. 2, coded as M. S. 1949, Ch. 327, Sec. 327.17, Subd. 2, which provides:

> 'The monthly fee of $1.50 for each occupied trailer coach situated upon a licensed trailer coach park shall be paid by the licensee to the treasurer of the municipality, or county where there is no municipality, wherein such licensed trailer coach park is situated. Such monthly fee is hereby allocated and required to be paid by the municipal treasurer as follows:
>
> 'For each $1.50 monthly fee collected by the municipal treasurer, seventy-five cents shall be paid to the local public school district or school districts attended by any children from said trailer coach park, and if said children attend more than one local public school district then said seventy-five cents shall be prorated between said districts in direct ratio to the number of children in attendance at each school district, and if there are no children attending any public school then said fee shall be paid to the school district wherein such licensed trailer coach park is located, fifty cents to be retained by the municipality and twenty-five cents to be paid to the county treasurer if there is county wide relief within the county, otherwise the twenty-five cents will be retained by the municipality. If there is no municipality, both the fifty cents and the twenty-five cents shall be retained by the county treasurer.'

"The county auditor questions the right of the County of Hennepin to accept this payment under the phraseology of the above law. The allocation to Hennepin County is based upon the premise that there is

county wide relief in operation within Hennepin County as provided by said Section 4, Subd. 2. While there is county wide relief in operation within Hennepin County under the town system, the county as a political subdivision does not levy, expend or administer any poor relief under the poor laws as distinguished from aid or relief administered by the Hennepin County Welfare Board under the provisions of [M. S. 1949, C. 393] relating to welfare boards."

In connection with the foregoing, you ask the following

Question

Do the words "county-wide relief within the county," as used in the second paragraph of L. 1951, C. 428, Section 4, Subd. 2, refer to counties operating under the county system of administering poor relief or do they also refer to counties in which some system of county-wide relief is in operation under which relief may be granted throughout the county irrespective of the political subdivisions which grant such relief?

Opinion

There exists in every county of Minnesota some system for administering poor relief on a county-wide basis. M. S. 1949, Section 261.06 reads in part as follows:

> "The system of caring for the poor in counties in which they are chargeable upon the county shall be known as the county system. That system in which they are chargeable upon the towns, cities, and villages thereof shall be known as the town system. * * * "

The county system of administering poor relief is described in M. S. 1949, C. 262; the town system for administering poor relief is described in M. S. 1949, C. 263.

By L. 1951, C. 428, Section 4, there is imposed upon each occupied trailer coach covered by the act a monthly fee of $1.50 per month to be distributed in conformity with the second paragraph of subd. 2 of said Section 4. As applicable to the Village of Crystal, the village treasurer distributes the $1.50 collected as follows:

(a) Seventy-five cents is paid to the local school district or school districts attended by any children from the trailer coach park, and if the children attend more than one local public school district, the seventy-five cents is prorated between the districts in direct ratio to the number of children in attendance in each school district.

(b) If there are no children attending any public school, the seventy-five cents is paid to the school district wherein the licensed trailer coach park is located.

(c) Fifty cents is retained by the village.

(d) If there is "county-wide relief within the county," twenty-five cents is paid to the county treasurer, otherwise the twenty-five cents is also retained by the village.

By the statutory provision under consideration, the legislature intended that under some circumstances the municipality would receive the seventy-five cents provided for under (c) and (d) above and under other circumstances, the county would receive the twenty-five cents provided for under (d). If the words "county-wide relief within the county" were construed to apply to a county operating under the town system of poor relief as well as to a county operating under the county system of poor relief, a county would never receive the twenty-five cents referred to in (d) where a trailer coach park was located in a municipality. We do not believe that was the intention of the legislature. See M. S. 1949, Section 645.16.

It is therefore our opinion that the words "county-wide relief within the county" were used in the statutory provision under consideration as referring to a county operating under the county system of poor relief. Hennepin County not being such a county, it is our opinion that the twenty-five cents referred to in (d) above should be retained by the Village of Crystal and not paid to Hennepin County. We concur in your interpretation of the law as set forth in your letter of April 14, 1952.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Hennepin County Attorney.
April 16, 1952. 238-i

102

Funds — Expenditure — No authority to expend public funds for Christmas street decorations—M. S. 1949, Sections 465.56, 465.57.

Facts

"A group of the business men of Alexandria are propaganding the Council and proposing that the City take over the expense of the Christmas decorations of the street during the Christmas season, which is from approximately right after Thanksgiving until through Christmas. The cost thereof would be in the neighborhood of between $400 and $500. Heretofore, the Board of Public Works, our utility commission, has assisted in the hanging of them because of their having the extension ladders; and of course, the City has furnished the current for the colored lights. Now they want the City to take over the entire project of the street decorations whereby the City will purchase the streamers of colored lights and that the entire cost of the same be borne by the City.

"We, of course, are operating under a Home Rule Charter. There is nothing under the Charter that would authorize that, save and except the general provision of providing proper and adequate lighting for the streets."

Question

May "the City of Alexandria under any provision of the City Charter or provision of the State Law assume out of the general fund the expense of the Christmas decorations during the holiday season"?

Opinion

Cities operating under home rule charters have such powers only as are expressly conferred either by statute or by charter provision or are necessarily implied in those which are expressly conferred. They have no inherent power. 4 Dunn. Minn. Dig., Section 6684 and cases there cited.

The City Council of the City of Alexandria has no legal authority to expend public funds for the purposes here involved unless such authority is conferred either by the charter or by an act of the legislature.

The question here involved is one of corporate power. Two reasons suggest themselves to me why a negative answer to your specific inquiry is compelled:

1. It is elementary that public funds can only be expended for public purposes. **Castner v. City of Minneapolis**, 92 Minn. 84, 99 N. W. 361. If the primary object of the appropriation of public funds is to promote some private end, the expenditure is illegal, although it may incidentally serve some public purpose also. **Burns v. Essling**, 156 Minn. 171, 194 N. W. 404. If the principal object of the project proposed to be financed by public funds is a commercial one, designed to promote the trade and business interests of the municipality, and the benefit to the inhabitants is merely indirect and incidental, then the proposed expenditure is illegal. See **Manning v. City of Devils Lake**, 13 N. D. 47, 99 N. W. 51, 65 L. R. A. 187, 112 Am. St. Rep. 652.

2. Assuming, without indicating, that the project here considered involves municipal advertising and, as such, constitutes a public purpose for which the taxing power may be exercised, yet the City Council of the City of Alexandria is without authority to expend public funds for that public purpose unless the authority so to do is granted, either expressly or by necessary implication, by a statutory enactment or by a provision of its home rule charter See McQuillin, Municipal Corporations (3d Ed.), Vol. 16, Section 44.40. We concur in your view that the general provision of the city charter authorizing the council to provide for lighting the city is not sufficient charter authority for the expenditure of public funds for the purposes here considered. We have not been able to find, nor have we been cited to, any provision in the charter of the City of Alexandria which would furnish the necessary authority for the expenditure of the public funds for the purposes here involved. Nor have we found or been cited to any statute of the state which authorizes the expenditure of public funds for the type of municipal advertising that is involved in your question.

M. S. 465.56 authorizes the governing body of any city of the fourth class annually to levy a tax within the limits therein specified "for the purpose of advertising the * * * city and its resources and advantages."

However, the authority conferred by 465.56 may be exercised only after authority so to do has been granted by the electors of the city voting on the question as provided in 465.57. We gather from the tenor of your inquiry that the electors of the City of Alexandria have not authorized the governing body of the city to levy the tax prescribed by 465.56.

Accordingly, we concur in your conclusion and answer your specific question in the negative. See also McQuillin, Municipal Corporations (3d Ed.), Vol. 15, Section 39.21, pp. 54-58.

LOWELL J. GRADY,
Assistant Attorney General.

Alexandria City Attorney.
December 11, 1951. 59-A-22

103

Funds — Investment — Transfer — Funds earned by operation of municipal hospital may be transferred to general fund—M. S. 412.221, subd. 16; 412.241; 471.56; 475.66.

Facts

"The Village of Madelia operates under the General Village Law and owns the Madelia Hospital. A special Hospital Board has been appointed to operate the hospital in accordance with an Ordinance adopted by the Village, and with all powers authorized by statute for a Hospital Board. The hospital account now has a large reserve, and it is desired to invest $10,000.00 in bank C.D.'s."

Questions

"1. May the Village Council invest this reserve in a C.D. at the local bank with a maturity of twelve months?

"2. May the Hospital Board or the Village Council place a restriction upon this investment to provide that the money must be used by the Village of Madelia for hospital purposes only?

"3. May the reserve in the hospital account be transferred by the Village Council to the General Fund of the Village and used for general village purposes?

"4. If the answer to the preceding question is that such a transfer may be made, may the Village Council agree with the Hospital Board that this money will be replaced in the Hospital fund of the Village together with an amount that would represent interest on the money that was transferred to the Village Account?"

Opinion

We consider generally applicable to all of your questions the following quoted portions of the village code:

M. S. 412.221, subd. 16, so far as it pertains to your question, provides as follows:

> "The village council shall have power to provide hospitals. The council of any village operating a municipal hospital may by ordinance establish a hospital board with such powers and duties of hospital **management and operation** as the council confers upon it; * * * ."

M. S. 412.241, dealing with the control of the village council over the financial affairs of the village, provides:

> "The council shall have full authority over the financial affairs of the village, and shall provide for the collection of all revenues and other assets, the auditing and settlement of accounts, and the safekeeping and disbursement of public moneys."

I fail to find any provision in the village code specifically providing for the investment of village funds not presently needed for village purposes. However, M. S. 471.56 provides, so far as here material:

> "Any municipal funds, not presently needed for other purposes, may be invested in any obligations in which sinking funds are now authorized to be invested pursuant to Section 475.30, including appreciation bonds issued by the United States of America on a discount basis.
>
> "The term 'municipal funds' as used herein shall include all general, special, permanent, trust, and other funds, regardless of source or purpose, held or administered by any county, city, village or borough, or by any officer or agency thereof, in the State of Minnesota."

Section 475.30 has been renumbered as Section 475.66. It is amended by L. 1951, C. 422, Section 7. M. S. 475.66, as so amended, provides that any surplus in any sinking fund may be invested, under the direction of the governing body, in any general obligation of the United States, the State of Minnesota, or any of its municipalities.

While Section 471.56 is supplemental to any other statutory provision relating to the investment of municipal funds, I fail to find any other statutory provision which authorizes the investment of surplus village funds in the manner embraced within your question. Accordingly, your first question is answered in the negative.

If the surplus is invested pursuant to Section 471.56 and the village later sells the obligations purchased pursuant thereto, the "money received from such sale, and the interest and profits or loss on such investment shall be credited or charged, as the case may be, to the fund from which the investment was made." See 471.56. That renders further answer to your second question unnecessary.

Your third question is answered in the affirmative.

Your fourth question is answered in the negative. The funds involved are village funds. I know of no authority on the part of the village council to agree that the village will pay interest for the use of funds of the village.

LOWELL J. GRADY,
Assistant Attorney General.

Madelia Village Attorney. 476-A-15
February 6, 1952. 1001-H

104

Funds—Legal services—Based upon stated facts, town board authorized to pay for legal services incurred by town board members sued for alleged trespass in widening of township road—Payment may be made from general fund of town—City of Moorhead v. T. L. Murphy, 94 Minn. 123, 102 N. W. 219; **State ex rel. Feist v. Jesse Foot, et al,** 151 Minn. 130, 132, 133, 186 N. W. 230. McQ. Mun. Corp., 3d ed, Section 12.137, p. 488 **(Hotchkiss v. Plunkett,** 60 Conn. 230, 233-234, 22 Atl. 535.)

Facts

"Two members of the Town Board, including the Town Chairman, were individually sued for alleged trespass in the widening of a Township road. These two men retained counsel, and the action was successfully disposed of without cost other than the employment of a surveyor and an attorney. The Township desires to pay the attorney's fees incurred by its members if it may legally do so as the litigation arose out of official acts by the Board members."

Question

"Would it be legal for the Township to pay the attorney's fees incurred by these men in the defense of the action, and if so, what funds should said fees be paid from?"

Opinion

Based upon the facts you submit, it is our opinion that it would be legal for the township to pay the referred to fees.

The Minnesota courts have held that absent a prohibitive provision a municipality may pay expenses of this nature. **City of Moorhead v. T. L. Murphy,** 94 Minn. 123, 102 N. W. 219; **State ex rel. Feist v. Jesse Foot, et al,** 151 Minn. 130, 132, 133, 186 N. W. 230.

Each case must be determined upon its individual facts. The general rule is stated in McQuillin's Mun. Corp., 3d ed, Section 12.137, at p. 488, which rule is cited from Hotchkiss v. Plunkett, 60 Conn. 230, 233-234, 22 Atl. 535.

> " * * * It has been said that in order to justify the expenditure of money by a municipal corporation in the indemnity of one or any of its officers for a loss incurred in the discharge of their official duty, three things must appear. First, the officer must have been acting in a matter in which the corporation had an interest. Second, he must have been acting in discharge of a duty imposed or authorized by law.
>
> And third, he must have acted in good faith. * * * "

It is our opinion that the fact situation you refer to falls within the requirements of the stated rule.

It is our further opinion that this expenditure may be properly paid from the general funds of the town.

DONALD C. ROGERS,
Assistant Attorney General.

Attorney for Town Board of Watertown Township.
April 30, 1951. 442-A-1

105

Funds—Mayor's contingent—Expenditures—Not subject to limitations contained in Sections 84 and 118 of said act, and may be used for the purposes authorized by Sections 66 and 149 thereof, which last mentioned sections are cumulative and not repugnant nor restrictive—Laws 1895, Ch. 8.

Facts

Cloquet is a city of the fourth class organized under Laws 1895, C. 8. Sections 66 and 149 thereof relate to the mayor's contingent fund and provide the purposes for which expenditures may be made from such fund. It appears that expenditures have been made from such contingent fund to reimburse expenses incurred in traveling to places outside of the city and within the state upon official business and matters concerning the business of the city.

Questions

1. May the mayor's contingent fund be used for purposes other than those specifically authorized by Laws 1895, C. 8, Section 66?

2. Are disbursements from the mayor's contingent fund subject to the limitations contained in Sections 84 and 118 of said act?

Opinion

1. You have referred to attorney general's opinions dated October 5 and October 11, 1933, File 61d, construing the sections of Laws 1895, C. 8 now under consideration. You have indicated your concurrence with the conclusions expressed in the opinions above referred to.

We have examined the conclusions stated in said attorney general's opinions and we are in accord with the conclusions therein stated.

We believe that expenditures may be made from the mayor's contingent fund for such public purposes as the mayor "may deem necessary in case of emergency to secure information and evidence of crime and arrest convicts and to relieve distress in the event of public calamity in this state," as expressly provided for by Section 66 of said act. In addition to the expenditures authorized by said section the mayor's contingent fund may be used for the purpose of advancing the interests of the city when the same is for a public purpose, subject, however, to the restrictions and limitations contained in Section 149 of said act.

It is our opinion that said Sections 66 and 149 should be construed as cumulative and not as being repugnant nor restrictive to each other.

Expenditures from said mayor's contingent fund must be for a public purpose and within the amount of money appropriated and available therefor. As bearing thereon, see **Mitchell v. City of St. Paul**, 114 Minn. 141, 130 N. W. 66.

2. In our opinion expenditures from the mayor's contingent fund as authorized by and subject to the limitations contained in said Sections 66 and 149 are not subject to the limitations contained in Sections 84 and 118 of said act. Whether or not a particular item of expense comes within the permissible expenditures authorized by said Sections 66 and 149 is a factual question, and it has been the consistent policy of this office not to pass upon a question of fact.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Cloquet City Attorney.
March 13, 1952. 61-D

106

Purchases—Conditional sales contract—Motor patrol—In the absence of statute a county is without authority to purchase a motor patrol under a conditional sales contract providing that title is reserved in the vendor until the full purchase price and the cost of collecting the same have been paid.

Facts

"A county having a population under 50,000, in need of a motor patrol, called for bids. The advertisement for bids published by the county stated that the county should be allowed to pay for the equipment in three equal annual instalments, and that the county would pay interest on the deferred instalments, but that the rate of interest would be a factor in the bidding.

"The lowest bidder was selected, and the county entered into a contract with the vendor which permitted payment of the purchase price in instalments as proposed. This contract contained the following clause:

> 'That the title thereto shall not pass from it (vendor presumed) to any other person, firm, or corporation until the full purchase price, according to the terms set forth on the reverse side hereof, and cost of collection, if any, has been paid to it'."

Questions

"(1) Assuming this county had not sufficient money on hand in the fund from which the purchase could be made, or from taxes already levied and in the process of collection, to pay the purchase price in full, could the county, in your opinion, have legally entered into a contract under the terms described?

"(2) If the county did have sufficient money on hand or there would be sufficient money available from taxes already levied and in the process of collection, would your answer be the same?"

Opinion

In the absence of statutory authority therefor, this office has held that a county may not enter into a conditional sale or other instalment contract for the purchase of road machinery to be used in carrying on its governmental functions. See opinion No. 237, 1934 report.

M. S. 1949, Section 412.221, subd. 2, authorizes a village to purchase property through a conditional sales contract but we are unaware of any similar statutory provision relating to a county.

Municipalities have the power to purchase equipment and to finance it by revenue derived from its use. In the case of **Williams v. Village of Kenyon,** 187 Minn. 161, 244 N. W. 558, the court upheld the conditional sales contract entered into by a village for the purpose of purchasing an electric light and power plant. However, it was there pointed out that the purchase of the equipment by the village was made by it in its proprietary capacity and all of the instalments of the purchase price were to be paid out of the net profits resulting in the operation of the plant and that the contract did not obligate the village to pay any part of the purchase price out of the money raised by taxation. See also **Hendricks v. City of Minneapolis,** 207 Minn. 151, 290 N. W. 428.

The purchase of a motor patrol does not, in our opinion, come within the purview of the foregoing cases. It is the general rule that a county in purchasing personal property must secure title. Under the provisions of the contract set forth in your letter, the county may never acquire title to the motor patrol. In the absence of some express provision authorizing the county to purchase property in the manner indicated in your letter, we are of the opinion that the county has no such authority

Your first question is therefore answered in the negative. Our answer thereto would be no different under the facts set forth in your second question.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Public Examiner.
July 28, 1952. 125-A-40

107

Warrants — Issuing — Claims — County hospitals — County auditor has no authority to issue warrants of county in payment of claims incurred by hospital board appointed under Section 376.06 without the approval of such claims by the Board of County Commissioners.

Facts

"The County of Meeker is in the process of constructing a County Hospital and under Section 376.06 have appointed a board of five members to operate the same. It is the desire of the County Board to give as much power as possible under the statute to the Hospital Board so appointed. It is proposed that the Hospital Board be empowered to purchase and contract for all supplies, equipment, etc., at a cost of less than $1,000.00 and all items in excess of $1,000.00 to be purchased by the County Board after advertising for bids as provided by law. It is proposed that the Hospital Board pass on and approve all bills under the $1,000.00 limitation and that an abstract of all bills so allowed be presented to the County Board for filing with the County Auditor and that thereupon the said bills be paid by warrant of the County Auditor without approval of the County Board. It is contemplated that a monthly operating statement of the hospital will be furnished to the County Board."

Comment

"In the way of information it is considered impractical by both the County Board and Hospital Board that said bills under $1,000.00 be made subject to approval by the County Board."

Question

"May the County Auditor issue his warrants for the above purposes without the approval of said bills or accounts by the Board of County Commissioners?"

Opinion

The question is answered in the negative.

M. S. A. 384.13, in its parts here pertinent, provides:

"No claims against the county shall be paid **otherwise than upon allowance of the county board,** upon the warrant of the chairman thereof, attested by the county auditor, except [1] in those cases in which the precise amount is fixed by law, or [2] is authorized to be fixed by some other person, officer, or tribunal, in which cases the same shall be paid upon the warrant of the auditor, upon the proper certificate of the person, officer, or tribunal allowing the same."

This statute prescribes cases of two categories in which claims against the county may be paid by the auditor without allowance by the county board. These statutory categories are indicated by the numerals in brackets in the statute above quoted.

Unless the claims against the county involved in your inquiry fall within one of the two categories above indicated, the claims against the county incurred by the hospital board cannot be paid except upon allowance thereof by the county board.

The mere statement of category [1] demonstrates its inapplicability to the factual situation here considered.

The question then remains whether the claims against the county involved within your inquiry fall within the limits of category [2]. I think they do not.

M. S. 1949, Section 376.06, as amended by L. 1951, C. 326, authorizes the county board of any county having erected buildings for hospital purposes, as provided by statute, to operate the same as a county hospital and to provide for the management and operation thereof. The statute cited, in its pertinent parts, provides:

" * * * if the [county] board shall determine that it is in the interest of the public so to do, it may appoint a hospital board of not less than three, nor more than nine members, who shall serve without compensation, and who shall be resident freeholders of the county wherein such hospital is located, and may, subject to its supervision, commit the care, management, and operation of such hospital to such hospital board so created, and may provide for the organization of such hospital board, its duties and the duties of the members thereof, and such further regulation in reference thereto and to the management, operation, and control of such hospital as may be proper, necessary, or desirable, or it may lease and let unto a responsible hospital association such hospital grounds and buildings upon such terms as it may deem advisable."

Under the statute cited, what the county board may, subject to its supervision, commit to the hospital board is the **"care, management, and operation** of such hospital." In making that commitment to the hospital board, the county board may by proper regulation provide for "the management, operation, and control of such hospital as may be proper, necessary, or desirable." While the statute cited is broad in respect of its subject matter, it does not, either expressly or impliedly, authorize that claims against the county arising from the operation of the hospital may be fixed by the hospital board within the meaning of category [2] of 384.13, supra, nor is there anything in M. S. A. 376.06 which authorizes the board of county commissioners to delegate to a hospital board created under Section 376.06 the statutory duty of the county board to pass upon claims against the county under Section 384.13.

M. S. A. 376.31 is a statute dealing with county sanatoria. Among other things, that statute provides that all moneys collected or received for sanatorium purposes "shall be paid out in a manner provided by law for other county expenses **by the proper officers of the county or counties** upon the properly authenticated vouchers of the county sanatorium commission, signed by the president and the secretary thereof." The authority conferred by the statute last cited is of the type within the authority of category [2] of Section 384.13. If the legislature had intended that a county hospital board created under Section 376.06 should have the authority to disburse county funds without the allowance by the county board of the claims thereby paid, it could easily have so provided as it did in Section 376.31.

See also opinion of the Attorney General dated August 24, 1949 (1001h), a copy of which is herewith enclosed.

If the county auditor is to be authorized to issue county warrants for the purposes stated in your inquiry without the approval of the claims against the county by the board of county commissioners, that authority must be conferred by the legislature.

LOWELL J. GRADY,
Assistant Attorney General.

Meeker County Attorney.
July 25, 1951. 1001-B

108

Warrants — Issuing — In anticipation of tax collections — Construction of M. S. 1949, Sections 471.69 and 365.43. (Opinions heretofore rendered inconsistent herewith are hereby superseded.

Question

Opinion requested on the issuing of orders or warrants by subdivisions of government in anticipation of the collection of taxes and specifically information as to whether it is necessary to have a different ruling for counties than for towns and other municipalities with respect to the issuing of "tax anticipation instruments."

Opinion

It is assumed by the writer that by your use of the expression "tax anticipation instruments" in the question you have submitted you refer to so-called tax anticipation warrants or orders which are issued by towns, villages, school districts, and counties in anticipation of collection of taxes with which to pay such orders and not to certificates of indebtedness in anticipation of the collection of taxes as provided in such sections as Section 368.05, Section 412.261, or Section 412.471.

It is clear that our statutes contemplate the issuance of orders or warrants by a town, village, school district, or county in anticipation of the collection of taxes. In the case of towns, Section 367.19 provides that, if no money is on hand for the payment of an order when presented to the town treasurer, it is to be registered by him and paid in the order of registration, with interest thereon at the rate of not to exceed five per cent per annum from the date when presented. Money expended for village purposes is disbursed by an order drawn by the mayor and clerk on the village treasurer. Such orders shall likewise be paid in the order of their presentation to the village treasurer. If not then paid for want of funds, they shall, as provided in Section 412.271, bear interest from the date of presentation at the rate of five per cent or such lower rate as is fixed by the council prior to their issuance. County warrants or orders, signed by the chairman of the county board and attested by the county auditor, are drawn upon the county treasurer. If funds are not available to pay such warrants or orders, they shall, pursuant to Section 385.31, be numbered and registered in the order of presentation and be entitled to payment in like order, with interest at not to exceed the rate of four per cent per annum from the date of presentment.

Reference is made to the above cited statutory provisions for the purpose of disclosing that orders or warrants may be issued in anticipation of the collection of taxes and that, from the wording of the sections so far cited, there appears to be no requirement of a different ruling for counties from that for towns and other municipalities.

It would appear that under Section 275.27 the incurring of debt or the issuance of orders or warrants for the payment thereof is restricted to the extent that it shall not be necessary to levy a rate of taxes during the current or subsequent year which shall exceed the maximum prescribed by law.

It would also appear that the issuance of such warrants is restricted by Section 471.69, which, in so far as here material, reads as follows:

"No school district, county, town, or village shall contract any debt or issue any warrant or order in any 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, and an average of other income excluding gifts received by the school district for the past three years."

A section which refers to towns only is Section 365.43. It reads as follows:

"No town shall contract debts or make expenditures for any one year exceeding in amount the taxes assessed for such year, unless such debt or expenditure is authorized by the vote of a majority of the electors of such town, and no taxes in excess of the amounts authorized by law shall be levied by any town in any one year."

In construing the provisions of the statutes hereinabove cited, I am of the opinion that any school district, town, village, or county may after January 1st in any calendar year issue anticipation orders or warrants in anticipation of the payment of taxes levied in the previous calendar year for the calendar year in which such warrants or orders are issued, provided that the total indebtedness incurred or warrants issued in the current calendar year do not exceed the average tax receipts for the three previous calendar years plus ten per cent therof, and an average of other income excluding gifts received by the school district for the past three years. It is, however, to be noted that the section under consideration, viz., Section 471.69, does not apply to certain municipalities designated therein.

Section 365.43, applying alone to towns, should, I believe, be construed to permit by a vote of the majority of the electors the contracting of debts or the making of expenditures in any current year in excess of the taxes levied for the year in which such expenditures are made. In connection with such expenditure, it would appear that orders or warrants may be legally issued in anticipation of taxes to be paid in the following year.

However, in such a situation, it would not be legal for a town to issue such orders or warrants in the current year until the levy which is usually made at the March town meeting for the succeeding year has been made. At any time after the levy is so made, such town warrants or orders may be issued in anticipation of the collection of taxes during the next year, provided that the levy of taxes for that succeeding year shall not thereby be in excess of the amounts authorized by law.

In your communication you call attention to previous opinions of this office which held that most municipalities may issue warrants in anticipation of taxes which have been levied and are in the process of collection. There appears to be no statutory provision using the expression "in process of collection," but, as hereinbefore stated, it is my opinion that, by reason of provisions of Section 471.69, such warrants may only be issued in any calendar year in anticipation of the collection of taxes to be collected in that year, with the limitations and exceptions hereinabove referred to,

except in so far as Section 365.43 authorizes issuance of warrants or town expenditures in excess of the levy of a previous year if voted for by a majority of the electors of a town. If such an expenditure is so authorized, it would appear that warrants for payment of the debt so contracted by vote of a majority of the electors may be issued at any time after a levy has been made in the calendar year when such expenditures were incurred although the taxes levied during that year are not to be collected until the following year. However, when the debt is so incurred by a majority vote of the electors of a town, it may not, in my opinion, when added to other expenditures, exceed the amount of the town taxes authorized by law for the succeeding year.

Any and all opinions heretofore rendered inconsistent herewith are hereby superseded.

J. A. A. BURNQUIST,
Attorney General.

Public Examiner.
August 19, 1952. 107-A-1

109

Warrants—Lost—School district to which lost warrant has been issued not required to furnish bond required by M. S. 1949, Section 366.24—M. S. 1949, Sections 366.23, 366.24, 366.25, and 645.27. Opinions dated March 15, 1933; March 28, 1938; January 12, 1942, and January 15, 1942, reversed.

Facts

The County Auditor of Mower County drew a warrant on December 1, 1950, in the amount of $31,850.45 payable to a school district treasurer. The warrant covered the school district's portion of tax money and state aid. It was mailed to the treasurer of the school district at his home address but was never actually in his hands. The envelope containing the warrant was received at his home during his absence and opened by his wife. The envelope and warrant were then placed in a convenient location, to be delivered to the treasurer on his return to his home. After his return the envelope and the warrant could not be found, have not since been located, and are now presumed to be lost. The school treasurer has never endorsed the warrant. If the school district is required to furnish a bond under M. S. 1949, Section 366.24, an expense of approximately $1,280 would have to be incurred.

Question

Do M. S. 1949, Sections 366.23, 366.24, and 366.25 apply "to a situation such as this when the warrant is drawn in favor of a school district"?

Opinion

It is my understanding that this question involves primarily the determination of the obligation of a school district to which a warrant has been issued by the county auditor to furnish, in the event the warrant is lost, a bond in double the sum of the instrument.

If the warrant in question had been issued to a private party, it is clear that such owner would be required under M. S. 1949, Section 366.24 to furnish a bond as therein provided. As the warrant here involved was issued to a subdivision of the state government, it is necessary to consider whether such governmental agency not expressly named in the statute must furnish the bond required of an individual.

M. S. 1949, Section 645.27 provides:

> "The state is not bound by the passage of a law unless named therein, or unless the words of the act are so plain, clear, and unmistakable as to leave no doubt as to the intention of the legislature."

The general rule with reference to construing a statute's application to the state or its governmental subdivisions is well expressed in the following statement in 59 C. J., Statutes, Section 653:

> "The state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest * * * ."

In the statutory sections here considered there is no expressed legislative intent that a governmental subdivision to which a warrant is issued shall furnish a bond in double the amount of the warrant before the issuing of a duplicate in the event that the warrant is lost. The reason for requiring an adequate bond in such a situation from an individual is not applicable to a governmental subdivision.

A construction in the matter here considered which would impose a duty upon a school district to furnish the bond required under above cited Section 366.24 when the legislative intention to do so does not clearly appear from the language used would, in my opinion, be contrary to the general rule above quoted.

It is, therefore, herein held that the sections of the statutes to which you refer do not require the giving of a bond by the school district in question before a duplicate of the lost warrant may be issued by the auditor.

It is further held that, upon the furnishing of an affidavit to the county auditor and county treasurer by the school district treasurer showing the manner of the loss of the warrant, that the same has never been actually received by such treasurer, and that it has never been endorsed by him, or the furnishing to the auditor and treasurer of such facts as will satisfy them of the loss of the warrant and that the same has not been endorsed by the owner thereof, and upon the giving of notice to the county treasurer and by him to the depositories of county funds that payment of the lost

warrant be stopped, the county auditor may issue a duplicate warrant to the school district entitling said district to the tax money and state aid intended to be paid by the warrant issued on December 1, 1950.

Opinions of this office (file 107a-8) dated January 5, 1918, February 8, 1918, August 13, 1930, April 6, 1932, and October 12, 1937, are hereby adhered to, but opinions dated March 15, 1933, March 28, 1938, printed No. 135, 1938 report, January 12, 1942, and January 15, 1942, are hereby reversed.

J. A. A. BURNQUIST,
Attorney General.

Mower County Attorney.
January 12, 1951. 107-A-8

HIGHWAYS

110

Bridges—Railroads—Contract—Bids—Village council not authorized to contract with railroad company for reconstruction of bridge—Order of railroad and warehouse commission should be first secured—M. S. 1949, Sections 219.39, 219.40.

Facts

The village council considers it advisable to replace an existing bridge over the right of way and tracks of a railroad company. An agreement for the replacement of the bridge and apportionment of the cost between the village and the railroad company has been considered. Such an agreement contemplates that the existing bridge shall be removed and replaced by a new structure according to the plan as tentatively agreed upon. All of the work, including the furnishing of labor, materials, services and equipment, is to be done by and under the supervision of the railroad company. Upon completion thereof, the village will reimburse the railroad company for one-half of the cost of the bridge. The village will provide approaches to the bridge, and will maintain the roadway slab, curbs, sidewalk and railings, and the railroad company will maintain the remainder of the structure. Reference is made to M. S. A. Sections 219.39, 219.40, 412.421; and 434.29, and you present these

Questions

May the village enter into the above proposed agreement, and under its terms reimburse the railroad company for one-half of the cost of the replacement of the bridge in question?

Are the statutory provisions requiring advertisement for bids and awarding contracts to the lowest responsible bidder applicable?

Opinion

M. S. A. 412.221, subd. 6, grants to the village council the power to lay out streets and other public ways and grounds, and to repair, control, and maintain the same.

Bridges are parts of streets and highways. It is the duty of municipalities to use ordinary care in the maintenance of highways. Whenever a bridge forms a part of a highway the municipality must take due care to make the same reasonably safe for public use and travel. **Anderson v. City of St. Cloud,** 79 Minn. 88, 81 N. W. 746; **Tracey v. City of Minneapolis,** 185 Minn. 380, 241 N. W. 390.

We are not advised of any statute which we think could be construed so as to grant to the village authority to enter into the proposed agreement and plan with the railroad company for the removal of the existing bridge, and for the reconstruction of a new bridge, the cost to be borne equally between the railroad company and the village.

It seems reasonably certain to us that there is need for a new bridge. Apparently the proposed agreement and plan is acceptable to both the railroad company and to the village. The problem of making effective the proposed plan for reconstruction of the bridge presents a legal question.

We believe that the matter should be presented to the Railroad and Warehouse Commission as provided for in Section 219.39. The proposed agreement and plan for the new structure and the method of sharing the cost should also be submitted to the commission. It is reasonable to assume that the commission would make an order as required by Section 219.40, and in making such order would give consideration to the proposed agreement and plan for the new structure, and the manner of sharing the cost thereof. Upon making such an order the proposed contract between the village and the railroad company could be formally entered into, and the statutory provision relating to advertisement for bids and awarding the contract to the lowest responsible bidder would not apply. See copy of opinion of Attorney General dated May 11, 1949, File 642b-9; also see **City of St. Paul v. Great Northern Railway Co.,** 178 Minn. 193, 226 N. W. 470.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

St. Louis Park Village Attorney.
May 2, 1951. 642-B-9

111

Cartways—Establishment—Petition — Town Board — Two members thereof constitute a quorum—Hearing on petition to establish a cartway may be continued by a majority of the board — Chairman is not vested with authority to conduct or adjourn meeting of the board.

Facts

"Pursuant to petition for establishment of a cartway the town board issued notice of meeting. Notices were duly served and posted. At the meeting the only member who appeared was the chairman. The Clerk was absent, too. There being no quorum the chairman adjourned the meeting for one week and so advised all those present including the owner of the land upon which the cartway was to be established."

Question

"Does the chairman have authority to adjourn the meeting in the absence of a quorum or does the purported meeting become a nullity?"

Opinion

M. S. A. Section 163.15 provides the manner of petitioning for the establishment of a cartway. The proceedings for the establishment thereof, except as provided for in the aforesaid section, are governed by Section 163.13. **State ex rel. Rose v. Town of Greenwood**, 220 Minn. 508, 512, 20 N. W. (2d) 345.

Subdivision 3 of the last mentioned statute provides:

"At the time and place designated, the town board shall meet and, on proof by affidavit of the giving of such notice, it shall examine the road proposed to be established, altered, or vacated, hear all parties interested, and determine whether it will grant or refuse the petition.

If it be refused, that fact shall be noted on the back thereof."

It appears that notices of the meeting to act upon the petition "were duly served and posted." At the time specified for such meeting only the chairman of the town board was present. He adjourned the meeting for one week and so advised all those who were present, including the owner of the land upon which the cartway was to be established.

The town board may adjourn the hearing on a petition for establishment of a town road from the day stated in the notice for a reasonable time and to another certain day. See 5 Dunnell's Minn. Digest, Section 8461. Two members of the town board constitute a quorum; one member thereof is not authorized to hold a meeting of the board, neither is one member authorized to adjourn a board meeting. The action of the chairman in adjourning the meeting for one week is not binding upon the board.

Notwithstanding the lack of authority of the chairman to adjourn the meeting for one week, his action in so doing might be acquiesced in by the other members of the board. See **State v. Smith**, 22 Minn. 218, 223. No facts have been presented which bear upon any acts constituting acquiescence and we express no opinion thereon. Furthermore, the parties who are entitled to a notice of the time and place when the petition for the establishment of the cartway in question would be considered by the board may waive service of such notice. Likewise, the action of the chairman in

adjourning the hearing for one week may be waived by the interested parties. Attendance of the interested parties at such adjourned hearing may constitute a waiver of any defects or irregularities in connection with the action of the town chairman. See **Kieckenapp v. Supervisors of the Town of Wheeling**, 64 Minn. 547, 67 N. W. 662. No facts have been presented relative to any proceedings beyond the adjournment of the hearing for one week by the chairman of the town board and, consequently, we cannot pass upon what may have transpired subsequent thereto.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Goodhue County Attorney. 437-A-12
October 30, 1952. 379-C-1-d

112

Cartways—Establishment—Proceedings to establish cartway on town line— M. S. A. 163.13, 163.15, 163.17.

Facts

A farmer residing on land owned by him in the town of Wilson also owns an adjoining tract of land on the south in the town of Wiscoy. He has no access to either properties except across the lands of others, and for such purpose has a one rod wide roadway extending east and along the south side of the town line of the town of Wilson from the lands occupied by him to an existing public highway. This private roadway is one rod wide but is not wide enough for the county or the town board to plow the same in the winter, and the occupant farmer for all practical purposes does not have access to his land during the wintertime. A plat showing the location and description of the above properties, the location of the private roadway and its connection with an existing public highway was enclosed with your letter.

Questions

1. Is the occupant farmer entitled to a cartway under the provisions of M. S. A. 163.15, subd. 2?

2. If a cartway is established on the town line, should it be done by both town boards?

Opinion

We will consider both of these questions together.

The facts and the plat disclose that the premises upon which the buildings are located and upon which the occupant resides are described as the SW¼ of the SE¼, Sec. 32, in Wilson township. He also owns the 40-acre tract which adjoins these premises on the south, and which tract is situated

in Wiscoy township. The one rod wide private roadway begins at the southeast corner of said SW¼ of the SE¼ and extends east along the south line of Wilson township, having its termini at a county aid road which is 80 rods distant from the place of beginning. The nature of the interest of the occupant farmer in this one rod roadway is an easement for ingress and egress to his premises, which rights, as granted by the easement, terminate in 1962. This roadway is a private and not a public highway.

It appears that this one rod wide roadway is not wide enough so that either the county or the town board can plow snow therefrom during the winter. By reason of this situation the roadway is impassable during the wintertime because of accumulated snow.

The case of **Kroyer v. Board of Supervisors of Spring Lake**, 202 Minn. 41, 277 N. W. 234, involved proceedings for the establishment of a cartway under the provisions of Minnesota Statutes 1927, Section 2585 (2), which now constitutes M. S. A. Section 163.15, subd. 2. In that case the petitioner, who was the owner of a 98-acre farm, had the use of a private trail or road which provided access to a public highway from his premises. However, this trail or road was, as the court said on page 42, "passable during dry seasons but is blocked by snowstorms and periods of wet weather." In these circumstances the trial court concluded that the petitioner had no access to the public highway except over the lands of others, and he was therefore entitled to a cartway connecting his lands with a public highway. From this decision we conclude that the occupant farmer, under the circumstances above stated, is entitled to have a cartway established under the provisions of Section 163.15, subd. 2. See also **Mueller v. Town of Courtland**, 117 Minn. 290, 135 N. W. 996; **Rask v. Town Board of Hendrum**, 173 Minn. 572, 218 N. W. 115.

In the event that the proposed location of the cartway follows along and adjacent to the south line of the town of Wilson the proceedings should conform to Section 163.13. See **Rose v. Town of Greenwood**, 220 Minn. 508, 512, 20 N. W. (2d) 345.

If, however, the proposed location of the cartway is upon the town line so that a part thereof is within both the town of Wilson and the town of Wiscoy, then the proceedings should conform to the provisions of Section 163.17.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Attorneys for Town of Wilson.
October 16, 1952. 377-B-1

113

Snow removal — Snow plowing on private property by authority of county board—No credit to be extended—Civil action may be brought to collect delinquent accounts—M. S. 1949, 160.37, subd. 3.

Facts

"For some years past our County Highway Department, pursuant to resolution of the County Board of Commissioners, has made a practice of plowing private driveways for farmers in connection with its snow removal program. A charge is made to the farmer for this service by the Highway Department. The amount of this charge is not very great and many of these accounts become delinquent."

Question

Is there any way in which these delinquent accounts could be added to and collected with the taxes of these individuals?

Opinion

M. S. 1949, 160.37, provides that

"The county board may by resolution adopted at a regular meeting thereof authorize the use of county snow removal equipment and operators thereof for the removal of snow upon either public or private property within the county upon such terms and conditions as the county board shall determine, not less than the actual cost of the use of such equipment and operators to the county."

You will notice that there is no authority here for the extension of credit and that there is no authority for including the charges for plowing snow on private property in taxes against the property on which the work is done. Accordingly, such charges may not be included in the taxes. No credit should be extended. The service should be paid for in advance or at the time that the work is done. No machinery is set up for credit.

A civil action could be brought in the name of the county against the persons who owe the county for this service. No public officer has any authority to extend time for the payment for snow plowing.

CHARLES E. HOUSTON,
Assistant Attorney General.

Sibley County Attorney.
June 25, 1951. 377-A-11

114

State aid roads—Street designated as state aid road—Jurisdiction as to stop signs—M. S. 169.30.

Question

Whether or not the village authorities, without the consent or approval of the County Board, may erect and maintain on said street (state aid road) at the entrance to the village a stop sign.

Opinion

Section 169.30 to which you refer reads as follows:

"The commissioner, with reference to state trunk highways, and local authorities, with reference to other highways under their jurisdiction, may designate through highways by erecting stop signs at entrances thereto or may designate any intersection as a stop intersection by erecting like signs at one or more entrances to such intersection; * * * "

Where the entire village street is designated as a state aid road, it is my opinion that the village should have the consent of the county board to erect and maintain a stop sign on said street at the entrance to the village.

Where the state aid road covers only a portion of the village street, such as 24 feet more or less in the center thereof, it is my opinion that the erecting and maintaining of such a stop sign at the entrance to the village would require concurrent action by both the subdivisions of government involved.

See opinion to the Lincoln County Attorney February 18, 1952, No. 115 1952 report.

J. A. A. BURNQUIST,
Attorney General.

Sibley County Attorney.
February 19, 1952. 379-C-11

115

State aid roads—Supervision—Regulations—Installing local improvements and public utilities—M. S. 160.07, 160.43, subds. 1, 2, 3, and 5; 160.37, subd. 2; 160.431, subd. 5; 160.47; 160.48; 162.01, subd. 1.

Statement

Before answering your specific questions relating to state aid roads, reference will be made to what I believe to be some of the general principles of law and certain statutory provisions which are pertinent to the matter under consideration.

The legislature has paramount authority over public highways. The subdivisions of the state may exercise such control over them as the legislature shall prescribe. The state, through its legislature, may transfer control of highways to such municipalities as it deems advisable. It may give a county control over those in a village or city, place such control in other agencies of the state, or take it away from any local government if it sees fit to do so.

Town of Kinghurst v. International Lumber Co., 174 Minn. 305, 219 N. W. 172;

Austin v. Village of Tonka Bay, 130 Minn. 359, 153 N. W. 738.

However, giving control of a public highway within a village or city to the county or the state does not mean that such city or village is entirely divested of its police powers therein. See **Automatic Signal Advertising Co. v. Babcock**, 166 Minn. 416, 208 N. W. 132.

The above cited cases make it apparent that the legislature has the power to grant the control of a public highway within a village or city to a county, but the question here involved is to what extent the legislative enactments relating to state aid roads place such control in the county.

All references to statutory sections herein made, unless otherwise noted, are to those of Minnesota Statutes 1949.

The county may designate a state aid road with the consent of the highway commissioner both within and outside of village or city corporate limits, but, if a state aid road is designated within such limits, the designation must have the approval of the governing body therein. Under certain conditions, if the county board refuses to designate a state aid road, the state highway commissioner may do so. Section 160.43, subds. 1, 2, 3, and 5.

Section 160.07 provides that county boards shall construct, improve and maintain state aid roads under rules and regulations to be made and promulgated by the commissioner of highways. In the matter of trunk highways, the courts have held that by use of the words "improve and maintain," was meant and intended to give general supervision. **Automatic Signal Advertising Co. v. Babcock**, 166 Minn. 416, 208 N. W. 132. The same construction should be given the same words when used as in above cited section. Section 160.07 also provides that in connection with the county board's powers, "the several counties are vested with all rights, title, easements, and appurtenances thereto appertaining, held by, or vested in any of the towns or municipal subdivisions thereof, or dedicated to the public use prior to the time such road is designated a state aid road."

Under Sections 160.37, subd. 2, and 160.431, subd. 5, counties are directed to keep state aid roads in a passable condition by removal of snow therefrom. Under Section 160.47 counties are authorized, when state aid is to be claimed, to make the contracts for the construction or improvement of state aid roads and pay for same. Under Section 160.48, the state's share thereof is not paid until after the county has performed the work. In cases where the federal government furnishes funds to counties and the state highway commissioner acts as its agent, it was held in **Poynter v. County of Otter Tail**, 223 Minn. 121, 25 N. W. (2d) 708, that it is the county that is liable for damages, if any, in the course of the construction of the highway.

Section 162.01, subd. 1, provides that county boards shall have general supervision of county roads. An opinion of the Attorney General, dated May 4, 1935 (File 378-B, No. 238 in the 1936 Report), holds that the dele-

gation of such general control to a county board included power to make regulations with reference to pole lines within the right of way of such roads. The practice in this state since state aid roads were established has been the exercise of similar supervision and control of state aid roads by the county boards. As stated in **State v. Board of County Commissioners of Polk County**, 87 Minn. 325, 92 N. W. 216, " * * * every statute is understood to contain, by implication, if not by its express terms, all such provisions as may be necessary to effectuate its object and purpose. * * * ." It must therefore be implied from the practice of the past and the statutory authority conferred upon county boards that they have the power to take necessary action to prevent obstruction in any manner of the use of state aid roads.

It would therefore appear that the state aid roads so designated, constructed and maintained by a county are in effect the property of the county. Under their general powers the county commissioners have the care and management of county property. The construction, improvement and maintenance of state aid roads are by statute made specifically the duties of a county, and where state road and bridge funds are allocated therefor, it is the county commissioners who have jurisdiction thereof subject to rules and regulations of the state highway commissioner. As stated in Section 160.47, the work shall be done under the supervision of the county engineer who shall in all matters pertaining to such work act under the rules and regulations of the commissioner of highways. I believe that it is rules and regulations of that nature that the legislature intended to authorize the state highway commission to adopt, and not rules and regulations requiring county boards to surrender their general jurisdiction over state aid roads, or that such jurisdiction shall be exercised by the villages or cities within whose corporate limits any state aid road shall be constructed. Rules or regulations adopted by any board or official and construed to be beyond those intended to be authorized by the legislature would, of course, have no force or effect. The power to enact legislation cannot constitutionally be delegated to any officer or board.

The consent by the commissioner of highways to the dedication of a state aid road by the county, the approval by a village or city when the designation is within the corporate limits thereof, and the adoption of rules and regulations by the highway commissioner obviously intended to be limited to such as pertain to the work to be done, would not, in my opinion, release the county of its primary responsibility, clearly imposed by above cited statutes and logically implied, for the designation, construction, improvement, maintenance and supervision of the state aid roads in question.

With the above cited authorities and statutory provisions in mind, your questions will be herein stated and answered in the order in which they have been submitted.

Question 1

Can the village barricade and block off the entire street including the designated state aid road without the permission of the county board?

Opinion

Except in emergencies justifying the exercise of the police powers of the village in question, consent of the county must be had.

Question 2

Can the village grant permission to private parties to open up the state aid road for the purposes of installing sewer and water service connections without the permission of the county board?

Opinion

As the county board has supervision and control over the portion of the highway or street which is a state aid road, any interference with such state aid road must have the consent of the board of county commissioners.

Question 3

If the above questions are answered in the affirmative, who is responsible for the replacement of the surface of the state aid road to its original conditions?

Opinion

The answers to the first two questions are not in the affirmative, but the fact that a village cannot obstruct a state aid road except in emergencies without the consent of the county or interfere with the use of a state aid road in the construction of sewers or other local improvements without the consent of the county does not eliminate the possibility of making arrangements between the two subdivisions of government to authorize the making of local improvements under reasonable conditions and if a state aid road is interfered with by such local improvements to require that it be restored to its original condition.

Question 4

Does the county board have authority to set up regulations regarding the installation, erection and maintenance of all village utilities within the state aid road area?

Opinion

In the construction of state aid roads, where the state road and bridge funds are expended, the rules and regulations adopted by the state highway commissioner have been authorized, I believe, to secure efficient construction and proper expenditure of such funds. However, in matters pertaining to the installation, erection, or maintenance of village utilities which would interfere with the use of state aid roads within the state aid road area, the board of county commissioners, in my opinion, possesses the power to establish rules and regulations which would require the installation, erec-

tion, and maintenance of such village utilities in a way that would not obstruct the proper use of state aid highways. The authority to make such rules and regulations by the county board is, I believe, as heretofore stated, a necessary implication from the statute requiring the supervision of such roads by the county board and the many years of the control thereof by the county board. In addition thereto, in certain cases there is the express provision that, in the construction and maintenance of any water power, telegraph, telephone, pneumatic tube, or electric light, heat, or power company, the company shall be subject **to all reasonable regulations imposed by the governing body of any county**, town, village or city where such public road may be. Section 222.37, as amended by L. 1951, C. 261.

Question 5

In case of liability to a private party because of defects caused by the use of the state aid road by the village for sewer lines or water mains, who would be liable for the damages?

Section 160.431, Subd. 4, authorizes agreements between a county and village for the maintenance of a state aid road by a village. When a village under such agreement to maintain a state aid road installs sewer lines or water mains and as a result thereof there are defects in the highway, any liability for damages to a private party by reason thereof would be that of the village and not the county. See **Paul v. Faricy**, 228 Minn. 264, 37 N. W. (2d) 427.

Where the maintenance of a state aid road is the sole obligation of the county, the county would not as a general rule be liable for negligent maintenance. **Hitchcock v. County of Sherburne**, 227 Minn. 132, 34 N. W. (2d) 342. It may, however in certain cases be liable for damages resulting in what is equivalent to the taking of property from the owner thereof. See **Poynter v. County of Otter Tail**, 223 Minn. 121, 25 N. W. (2d) 708.

J. A. A. BURNQUIST,
Attorney General.

Lincoln County Attorney.
February 18, 1952. 379-C-11

116

State rural highways—A road established under the so-called Elwell Act, L. 1911, C. 254, and not taken into the trunk highway system became a state aid road—M. S. 1949, Section 160.01, Subd. 3. **As such, the maintenance thereof cannot be abandoned by the sole action of the county board**—M. S. 1949, Section 160.43, Subd. 6.

Facts

"Highway No. 34 in Cass County was built by the County under the Elwell Law, the county issuing bonds to build the same."

Question

"Is it within the authority of the County Board to abandon the maintenance of this road, or any part of it? If so, whose duty would it be to maintain this road in case the county has authority to abandon same?"

Opinion

The Elwell Law referred to in your letter was enacted as L. 1911, C. 254, appearing in General Statutes of Minnesota 1913, as Sections 2603 et seq. and related to state rural highways. It was repealed by L. 1915, C. 52, except as to state rural highways theretofore constructed or in the process of construction.

State rural highways not included in the trunk highway system became "state aid roads" by L. 1921, C. 323, Section 1, Subd. 2, now M. S. 1949, Section 160.01, Subd. 3. Said subdivision reads as follows:

> "The words 'state aid roads' shall be construed to include all roads which have heretofore been designated as state roads, or which may hereafter be designated as state aid roads, except such as may be, or have heretofore been, annulled or changed, and except such as may be included in the trunk highway system."

We therefore assume that Highway No. 34 in Cass County is a state aid road.

The duty of maintaining a state aid road is on the county. See M. S. 1949, Section 160.46. The county board is without authority to abandon the maintenance of a state aid road by reason of the fact that a state aid road may only be abandoned as such by joint action of the county board and the commissioner of highways. See M. S. 1949, Section 160.43, Subd. 6.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Cass County Attorney.
September 7, 1951. 379-C-11

117

Streets — Dedication — Easement in a street of a municipality could be acquired by user prior to 1913—Laws 1899, Ch. 152; Laws 1913, Ch. 235, M. S. 1949, Sections 160.01, 160.19 — **Street in municipality cannot be dedicated by user under M. S. 1949, Section 160.19, nor could it be so dedicated since 1913.**

Opinion 489, 1934 report and opinion dated June 29, 1932, superseded.

Question

Whether the provisions of M. S. 1949, Section 160.19, apply to village streets platted and laid out prior to 1921.

Opinion

M. S. 1949, Section 160.19, reads as follows:

> "When any road or portion thereof shall have been used and kept in repair and worked for at least six years continuously as a public highway the same shall be deemed dedicated to the public to the width of two rods on each side of the center line thereof and be and remain, until lawfully vacated, a public road whether the same has ever been established as a public highway or not; provided, however, that nothing herein contained shall impair the right, title or interest of the water department of any city of the first class, secured under Special Laws 1885, Chapter 110."

Prior to 1899, the statutory provisions did not contain a provision that a road acquired by user should be deemed dedicated to the public to the width of two rods on each side of the center line. See Laws 1899, Ch. 152. In 1913 a comprehensive road law was adopted. See Laws 1913, Ch. 235. Section 1 of that act reads:

> "The provisions of this act shall be construed as relating solely to roads, cartways and bridges thereon, not included within the limits of any city, village, or borough, except when highways within villages or cities are specifically specified."

These provisions of the 1913 act now appear in M. S. 1949, Section 160.01, Subd. 1.

Prior to 1913 and amendment of the above quoted provision, an easement for a public road could be acquired over a public street in a municipality by user. There are many decisions to this effect. See:

Northwestern Telephone Exchange Co. v. City of Minneapolis, 81 Minn. 140, at page 155, 83 N. W. 527, 86 N. W. 69;

Duluth Terminal Ry. Co. v. City of Duluth, 113 Minn. 459, at page 470, 130 N. W. 18;

City of Duluth v. Duluth Telephone Co., 84 Minn. 486, at page 490, 87 N. W. 1127;

Elfelt v. Stillwater Street Ry. Co., 53 Minn. 68, 55 N. W. 116;

Hall v. City of St. Paul, 56 Minn. 428, 431, 432, 57 N. W. 928;

Village of Benson v. St. Paul, Minneapolis & Manitoba Ry. Co., 62 Minn. 198, 200, 64 N. W. 393.

After 1913 the user statute was not applicable to streets in a city or village. Such streets in cities or villages were expressly excluded from the operation of the comprehensive road law adopted in 1913 (Laws 1913, Ch. 235). Such city and village streets are expressly excluded from the operation of the current statutory provisions relating to roads. See M. S. 1949, Section 160.01, Subd. 1.

On June 29, 1932, this office rendered an opinion to the Village Attorney of Grand Rapids, Minnesota (File 396-C-4), referred to in your letter, and in which opinion the writer thereof, after referring to Mason's Statutes 1927, Section 2590 (now M. S. 1949, Section 160.19), said:

> "This statute is applicable to streets as well as roads: Northwestern T. E. Co. v. Minneapolis, 81 Minn. 140, p. 155; 83 N. W. 527."

On December 5, 1934, this office rendered an opinion to the City Attorney of Pipestone, Minnesota (File 396-C-4), published in the 1934 Op. A. G. as No. 489. The writer thereof after referring to the same statutory provision of the 1932 opinion said:

> "There is no question but what this applies to village streets. Section 2543, Mason's Minnesota Statutes, which was a part of Chapter 323, Laws of 1921, as was Section 2590 above quoted, reads as follows:
>
> > '"Road" and "highway" defined.—The words "road or highway" whenever used in this act shall mean, unless otherwise specified, the several kinds of highways as defined in Section 1 of this act, and also cartway, street, alley, avenue, boulevard, together with all bridges or other structures thereon which form a part of the same.'
>
> "There is also case law to the effect that Section 2590 applies to streets in incorporated municipalities. See Northwestern Telephone Exchange Company v. City of Minneapolis, et al., 81 Minn. 140, 83 N. W. 527 (Rehearing, 86 N. W. 69)."

We do not know what facts, if any, were before the writers of the 1932 and 1934 opinions above referred to. If the facts related to roads in cities or villages established by user prior to the enactment of the 1913 act, the conclusions arrived at are correct. In any event, since 1913 and at the present time the statutory provision (M. S. 1949, Section 160.19) relating to the establishment of a road by user, has no application to a street within a city or village by reason of M. S. 1949, Section 160.01, Subd. 1. In so far as the 1932 and 1934 opinions may indicate the contrary, they are hereby superseded.

Your letter discloses that you are concerned with a problem relating to streets in your village laid out and platted long prior to 1921. Without knowing the date when these village streets were laid out and the circumstances in connection therewith, we are unable to say whether an easement in said streets was acquired by user. If such streets were established prior to 1913, an easement by user may have been acquired therein; if such streets were established after 1913, an easement by user could not have been acquired therein by reason of the statutory provisions here discussed.

In connection with the dedication of a street by user, we invite your attention to a similar and related matter, viz: the common-law dedication of streets. See **Anderson v. Birkeland**, 229 Minn. 77, 38 N. W. 2d 215, and the cases therein cited.

J. A. A. BURNQUIST,
Attorney General.

Crosby City Attorney.
April 13, 1951. 396-C-4

118

Town line roads—Where town line road is established by two towns under General Statutes 1894, Sections 1824 to 1827, and each town agrees to maintain a portion thereof, each has the burden of maintaining the part agreed upon.

Facts

On June 1, 1885, the Town of A in Wilkin County and the Town of O in Otter Tail County duly established a public road along the entire length of a common line between the two towns, the proceedings being carried out under what is now M. S. 1949, Section 163.17. A division of the road was duly made dividing the same in two districts with the Town of A taking over the north 3½ miles and the Town of O taking over the south 2½ miles. Since that time the mileage of the duly established town line road has been taken over as county roads by Wilkin County and Otter Tail County except one mile thereof which in 1885 the Town of O agreed to maintain.

With reference to the one mile of the road referred to, the town of O takes the position that the cost of maintenance of this one mile should be divided. The Town of A takes the position that the original agreement requires this mile of road to be maintained by the Town of O.

Question

Is the agreement entered into in 1885 between the two towns for the maintenance of the road still effective?

Opinion

On the basis of the facts submitted, we think that the agreement entered into in 1885 between the two towns for the maintenance of the road is still effective. See **Town of Mount Pleasant v. Town of Florence**, 138 Minn. 359, 165 N. W. 126.

At the time the town road was established, the law in force governing the burden of maintenance was L. 1873, C. 5, incorporated in General Statutes 1894, Sections 1824 to 1827 inclusive. Under said statutory provisions

when the two towns established the town road along a line common to them and agreed upon a division of the road into road districts, each district belonged wholly to the town to which it had been allotted for the purpose of keeping it in repair. See the opinion of this office to the county attorney of Benton County dated May 24, 1945, file 379-C-8-C, and the cases cited therein, a copy of which is enclosed for your information.

Although we think that the Town of O is responsible for the one mile of road remaining to be maintained by the township under the agreement of 1885, we cannot categorically say that said town can be compelled by mandamus to maintain the same on the basis of the information contained in your letter. See **State ex Rel. Linbo v. Martin**, 179 Minn. 463 (229 N. W. 577) and the cases cited therein on page 467.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Wilkin County Attorney.
September 18, 1951. 379-C-8-C

119

Town roads—Abandonment—Reopening—Title thereto may not be acquired by adverse possession—L. 1899, Ch. 65—uninterrupted and long continued nonuse may constitute abandonment.

Facts

"On March 29, 1870, the Supervisors of one of our townships established a public highway four rods wide on the section line and caused the same to be surveyed by a surveyor and accepted his report. All of this is a matter of record in the township books.

"There is no record of any vacation proceedings in connection with the said highway.

"There is no township record that the road was ever improved. However, there was travel on this road down to about 1925. About this time, the owners of adjacent land placed a fence in the road, and, subsequently, trees were planted.

"The town board now wishes to reopen this highway and improve the same. The owners of the adjacent lands take the position that the township has lost its right in the highway because they have occupied and cultivated the land since about 1925."

Question

"Is the town board entitled to open this highway at the present time without payment of damages to adjacent owners?"

Opinion

The above facts disclose that on March 29, 1870, the town board of supervisors established a town road four rods wide on the section line. There is no record of any vacation of this road. The road was traveled until 1925 when the adjacent landowners placed a fence across the road, and thereafter trees were planted within the roadway.

Since the enactment of Laws 1899, Ch. 65, title to a public highway cannot be acquired by adverse possession. See 1 Dunnell's Minn. Digest, Section 111, and cases cited.

Uninterrupted and long continued nonuse of a public highway may constitute an abandonment thereof. 3 Dunnell's Minn. Digest, Section 4160, and cases cited. Whether there has been an abandoment of the road in question depends upon all of the material facts. This office does not pass upon questions of fact.

The case of **Freeman v. Township of Pine City**, 205 Minn. 309, 286 N. W. 299, involved a legal problem analogous to the question involved in the instant case. In the course of the decision the court, on page 315, quotes from the case of **Anderson v. Supervisors**, 92 Minn. 57, 59, 99 N. W. 420, as follows:

> "Proceedings in the matter of laying out public highways have always been treated liberally by this court, and the statutes on the subject construed broadly, and with a purpose to facilitate the action of public authorities. To apply strict rules of jurisdiction would result in rendering invalid nearly all such proceedings, and be subversive of the best interests of the public."

And on the same page the court disposes of the claim of abandonment by referring to L. 1899, Ch. 65, which precludes the acquisition of title to a public highway by adverse user. The court quotes with approval from **Parker v. City of St. Paul**, 47 Minn. 317, 319, as follows:

> "It may also be safely laid down as sound, both upon reason and upon considerations of public policy, that until the time arrives when a street, levee, or the like is required for actual public use, and when the public authorities may be properly called upon to open or prepare it for such use, no mere nonuser for any length of time, however great, will operate as an abandonment."

And in conclusion the court said:

> "In the case at bar there was no evidence other than the mere fact of nonuser. The burden was on plaintiffs to prove abandonment."

We believe that the decision in the **Freeman** case, supra, is controlling upon the question presented in the instant case. Possession of the road in question by the abutting property owners since 1925 and planting trees thereon did not vest title thereto in the abutting property owners. Furthermore, the mere nonuse of the road in question did not of itself operate as an abandonment. The burden of establishing abandonment would be upon the abutting landowners. **Parker v. City of St. Paul**, supra.

It is therefore our conclusion that the town board may proceed to improve the road involved as public need and necessity therefor may exist, and without the necessity of instituting further road proceedings for that purpose.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Watonwan County Attorney.
October 15, 1952. 377-B-10-k

120

Town roads—Fences—Power of town to require removal of fences within road limits — Right of abutting landowners to use portion of road— M. S. 1949, Sections 160.27 and 616.01 considered.

Questions

"1. Does the Township Board have any authority to restrict the abutting owner of land from farming on the road right-of-way within the area contained within one rod from the center of the road?

"2. On a four-rod township road, does the Board have the authority to force the abutting land owner to keep and maintain his fences two rods from the center of the road, or, in other words, on the outer edges of the road right-of-way?"

Opinion

These questions may be conveniently considered together and likewise answered.

The town board has control and jurisdiction over town roads. Section 160.01, subdivision 5, and Section 163.01.

A party whose lands abut a public rural highway has certain rights to use a portion of such highway not needed for public travel, and may plow, level, and seed the same to grass within one rod of the center. He may not by such work interfere with the travel upon the road or improvements of such road. M. S. 1949, Section 160.27.

The answer to the first question is to be resolved by a determination of whether the use by an abutting owner of the marginal area from "one rod of the center" to his property will interfere with the use of the travel upon the road by the public, or improvements of the road. If it does, then the town board has the power to restrict such use as in its judgment may be necessary to protect the public.

The fee of an abutting property owner extends to the center of the street or highway subject only to the public easement for public use, and he may use his property for a purpose compatible with the free use by the public, the public authorities determining how much shall be reserved for such use. See **Kooreny v. Dampier-Baird Mortuary, Inc.**, 207 Minn. 367, 291 N. W. 611.

In **Kelty v. City of Minneapolis, et al.**, 157 Minn. 430, 431, 196 N. W. 487, the court said:

> "The abutting owner owns to the center of the street, subject to the easement of the public, and may use it for a purpose compatible with the free use by the public of its easement, Town of Glencoe v. Reed, 93 Minn. 518, 101 N. W. 956, 67 L. R. A. 901, 2 Ann. Cas. 594; West v. Village of White Bear, 107 Minn. 237, 119 N. W. 1064; Rost v. O'Connor, 145 Minn. 81, 176 N. W. 166, 9 A. L. R. 1265; Pederson v. City of Rushford, 146 Minn. 133, 177 N. W. 943, and cases cited; Dunnell, Minn. Dig. and 1916 and 1921 Supp. Sections 4182-4183, and cases cited. Whether a use is compatible, or is an obstruction, depends upon the character of the use by the abutter and the character of the street."

An abutting owner may not construct and maintain fences within the right of way limits if by so doing the usefulness of the highway for the traveling public is impaired, or which would render dangerous the use of the highway by the public. Such a use thereof would constitute a public nuisance under Section 616.01.

The purpose of this statute declaring it a public nuisance to obstruct and render dangerous the exercise of the public right of passage on a highway is to secure to everyone an enjoyment of a public right. **Hanson v. Hall et al.**, 202 Minn. 381, 279 N. W. 227. See also Dunnell, Minn. Dig., Vol. 3, Sections 4168, 4169, 4179 and 4180, and cases cited thereunder.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Renville County Attorney.
April 10, 1951. 377-B-10-j

121

Town roads—Vacation—Street—Towns subject to M. S. A. Section 368.01, may, as fee owner of all abutting lands affected, petition for vacation of highway under Section 412.851.

Facts

"The Town of Bloomington is the owner of Lots 10 and 11 in Waleswood Park. Lying between these two lots and abutting thereon is a street named Ruth Place extending from Logan Avenue to Morgan

Avenue, one block, which the Town desires to have vacated so that the street can be used in connection with the said lots which are being used and will be in the future used for the erection thereon of buildings for the use of the Town such as a garage building in which to house town street equipment, which last is now under construction."

The Town of Bloomington is subject to the provisions of M. S. A. Section 368.01, and is possessed of certain powers exercised by villages, including the power to vacate a highway as prescribed in Section 412.851. The town owns in fee all of the property abutting that part of the street sought to be vacated.

Question

"Can the Town of Bloomington petition its own Town Board for a vacation of this street or would it be better practice to proceed in District Court under M. S. 1949, Section 505.14?"

Opinion

The Town of Bloomington comes within and is possessed of the powers prescribed in M. S. A. Section 368.01, which reads as follows:

"Any town in this state having therein platted portions on which there reside 1,200 or more people shall have and possess the same power and the same authority now possessed by villages in this state under the laws of this state in so far as such powers are enumerated in Section 412.221, subdivisions 3, 6, 8, 9, 11, 14, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 28, 29, and 32, also the powers enumerated in Sections 412.11, 412.191, subd. 4, 412.231, 412.401 to 412.481, 412.491, 412.851 and 412.871. The town board thereof may adopt, amend, or repeal such ordinances, rules, and by-laws for any purposes so enumerated as it deems expedient."

Under the aforesaid statute a town is authorized and empowered to vacate streets as provided in Section 412.851, which provides:

"The council may by resolution vacate any street or alley or part thereof on petition of a majority of the owners of land abutting on the street or alley or part thereof to be vacated. No such vacation shall be made unless it appears for the interest of the public to do so after a hearing preceded by two weeks' published and posted notice."

We have not found any decision of our own court construing the word "owners" as used in the last mentioned statute to mean and include a municipal corporation or a town. Neither have we found any decision upon the question of whether a town board may, as an abutting owner, make a petition as such for a vacation of a street and then act upon its own petition.

It is our opinion that the term "petition of a majority of the owners of land abutting on the street" should be construed, in the instant case, to mean and include the town which owns the fee to all of the land abutting

the street proposed to be vacated. The term "owner," unless restricted, should be construed to mean corporations, both public and private, as well as individuals. See **People v. Village of Lombard** (Ill.), 149 N. E. 584; **McQuillin Municipal Corporations**, Vol. 2, Third Edition, Section 7.33, Vol. 13, Section 37.48; **64 C. J. S.**, Section 1672.

A more serious aspect of the question under consideration involves the right of the town to pass upon its own petition for vacation of a street over which the town has jurisdiction. However, under Section 412.851, supra, no vacation shall be made unless it appears for the interests of the public to do so, and after a hearing of which two weeks published and posted notice has been given. Persons who have an interest in the proposed vacation would have an opportunity to express their views at such hearing. The town may not vacate the street in question unless it is for the best interests of the public to do so. Furthermore, the action of the town ordering vacation could be by appropriate proceedings judicially reviewed.

From the foregoing we reach the conclusion that the town is an owner within the meaning of that term as used in Section 412.851, and that the provisions thereof are applicable to the proposed vacation of the street.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Bloomington Town Attorney.
December 1, 1952. 396-F-3

122

Traffic regulations—Authorized emergency vehicle—Privately owned vehicle of volunteer fireman, constable, deputy sheriff or sheriff is not an authorized emergency vehicle under M. S. 1949, Section 169.01, Subd. 5, except a vehicle of an active volunteer fireman permitted to display a red light in the front by the commissioner of highways under M. S. 1949, Section 169.58, Subd. 2. Privately owned vehicles of the other enumerated persons cannot be equipped with red lights — M. S. 1949, Section 169.64, Subd. 2. **No vehicle other than an authorized emergency vehicle can be equipped with a siren**—M. S. 1949, Section 169.68.

Question

Is a privately owned automobile equipped with red lights and a siren and used by a member of a volunteer fire department or by a constable, or by a deputy sheriff, or by a sheriff an authorized emergency vehicle within the meaning of M. S. 1949, Section 169.01, Subdivision 5?

Opinion

M. S. 1949, Section 169.01, Subd. 5, reads:

"Vehicles of the fire department, police vehicles, and such ambulances and emergency vehicles of municipal departments or public service corporations as are designated or authorized by the commissioner of highways or the chief of police of an incorporated city, and equipped and identified according to law."

Privately owned vehicles of the persons described in the question, unless such privately owned vehicles are rented by municipalities or public service corporations or are under the exclusive control thereof under a lease or otherwise, are not the kind of vehicles which may be designated or authorized as emergency vehicles by the commissioner of highways or the chief of police.

M. S. 1949, Section 169.64, Subdivision 2, prohibits a vehicle from being equipped or operated upon any highway with any lamp or device displaying a red light other than those required or permitted by the Highway Traffic Regulation Act. M. S. 1949, Section 169.68, permits authorized emergency vehicles to be equipped with sirens but not other vehicles. M. S. 1949, Section 169.58, Subdivision 2, permits a vehicle operated by an active member of a volunteer fire department, upon obtaining a permit from the commissioner of highways, to be equipped with a red light in the front of such vehicle. Permitting such vehicle to be so equipped is for identification purposes only and the vehicle is not and does not become an authorized emergency vehicle within the meaning of Section 169.01, Subdivision 5.

The views expressed herein are in conformity with the following opinions of this office: July 9, 1948, to the Commissioner of Insurance; May 20, 1948, to the chief of the highway patrol; July 1, 1947, to the city attorney of Hastings, Minnesota—all relating to volunteer firemen (our file No. 989-a-18). The latter opinion in so far as it infers that a volunteer fireman may use red lights or a siren, when permission to do so has been obtained from a chief of police or the commissioner of highways, is modified to the extent necessary to conform with the views expressed herein.

J. A. A. BURNQUIST,
Attorney General.

Pine County Attorney.
March 5, 1951. 989-A-18

123

Traffic regulations—Parking—Cities and villages may enact traffic regulations not inconsistent with Traffic Code, but any local regulation affecting trunk highways within municipality must have consent of Commissioner of Highways.

Facts

"The ordinances of the City of Mankato do not make it illegal to park in front of theaters, hotels, police station, bus stops, but only in the places set out in Ordinance 96, Sections 35 to 40, a copy of which is herein enclosed.

"The Statutes, Section 169.34, provides where stops are prohibited. No. 14 thereof, 'At any place where official signs prohibit stopping'."

Questions

1. "Does this provision 'At any place where official signs prohibit stopping' mean that the Council can pass an Ordinance regulating where stops are prohibited such as places in front of theaters, hotels, police station, and bus stops, and other public places?"

2. " 'Official signs': does that mean that the Police Department can erect a sign whenever it deems it necessary that no parking should be allowed by merely placing a sign or by painting the place yellow to prohibit parking, without a City Ordinance?"

Opinion

We consider both questions together.

M. S. Section 169.34, to which you refer, is a part of the Highway Traffic Regulation Act, coded as M. S., C. 169.

Section 169.34 prohibits the stopping, standing or parking of a vehicle, except when necessary to avoid a conflict with other traffic or in compliance with the directions of a peace officer or traffic-control device, in any of the places in that section specified.

M. S. Section 169.03 prescribes that the provisions of C. 169 shall be applicable and uniform throughout the state and in all political subdivisions and municipalities therein and that no local authority shall enact or enforce any rule or regulation in conflict with the provisions of that chapter unless expressly authorized by the provisions of that chapter. Local authorities are authorized to adopt traffic regulations not in conflict with the provisions of M. S., C. 169.

M. S. Section 169.04 expressly prescribes that the provisions of C. 169 shall not be deemed to prevent local authorities, with respect to streets and highways under their jurisdiction and, with the consent of the commissioner of highways with respect to state trunk highways within the corporate limits of the municipality, and within the reasonable exercise of the police power, from regulating, among other things, the standing or parking of vehicles.

Accordingly, under M. S. Section 169.03 the Council of the City of Mankato, in the reasonable exercise of the police power of the city, may by ordinance adopt traffic regulations not in conflict with the provisions of M. S., C. 169 and thereby regulate the standing or parking of vehicles in front of such places as "theaters, hotels, police station, and bus stops, and other public places." In so far as the ordinance regulating the standing or parking of vehicles in front of such places may involve a regulation with respect to state trunk highways within the city, the consent of the commissioner of highways of the State of Minnesota to such regulation must be obtained under M. S. Section 169.04.

Answering your second question, the adoption of traffic regulations by the City of Mankato involves legislative action. The legislative power of the city is vested in the city council. The ordinance should prescribe the places whereat the stopping, standing or parking of a vehicle shall be prohibited. By the same ordinance, or by resolution, the council might direct that the police department install at such prohibited places such suitable and official signs giving notice to the public of the restriction involved.

LOWELL J. GRADY,
Assistant Attorney General.

City Attorney Mankato.
June 13, 1951. 989-A-16

124

Traffic regulations—Parking—Overtime—Fines—No authority for envelope-ticket plan described.

Facts

"The City of Waseca, Minnesota, has provided parking meters throughout most of the business district and in order to minimize the inconvenience to violators who are required to report to the Police Department or Municipal Court Judge upon receiving a ticket, the Council has considered various other plans. One plan is to attach a combination parking ticket and money envelope to the vehicle in violation which would permit the violator to place a certain designated amount of fine money in the envelope and to leave the envelope at one of three boxes placed at strategic points in the business area. This would avoid having the violators reporting to the Police Department or Municipal Court.

"The question has been raised as to whether or not such arrangement would be legal in that under our Ordinance the violator is subject to a maximum fine of $1.00 to be imposed by the Municipal Judge. As a practical matter, the Judge has authorized the City Clerk to accept fine monies to avoid the inconvenience of holding Court solely for the purpose of hearing parking violation matters.

"I am enclosing herewith sample copy of the envelope which the Common Council would like to use. The ticket attached to this envelope is not available, but I believe it illustrates the type of thing we have in mind."

The sample copy of the envelope, in its material parts, reads as follows:

"To Person Operating Motor Vehicle:

Lic. No..... Meter No.....

Name .....

Address .....

State..... Date..... 195....

VIOLATION: PAID PARKING TIME

EXPIRED .....

For the above violation you may:

(1) Enclose $1.00 in this envelope, SEAL and DEPOSIT, **on same day issued** in an OVERTIME PARKING BOX, yellow collection box located.....

or..... or.....;

— or —

(2) Report to Police Department in the City Hall. Bring this Envelope Ticket with you."

We assume, from the tenor of your inquiry, that the plan and envelope involved will be applied only to overtime parking violations, the maximum penalty for which under the ordinance is a fine of $1.00.

You request an opinion on the

Question

"of the legality of parking violators **paying their fines in the manner described.**"

Opinion

Of course, no person given a ticket for overtime parking is required to use the envelope. If such person does enclose $1.00 in the envelope, that enclosure does not, under the plan submitted, constitute the payment of a **fine.** Only the court has power to impose the fine. In the plan submitted the court has not imposed a fine. Nor is there anything indicated in the plan submitted that the $1.00 enclosed in the envelope, if it is enclosed, represents "bail money" to be forfeited if the alleged violator fails to appear in court in response to the ticket. Assuming, without conceding, that a "bail-money" arrangement is not objectionable, it is sufficient to say that the plan submitted by you does not embrace that type of arrangement.

Traffic violations bureaus have been established in some of the larger cities for the purpose of assisting the traffic courts in those cities with the clerical work in traffic cases involving minor violations. An example thereof is furnished by L. 1941, C. 156, relating to the municipal court of the City of Minneapolis. By Section 6a, subd. 1, thereof there is established in the municipal court of the City of Minneapolis a traffic violations bureau for that purpose. Subd. 3 thereof provides that persons who have received traffic tags as defined in subd. 2—

> " * * * may answer to the charges therein set forth by appearing at the said traffic violations bureau and performing the following acts, to-wit: waiving a hearing in court, pleading guilty in writing to the charge, giving a power of attorney to the person in charge of said bureau to make such plea for them, and by paying the fine prescribed by said court. Acceptance of said power of attorney and said prescribed fine by said bureau shall be complete satisfaction for the violation charged and a receipt so stating shall be delivered to the person paying said fine."

Subd. 4 thereof provides that the judges of the municipal court of the City of Minneapolis **shall designate fines to be paid for all offenses, which may be satisfied at the bureau.** Subd. 5 authorizes the traffic violations bureau, among other things, to represent in court persons given such traffic tags who desire and are permitted to plead guilty to the violation charged, under the conditions stated, and to accept the prescribed fines and issue receipts therefor. In pursuance of the authority by that law conferred, the municipal judges of the City of Minneapolis have designated the fines to be paid for all traffic offenses involved and have issued an order relating to the operation of the traffic violations bureau. The law is also implemented by provisions of an ordinance of the City of Minneapolis relating to the traffic violations bureau. It will be noted that the traffic violations bureau of the City of Minneapolis and the procedures therein are based upon express statutory authority.

The municipal court of the City of Waseca operates under L. 1895, C. 229. See Vol. 27 M. S. A. at p. 316. Whether, independently of express statutory authority therefor, the municipal court of the City of Waseca could by rule establish therein a traffic violations bureau comparable to that existing in the City of Minneapolis is a question which is neither presented by your inquiry nor considered herein. It is sufficient, for the purposes of this opinion, to express my view that the proposed arrangement submitted by you has no legal authority. It should, perhaps, be unnecessary to say this, but, for the purpose of avoiding possible misunderstanding elsewhere, this opinion is limited to the specific inquiry presented by you and should not be construed as ruling that municipal courts operating under L. 1895, C. 229, are without power to establish therein a traffic violations bureau upon a legal basis.

LOWELL J. GRADY,
Assistant Attorney General.

Waseca City Attorney.
April 3, 1952.

59-A-53

125

Traffic regulations—Parking—Restrictions—Unattended vehicles—Removal of at expense of owner or operator.

Statement

Ordinance No. 97, Section 3, of the City of Virginia, reads:

"'Whenever any police officer finds a vehicle unattended upon any street or highway such vehicle constitutes an obstruction to traffic, or wrongly parked, such officer is hereby authorized to provide for the removal of such vehicle to any public garage at the expense of the owner or operator, and all incidental charges including towing and storage of such vehicle shall be paid by the owner or operator thereof'."

Facts

"At certain times of the year there are repairs made on various streets, avenues and alleys in the City and it is necessary to restrict parking by signs while said repairs are made. Also, at certain times of the year there is snow removal so that it is necessary to restrict parking by signs during that time. During said time of restricted parking, the City has notified the public by newspaper ads and by radio that the cars must be removed."

Questions

1. Where the restrictions on parking, indicated by the signs referred to in the Facts, are violated by the owner or operator of a vehicle, has the police officer, under the above-quoted portion of Section 3 of the ordinance, "the right to remove the vehicle to a public garage at the expense of the owner or operator and charge him for the towing and storage thereof?"

2. "Under this same Section, if a car is left unattended for several days, has the Police Officer the right to remove same to a public garage at the expense of the owner or operator and charge him for the towing and storage thereof?"

Opinion

No categorical answer to either of your questions is attempted.

In McQuillin, Municipal Corporations (3d Ed.), Vol. 7, Section 24.651, with reference to municipal ordinances prescribing parking regulations, this statement is found:

"Provision may be made for the hauling away and impounding of vehicles violating parking regulations. Thus, ordinances declaring illegal parking to be a nuisance and authorizing the removal of offending vehicles and their retention by the chief of police until payment of

charges have been sustained. Such an ordinance does not deprive an automobile owner of his property without due process of law or deny to him equal protection of the laws."

It does not follow that the particular provision of the ordinance here involved is a valid one under the above-stated general rule.

Municipal ordinances declaring any unoccupied vehicle parked upon a public street in violation of an ordinance of the city to be an obstruction in the street and a public nuisance, and providing for the summary removal by the authorities of such offending vehicle, have been sustained against the constitutional objection of denial of due process. See **McLaurine v. City of Birmingham**[1] (1946), 247 Ala. 414, 24 So. 2d 755; **Hughes v. City of Phoenix**[2] (1946), 64 Ariz. 331, 170 P. 2d 297.

The home-rule charter of the City of Virginia charges the city council with the "active care, supervision and control of all public highways, bridges, streets, alleys, public squares and grounds," and the city council is required to "cause all streets which have been opened and graded * * * to be kept open and in repair and **free from nuisances.**" See Section 117. Section 99, of the charter confers specific powers upon the city council. The seventh paragraph thereof authorizes the council to "regulate and prevent the use of streets * * * for signs, sign-posts, * * * **and other obstructions** * * * ; to remove and abate any nuisance, obstruction or encroachment upon the walks, streets, alleys and public grounds." The fifty-fifth paragraph of Section 99 authorizes the city council to "declare what shall be a nuisance, [and] to abate the same."

The council of the City of Virginia, under the charter provisions cited, has ample authority to define "nuisances" and to abate them and to "regulate and prevent the use of streets" and to provide for the removal of obstructions therefrom.

The question then remains: whether by the ordinance involved the city council has exercised this authority in respect of vehicles wrongly parked on the streets or vehicles left unattended thereon for any prohibited length of time.

We have in our file a 1940 compilation of the ordinances of the City of Virginia. Ordinance No. 97 appearing therein does not declare that any vehicle parked upon the public street at a place or in a manner or for a length of time prohibited by an ordinance of the city, if unoccupied, constitutes either an obstruction in the street or a public nuisance. The language of that portion of the ordinance quoted in your inquiry, although

[1]In the **McLaurine** case the section of the ordinance there involved read:
"Any vehicle parked upon a public street of the city at a place, in a manner or for a length of time prohibited by an ordinance of the city is, if unoccupied, hereby declared to be an obstruction in such street and a public nuisance, and any police officer of the city is hereby authorized to cause the same to be removed to, and impounded in, the depository provided by the city for such purpose."

[2]In the **Hughes** case the ordinance there involved was one entitled:
"An ordinance prohibiting the parking or standing of motor vehicles within the city in violation of the ordinances of the city regulating the same, declaring such illegal parking to be a nuisance and a menace to the safe and proper regulation of traffic, providing for the removal of such vehicle and its retention by the chief of police until the payment of removal and storage charges; and declaring an emergency."

somewhat defiant of any grammatical analysis, might be transposed, without injury to its intent, in this fashion: "The police officer is authorized to provide for the removal of a vehicle to any public garage at the expense of the owner or operator, **whenever the police officer** finds that a **vehicle** unattended upon any street or highway or wrongly parked **constitutes** an obstruction to traffic." If that be the proper construction of the provision of the ordinance here involved, it vests in the individual police officer the decision whether the particular vehicle, left unattended or wrongly parked on the street, constitutes an obstruction to traffic. The validity of any such attempted delegation of power to the individual police officer is open to serious question. The ordinance does not declare that certain conduct of the owner or operator of the vehicle shall constitute an obstruction or a nuisance. If the consequences of summary removal, together with liability for the towing and storage charges, are to follow the acts here involved of an owner or operator of a vehicle, considerations of elementary fairness suggest, if they do not require, that there be a definite and certain **legislative** standard prescribed which will apprise the owner or operator that those consequences will ensue upon the violation of the standard prescribed. The provision of the ordinance here considered prescribes no standard of conduct to which the vehicle owner or operator may look, unless it be the flexible standard of the judgment of the particular police officer, and even that flexible standard might vary according to the mood of the individual police officer.

LOWELL J. GRADY,
Assistant Attorney General.

Virginia City Attorney.
August 8, 1951. 989-A-16

126

Traffic regulations — Towns — (1) Right of town to adopt traffic ordinances relating to nontrunk highways limited by requirement that as to speed limits same must be approved by commissioner of highways — M. S. 1949, Section 169.14, Subdivisions 2 and 5. (2) Town held to be a municipality within purview of M. S. 169.14, Subd. 2.

Statement and Question

"By your Opinion No. 989-B-4, May 3, 1950, you ruled that the Town Board of the Town of Minnetonka, if it qualified under M. S. A. 368.01, had the power to enact ordinances regulating traffic on town streets. The Town of Bloomington qualifies under the aforesaid section and its Town Board desires to adopt an ordinance regulating the speed of traffic on certain of its town streets. In that connection, I have been reading M. S. A. Section 169.14 of the Highway Traffic Regulation Act relative to speed restrictions and it might appear from Subd. 5 of said

Act that any alteration made of the speed limits on streets can be only made upon authority of the Commissioner of Highways. Does that mean that the Town of Bloomington cannot enact ordinances relating to speed without the consent of the Commissioner?

"Subd. 2 of said Section 169.14 provides that the limit of speed shall be 30 miles per hour in any municipality. Nowhere in Chapter 169 do I find any definition of 'municipalities' and I have not been able to find any definition of that word in our Minnesota Statutes which would apply to the aforesaid section. The Town of Bloomington is a municipal corporation and absent in the section the use of any words to show that a town is not to be considered a municipality such as is a village, it appears to me that a town would come within the use of the word municipality of this section of the act. Section 169.01 which contains many definitions, contains no definition of a municipality unless it can be considered that Subd. 28 thereof with reference to local authorities is such. Many of our statutes have provisions which state that they relate to cities, villages, towns, boroughs, etc., but I find no such provision in this section unless it be the first paragraph of Section 169.03 and the first paragraph of Section 169.04."

Opinion

In an opinion of this office dated May 3, 1950, and to which you refer, the question referred to and passed upon related only to the general powers of a town board to regulate traffic on the streets within the town. We concur in your conclusion that in respect to a change in speed limits, such change must be made with the consent of the commissioner of highways and in the manner provided for under M. S. 1949, Section 169.14, Subd. 5. This office so held in an opinion dated June 14, 1949, and July 22, 1948 (file 989-A-19).

In respect to your second question, we concur in your conclusion that a town is deemed a municipality within the meaning of the term as generally used in M. S. 1949, Section 169.14, Subd. 2. It is true that the legislature in enacting Chapter 169 has not defined the term "municipality." As you point out, however, it is significant that under Section 169.01, Subd. 28, the term "local authorities" is defined and includes " * * * other local board or body having authority to adopt local police regulations * * * ." Section 169.14, Subd. 5, uses the term "When local authorities believe that the existing speed limit * * * ." This provides a method of modification of the limits established by Section 169.14, Subd. 2, which establishes, under clause (1), the 30-mile limit in any municipality. Construing the provisions together, it is our opinion that a township is a municipality within the meaning of the term as used in Section 169.14, Subd. 2, clause (1).

DONALD C. ROGERS,
Assistant Attorney General.

Attorney for Town of Bloomington.
August 9, 1951. 989-A-19

127

Traffic regulations—Trucks and semi-trailers — Equipment — Wheel flaps— Construction of L. 1951, Ch. 640.

Question

"Whether or not the design of this truck (shown in illustration) is such that it would be exempt from the wheel flap law."

Opinion

L. 1951, C. 640 (M. S. 169.733), in so far as here material, reads as follows:

" * * * every truck and semi-trailer **not equipped with rear fenders** by the manufacturer shall be equipped with wheel flaps behind its rear wheels, * * * ." (Emphasis supplied.)

The decided cases defining the word "fender" adopt the basic concept that a fender is a guard or protection. See 16 Words and Phrases 477. Fundamentally it would seem that a fender is a guard or protection for the vehicle of which it is a part or to which it is affixed.

It is clear that the chief purpose of the act in question is to provide a protection against the throwing by trucks or semi-trailers of water, slush, snow, mud, or any other substance on cars or persons happening to be at the rear of such trucks or semi-trailers.

It is a question of fact in each case involved as to whether a truck or semi-trailer is so constructed by the manufacturer as to afford a coverage or guard over or around the rear wheels as a separate or an integral part of its body construction. If the truck shown in the illustration transmitted with your request, or any other, is so equipped as to furnish the protection intended by the enactment here considered, such truck would not require the wheel flaps provided for in the act.

It is my opinion that those whose duty it is to enforce the law must determine the facts. In determining such facts they must exercise reasonable discretion. Any arbitrary or unreasonable requirement would be invalid.

J. A. A. BURNQUIST,
Attorney General.

Chief Highway Patrol Officer.
March 14, 1952. 989-A-18

128

Trunk—Improvements—Plans and specifications for improvement of trunk highways within municipality must have approval of municipality pursuant to Subd. 3, Section 161.03, M. S. 1949 — Plans and specifications must be detailed and specific.

Ordinances—Maps, plans, etc., incorporated by reference for change of grade or improvement of streets do not need to be published with ordinance.

Statement

You state that on December 29, 1947, the City of Moorhead enacted a Resolution, a copy of which you transmitted with your request for opinion. You further state that on December 10, 1951, the City Council of Moorhead passed another Resolution, a copy of which you transmitted with your request for an opinion. You call attention to the fact that in each of these Resolutions reference is made to "Highway Department maps." You further state that Section 63 of the Charter of the City of Moorhead provides in part as follows: " * * * every ordinance or resolution, before it takes effect, shall be published in the official paper * * * ."

You also state that at the time the Resolution of 1947 was adopted there was neither a constitutional nor statutory trunk highway route that authorized the Commissioner of Highways to designate a trunk highway on First Avenue South and that such a route was not available to him until Trunk Highway No. 231 was added by Chap. 663, Laws 1949. (Attention is directed to Subd. 5, Sec. 161.03, Minn. Stat. 1949, authorizing the Commissioner of Highways to change the numbering of trunk highways. Trunk Highway No. 231 as appears by the Resolution of 1951 has been renumbered as Trunk Highway No. 52 and to avoid confusion will be referred to herein as Trunk Highway No. 52-231.)

Question

"Having in mind Section 63 of the City Charter, is it necessary that Highway Department maps which are referred to in the resolutions be published in the official paper as a part of the resolution that is published?"

Opinion

The action taken by the City Council in the resolutions transmitted is evidently responsive to the requirements for approval of plans and specifications and approvals of grade changes required by Subd. 3 of Sec. 161.03, Minn. Stat. 1949. Plans and specifications for the construction of trunk highways are made and prepared by the Department of Highways and when completed are public records on file capable of being definitely and specifically identified by reference. I assume, in this case, that they were on file both in the office of the Commissioner of Highways and the office of the City Clerk. The general rule seems to be that an ordinance or resolution concerning the change of grade of streets or construction work to be performed on streets may refer to maps, plans, specifications and other documents, a part of the public records then in existence and on file and that such documents need not be published with the ordinance or resolution. (See McQuillin Municipal Corps., 3rd ed. Vol. 5, Enactment of Ordinances, Sec. 16.80, at p. 303; City of Napa v. Easterby, 18 Pac. 253, 76 Cal. 222, at p. 227; City

and County of Denver v. Bargan Land and Inv., 83 Colo. 551, 267 Pac. 405; State v. Waller, 143 O. State 409, 55 N. E. 2d 654, at p. 657.) This rule has been recognized in two previous opinions of this office. (See: Opinion of Attorney General No. 59-A-32 dated September 12, 1931; Opinion of Attorney General No. 624-D-3 dated July 26, 1946.) In my opinion it was not necessary under Section 63 of the Charter that the maps and plans referred to in the resolutions be published with the resolutions.[1]

You also ask, having in mind the foregoing statement of facts and the transmitted resolutions, the following

Question

"In view of the foregoing, the specific question that has been asked of my office is whether or not the Highway Department does have authority at this time to take any steps relating to the construction of the road down First Avenue South."

Opinion

Assuming as you state in your request for an opinion, that the Commissioner of Highways in 1947 had no statutory or constitutional authority to locate a trunk highway along First Avenue South, it would seem to me that the resolution passed by the City Council of Moorhead in 1947 purporting to approve changes in grade in and plans for the construction of such unauthorized trunk highway would be ineffective on the date it was passed. Subd. 3, Sec. 161.03, Minn. Stat. 1949, only authorized the approval of grades, plans, and specifications by the City of Moorhead on the "Trunk Highway System." The trunk highway was not built. Chap. 663, Laws 1949, did not refer to nor in any of its provisions purport to validate any specific previous action taken by the City of Moorhead and therefor the resolution ineffective on the date it was enacted remained so even though Trunk Highway No. 52-231 was added to the trunk highway system by Chap. 663, supra.

In examining the Resolution of 1951 it is necessary to have in mind the provisions of Subd. 3, Sec. 161.03, Minn. Stat. 1949, which, in so far as here material, reads as follows:

"No portion of the trunk highway system lying within the corporate limits of any borough, village or city shall be constructed, reconstructed or improved unless **the plans and specifications** therefor shall be approved by the governing body of such borough, village or city before such work is commenced, nor shall the grade of such portion of the trunk highway system lying within such corporate limits be changed without the consent of the governing body of such borough, village or city." (Boldface supplied.)

[1]Maps, etc., that are **drafted for the purpose of an ordinance** such as maps referred to in a zoning ordinance are generally held to require publication with the ordinance. See W. H. Barber Co. v. City of Minneapolis, 227 Minn. 77, 34 N. W. 2d 710; Opinion of Attorney General No. 59-A-32 dated January 6, 1949.

An examination of the Resolution of 1951 shows that it approves a "general layout plan" and recites that "when plans and specifications * * * have been completed and submitted to the council * * * the same will be approved by further resolution." The requirement made by Sec. 161.03, supra, is that **the plans and specifications** for the construction of the trunk highway must be approved. Plans are the drawings that show the design, profile, alignment, form, etc., of the improvement. (See 70 C. J. S., Plan, pp. 1098-1099.) Specifications consist of written matter describing in detail the particulars of the improvement to be built and in accordance with which the improvement is to be built. (See 13 McQuillin Municipal Corps. 3rd ed., Public Improvements, Sec. 37.68, p. 251; 9 C. J., Building and Construction Contracts, Sec. 4, p. 694; 58 C. J., Specifications, Sec. 2, p. 828.) Subd. 3, Sec. 161.03 supra requires the approval of **plans and specifications** as these terms are hereinbefore defined. In my opinion the Resolution of 1951 without further action is not a sufficient approval pursuant to the statute, to authorize the Commissioner of Highways to **commence the actual physical construction or reconstruction** of Trunk Highway No. 52-231 in Moorhead since no specifications were approved and the plan that was approved was only a "general layout plan." In addition, I might state that the resolution itself contemplates further action by the City Council. The foregoing does not apply to the location, designation, and establishment of Trunk Highway No. 52-231 within Moorhead nor to any steps taken by the Commissioner of Highways short of **the actual commencement of construction work** on said Trunk Highway No. 52-231 since the location, designation and establishment of the trunk highway itself is committed by the legislature to the Commissioner of Highways and as to such matters the approval or consent of the City is not required by Subd. 3, Sec. 161.03, supra. (See: Opinion of Attorney General No. 229-D-15 dated September 28, 1927; Opinion of Attorney General No. 229-D-15 dated January 28, 1952.)

It would appear from the Resolution of 1951 that a commendable practice concerning the construction of trunk highways within municipalities has been adopted by the Commissioner of Highways in that before the preparation at considerable public expense of detailed plans and specifications for the construction of a trunk highway within a municipality, he first submits to the municipality concerned a general layout plan of the improvement contemplated. This practice no doubt affords the municipality a full opportunity to consider the general plan of the improvement and as shown in the Resolution of 1951 gives some assurance to the Commissioner of Highways before he prepares plans and specifications at considerable expense that when the detailed plans and specifications have been completed and submitted for approval they too will be approved. Though assurance is made of course the further action of approving the detailed plans and specifications is necessary.

LOUIS B. BRECHET,
Special Assistant Attorney General.

Moorhead City Attorney. 229-D-15
February 8, 1952. 277-B-4

HOUSING AND REDEVELOPMENT

129

Redevelopment project—Change of the planned use of large unsold or unleased areas in the redevelopment project requires consent to such modification by all lessees and purchasers in the project area and adoption of the modification by the housing and redevelopment authority and the governing body of the political subdivision in which the project is located and a rezoning of the lands in compliance with zoning ordinances and regulations. If the new planned use is inconsistent with existing zoning ordinances and regulations, a rezoning of the lands affected is required — M. S. 1949, Sections 462.525, Subd. 6, and 462.445, Subd. 6.

Facts

In 1950 the city council approved the X redevelopment project, consisting of several square blocks, which project was completed sometime ago, and from time to time some of the parcels of land therein have been sold to private owners for residential development—approximately 30 lots out of several hundred parcels.

It now appears advisable to rezone a few of the blocks of the redevelopment project area for commercial purposes to the advantage of both the housing and redevelopment authority financially and of present and future purchasers of residential properties in the area, so as to make available to them desired commercial facilities.

Question

In order to accomplish the rezoning contemplated, should the proceedings be undertaken under the city charter in the usual way, or in lieu thereof, should the redevelopment plan be changed?

Opinion

The facts presented indicate that two matters are involved in changing the use of part of the area comprising the redevelopment project; first, the plan of the redevelopment area, and second, the zoning of a part of the redevelopment area.

We assume from the nature of your inquiry that the X redevelopment project is a redevelopment project as defined in M. S. 1949, Section 462.421, Subd. 13 (now amended by L. 1951, C. 568), and that when the project was approved by the city council in 1950, it in fact approved the redevelopment plan therefor defined in M. S. 1949, Section 462.421, Subd. 15. We also assume that the redevelopment plan was one developed by the housing and redevelopment authority on its own initiative, that it was approved by the planning agency of the city, that said planning agency rendered its written opinion as to the plan, and that before the plan received final approval of the authority, a public hearing thereon was held after published notice, all

as required by M. S. 1949, Section 462.515 (now amended by L. 1951, C. 568). We also assume that when the city council approved the plan in 1950, it acted in conformity with M. S. 1949, Section 462.521 (now amended by L. 1951, C. 568).

"Redevelopment plan" as defined by Section 462.421, Subd. 15, supra, means:

> "a plan approved by the governing body (or agency designated by it for that purpose or authorized by law so to act) of each municipality in which any of the area to be covered by a redevelopment project is situated, which plan provides an outline for the development or redevelopment of such area and is sufficiently complete (1) to indicate its relationship to definite local objectives as to appropriate land uses and improved traffic, public transportation, public utilities, recreational and community facilities, and other public improvements; (2) **to indicate proposed land uses and building requirements in such area**; and (3) to indicate the method for the temporary relocation of persons living in such areas; and also the method for providing, unless already available, decent, safe, and sanitary dwellings substantially equal in number to the number of substandard dwellings to be cleared from said area, at rents within the financial reach of the income groups displaced from such substandard dwellings." (Emphasis supplied.)

M. S. 1949, Section 462.525, Subd. 6, reads as follows:

> "A redevelopment plan may be modified at any time after the lease or sale of the project area or parts thereof, provided the modification shall be consented to by lessee or purchaser and adopted by the authority and the governing body of the political subdivision in which the project is located, except the minor changes due to conditions occurring or discovered during construction and amounting in the aggregate to not more than two per cent of the total construction cost of the development may be made by the lessee or purchaser without the consent of the authority, provided no such change shall lower the quality of the construction agreed upon."

This latter subdivision authorizes a modification of the redevelopment plan after the project area or parts thereof have been sold or leased providing (1) the modification is consented to by the lessees or purchasers in the project area; (2) the modification is adopted by the authority, and (3) the modification is adopted by the governing body of the political subdivision in which the project is located.

In view of this latter statutory provision, it is our opinion that the change in the redevelopment plan contemplated in the X redevelopment project is one that in effect requires the concurrence of the housing authority, all purchasers or lessees in the project area and the city council.

M. S. 1949, Section 462.445, Subd. 6, reads as follows:

> "All projects of an authority shall be subject to the planning, zoning, sanitary, and building laws, ordinances, and regulations applicable to the locality in which the project is situated."

If the redevelopment plan is to be changed pursuant to the statutory provisions hereinbefore referred to, and if, as a result of such contemplated change, the use of the lands within the area of the redevelopment project are not in conformity with existing zoning ordinances and regulations, it, of course, will be necessary to undertake proceedings to accomplish rezoning by reason of Section 462.445, Subd. 6, supra.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Attorney for Minneapolis Housing and Redevelopment Authority.
May 27, 1952. 430

130

Site — Approval — Result of election — Resolution approving site of project not required before submission of approval to the people — Governing body bound by result of election—M. S. 1949, Section 462.465, as amended by L. 1951, C. 568, Section 4, unless expressly otherwise stated.

Facts

"The City of Fergus Falls has not selected a site to date. One site has been submitted to the City Council and rejected. It is the opinion of at least one member of the Council that the matter of selecting a site should be submitted to the voters of Fergus Falls as provided for in our law pertaining to referendum."

Questions

"1. Is it obligatory upon the City Council to first favorably approve a site before it may be submitted to the voters for their approval?

"2. If the site is disapproved by the people, is it mandatory upon the City Council to follow the decision of the voters?

"3. Could the approval of a site be submitted to the voters without a resolution adopting the site by the Council prior to its submission?

"4. If it is necessary for the Council to first approve the resolution adopting the site before submitted to the voters, would it be proper that such resolution have a provision wherein and whereby the act of the Council in approving the site shall be null and void unless favorably approved by the voters?"

M. S. 1949, Section 462.465, as amended by L. 1951, C. 568, Section 4, reads:

"Nothing in this section shall prohibit the initiation of a referendum in any municipality on any resolution or ordinance of the governing body pursuant to the provisions of the home rule charter of that munici-

pality. Before any unconditional obligation for the acquisition of a site for any low-rent housing project may be incurred or the first notice of a call for bids for the construction of such project may be published, such project shall be approved by the governing body of the municipality by resolution, provided, however, that upon a vote of the majority of the members of the governing body of the municipality at the time of the adoption of said resolution, the question of approval may be submitted to the voters for approval or rejection at a special election or at the next general election, provided further that said special election shall be held not more than 60 days after the determination by the governing body of the municipality to submit said question to the voters, said election to be held in accordance with laws applicable within the municipality to the holding of municipal elections. This subdivision shall not be applicable to a project where any unconditional obligation for the acquisition of a site or any portion thereof has heretofore been incurred by the local authority or where the project location has heretofore been approved by the governing body of the municipality."

Opinion

1.

Your first question is answered in the negative.

Subd. 3[1] provides in part that "Before any unconditional obligation for the acquisition of a site for any low-rent housing project may be incurred * * * such project shall be approved by the governing body of the municipality by resolution * * * ." This provision standing alone would unquestionably make the adoption of such resolution a prerequisite to such acquisition. However, this provision does not stand alone. It is modified by the proviso by which it is followed. The proviso reads: "provided, however, that upon a vote of the majority of the members of the governing body of the municipality at the time of the adoption of said resolution." While the intention of the legislature could perhaps have been more clearly expressed, we have no doubt that the intention of the legislature was to empower the governing body to leave the ultimate decision on the question of approval to the voters of the municipality, if the governing body should, in the exercise of its discretion, decide so to do. That it is a matter of discretion appears from the language of the subdivision which states that the governing body **may** submit the question of approval to the voters of the municipality.

We are confirmed in this conclusion by two other provisions of Subd. 3. The first is the requirement that the election shall be held "not more than 60 days after the **determination** by the governing body of the municipality to submit said **question** to the voters." It is significant that the factor fixing the time of election is not stated to be the time of adoption of a resolution approving the site but the time of adoption of the resolution determining that the question of approval shall be submitted to the voters. It is, also, significant that Subd. 3 does not provide that the resolution of the govern-

[1]All statutory references herein are to M. S. 1949, Sec. 462.465, as amended by L. 1951, C. 568, Sec. 4, unless expressly otherwise stated.

ing body approving the site shall be submitted to the voters, but, on the contrary, it provides that the question of approval of the site shall be submitted to the voters. Weight must, also, be given to the provisions of the first sentence of Subd. 3, which preserves the applicability of referendum provisions of the municipality. If the election on the approval of the site was intended to be a referendum on the approval of the site by the governing body, the legislature would have said so. For the above reasons, it is our opinion that the answer to your question is in the negative.

2.

This question is answered in the affirmative.

There are, of course, many statutes which direct or authorize the submission of a question to a vote of the people. It is not customary to write into such statutes language that categorically states that the outcome of the election shall be binding and decisive of the question submitted. That it is binding and decisive is implicit in the enactment of the law providing for the election, unless it is specifically otherwise provided. In those rare instances when an election is to be advisory, the legislature states so expressly. It has not provided in Subd. 3 that the election shall be advisory only.

3.

This question is answered in the affirmative for the reasons stated in our answer to your first question.

4.

In view of our answers to your questions numbered 1 and 3, there is no need to answer this question.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Fergus Falls City Attorney.
November 13, 1952. 430

LIABILITY

131

Cities—School districts—Swimming pool—Recreational activities—Liability for negligence resulting therefrom considered.

Facts

"1. The swimming pool is operated under the jurisdiction of a recreational committee which was appointed by the City Council and

the School Board. This recreational committee was authorized and approved of by the voters of the City as well as the voters of the school district.

"2. A charge is made for the operation of the swimming pool.

"3. No charge is made for other recreational facilities furnished by the committee."

Questions

"a. What, if any, liability does the City and the School Board assume by the joint operation of the swimming pool?

"b. Is there any responsibility for the operation of any of the other recreational facilities for which no charge is made?"

Opinion

Facts will necessarily differ in each instance where, as the result of conducting recreational activities and maintaining a swimming pool by a municipal corporation for the use of the public, persons will sustain injuries and seek to recover damages caused by the negligence of the municipal corporation conducting and maintaining the same. The liability of the municipal corporation in each case will depend upon the facts upon which it will be determined whether the acts and functions of the municipal corporation, out of which the injury arose, were governmental or proprietary. The general rule of law is that in the discharge of duties placed on municipal corporations by law, they and their servants are regarded as the governmental agencies, and are not answerable for the negligence at the suit of a private party. **Emmons v. City of Virginia**, infra.

The principle of nonliability for governmental acts and liability for proprietary acts is easy to state, but difficult to apply. In **Heitman v. City of Lake City**, 225 Minn. 117, 30 N. W. (2d) 18, at page 119, the court said:

"From the antiquated maxim 'the King can do no wrong' comes whatever immunity in tort is enjoyed by a municipality. In the judicial process, the principle of nonliability has been increasingly qualified by the distinction that, while the King can do no wrong as King, he can certainly commit wrongs as an individual so far as municipal corporations are concerned. Nonliability in tort for negligence is confined to acts performed in a sovereign or governmental capacity, as distinguished from the liability attaching to acts which are performed by a municipality in its individual corporate or proprietary role. The principle of nonliability for governmental acts and liability for proprietary acts is easy to state but difficult to apply. When is the act governmental, and when is it proprietary? We have evolved no catchall test equally applicable to all situations. We have, however, come to recognize certain characteristics as indicative of the proprietary role. In Storti v. Town of Fayal, 194 Minn. 628, 632, 261 N. W. 463, 465, we adopted the rule of Bolster v. City of Lawrence, 225 Mass. 387, 390, 114 N. E. 722, L. R. A. 1917B, 1285, wherein the Massachusetts court said:

> ' * * * The underlying test is whether the act is for the common good of all without the element of special corporate benefit **or** pecuniary profit. If it is, there is no liability; if it is not, there **may** be liability.' (Emphasis supplied.)"

See also 26 Minn. Law Review, 334-343.

Consequently, a categorical answer cannot be given to either question. We shall, however, direct attention to the law applicable generally to each question, and which should be applied to the facts from which liability or nonliability is to be determined.

a. It appears from the facts submitted that "A charge is made for the operation of the swimming pool." We are not advised whether such charge is made for the privilege of using the swimming pool or for the use of bathing suits, towels, or other items which are made available to patrons upon the payment of a prescribed charge.

The case of **St. John v. City of St. Paul,** 179 Minn. 12, 228 N. W. 170, involved an action to recover damages for injuries received at a bathing beach maintained by the city in one of its public parks. A verdict was directed for the defendant upon the ground that the evidence did not disclose any negligence on the part of the city, and also upon the ground that the city "in the maintenance of bathing facilities in a public park was discharging a governmental function and hence not responsible for negligence to those making use of the same." The plaintiff did not pay for the privilege of using the bathing beach or the diving board which were used by him when he was injured. The use of the bathing beach and the diving board were free for the use of the plaintiff and the public without the payment of any fee or charge therefor. However, the plaintiff had paid 25 or 30 cents for the use of a bathing suit, towel, locker and soap, and in connection with injuries which might have resulted from these conveniences for which he had paid 25 or 30 cents the court, on page 15, said:

> "Keever v. City of Mankato, 113 Minn. 55, 129 N. W. 158, 775, 33 L. R. A. (N.S.) 339, Ann. Cas. 1912A, 216, and Brantman v. City of Canby, 119 Minn. 396, 138 N. W. 671, 43 L. R. A. (N. S.) 862, are by plaintiff deemed favorable to him. In the first case the city was held liable for death caused by disease-carrying water supplied to private consumers. In the second the city supplied gas to private consumers and also for street lighting and negligently allowed gas to escape to private property, causing damage for which it was held liable. In both cases the municipality engaged in private business and was held liable on the same ground as any individual would be, conducting a similar business, notwithstanding it combined the same with some permissible but not obligatory municipal function, as water for fire protection and gas for street lighting. Had appellant received injury from the bathing suit or towel rented because the city had negligently allowed them to become carriers of disease, the question here presented would have been somewhat analogous to the two cases just referred to."

Assuming that the plaintiff had sustained injuries from using the locker caused by the negligence of the city in failing to properly maintain such locker, or by its negligence in allowing such locker to become a carrier of disease, then it would seem clear that liability would result under the rule stated in the Keever and Brantman cases cited by the court, and above quoted.

By analogy it would seem that when a municipality maintains a swimming pool and makes a charge for the privilege of using the same and negligently permits the water of such pool to become "carriers of disease," or negligently uses chemicals in the attempted purification of the water, or permits such pool to become a nuisance so that from either of such sources persons are injured, then the rule stated in the Keever and Brantman cases, supra, should apply.

When a municipality is engaged in its governmental capacity in maintaining a bathing beach it is not liable for the negligence of its agents and officers, yet, if in connection therewith and in carrying out such governmental function it also engages in proprietary acts, it is bound to exercise ordinary care so as to avoid injuries to those who use the facilities of the bathing beach. **Nemet v. City of Kenosha** (Wis.), 172 N. W. 711, involved an action to recover damages for the death of a boy by drowning at or near a municipal bathing beach. There was a verdict against the city, which was affirmed on appeal. We quote from the syllabus of this case, as follows:

> "A city, in the maintenance of a bath house and bathing beach, was acting in its governmental, and not in its proprietary, capacity.
>
> "While a city, in its governmental capacity as proprietor of bathing beach, is not liable for negligence of agents and officers, nevertheless, being engaged in business of furnishing water to private consumers, in such respect it acts in a private capacity, and is bound to exercise ordinary care, and for failure is liable for injuries proximately caused.
>
> "Excavation by a city to extend its private waterworks system across its premises, used by the public for bathing purposes, without giving notice of the presence of the danger, constituted a nuisance, and the city was liable for damages proximately caused.
>
> "If excavation to extend a city's water system was so inherently dangerous as to be very likely to cause injury to public bathers on its premises, the city was bound to see that precautions were taken to prevent such injury, though the excavation was contracted for by an independent contractor."

In **Heino v. City of Grand Rapids** (Mich.), 168 N. W. 512, we quote from the syllabus, as follows:

> "The city, having purchased a park and built a swimming pool therein under Const. Art. 8, Section 22, authorizing establishment of parks, and Loc. Acts 1905, No. 593, authorizing it to buy and maintain

parks, acted as a governmental agency, and was not liable for the death by drowning of a child in the pool, the circumstances of whose death were left to conjecture by the evidence."

No charge was made for the privilege of using such bathing beach, as the court points out on page 516.

In concluding our consideration of your first question, we believe the principle of law established by the decisions above referred to is that the maintenance of a bathing beach or a swimming pool by a municipal corporation is a governmental function, and when no charge is made for the privilege of using the same, the municipal corporation is not liable for the negligent acts of its officers or agents in maintaining the same. We have not found any authority which holds that a municipal corporation is not liable for injuries received because of the negligent acts of its officers or agents in maintaining a swimming pool or bathing beach where a charge is made for the privilege of using the same. In the St. John case, supra, no charge was made for the privilege of using the bathing beach and the diving board, which were factors contributing to the injury sustained by the plaintiff. It will be noted that in the St. John case the court cites with approval Emmons v. City of Virginia, supra, to which we shall hereafter refer.

b. We are not advised as to the nature of the "recreational facilities" for which no charge is made, nor are we advised as to whether such activities are conducted or are to be conducted within a public park, or upon other public grounds, or upon private property. These facts are essential and material in reaching a conclusion upon the question of liability for injuries resulting from the negligence of the officers and agents in conducting and carrying on these activities for the city and the school district under the direction and control of the recreation committee.

Our court has stated that "a municipality has a peculiar interest in the recreation or the pleasure of the public," and that "A park is a pleasure ground for the recreation of the public to promote its health and enjoyment. A public golf course is for the same purpose." Various kinds of games and activities, such as tennis, pitching horseshoes, baseball, kittenball, skating and bathing are conducted within our parks, and the maintenance of such park is a public function. See **Booth v. City of Minneapolis**, 163 Minn. 223, 203 N. W. 625.

Emmons v. City of Virginia, hereinbefore referred to, 152 Minn. 295, 188 N. W. 561, involved an action to recover damages sustained by a child while using a slide in a public park maintained by the city. There was a demurrer to the complaint which was sustained by the trial court and affirmed on appeal. The general rule of nonliability of a municipal corporation for the negligent acts of its officers and servants in carrying on a governmental function is stated by the court on page 296. It will be noted that the court again points out the lack of payment of compensation for using the park facilities, and on page 297 stated:

"Cities, through park and school boards, have of late provided playgrounds equipped with various instrumentalities for exercise and amuse-

ment. Where this is done for the public good and **gratuitously**, the cities and their servants are to be regarded as agencies of the government, and are not acting in a proprietary character."

And, again on page 298 the court said:

"There is no allegation in the complaint that the park commission or the city charged plaintiff or any one else a fee for using the slide or derived any income from the equipment furnished the public for amusement. In Bernstein v. Milwaukee (158 Wis. 576, 578, 149 N. W. 382, L. R. A. 1915C, 435), the court said the city's action in establishing the playground 'was not one from which in its corporate capacity it could derive any special benefit or advantage. On the contrary, its action was the result of a duty conferred to conserve and develop the health and strength of future citizens of the state, and thus promote the general welfare of the whole community. Herein lies the distinction between the proprietary and governmental functions'."

On page 299 the court observes that the allegations of the complaint do not bring it (slide causing injury) within the common law or statutory definition of a nuisance.

The court cites and quotes from the case of **Ackeret v. City of Minneapolis**, 129 Minn. 190, 151 N. W. 976, which involved an action to recover damages in behalf of a minor child for injuries sustained by burning within Loring Park in the city of Minneapolis. The injuries suffered by the child in this case resulted from falling upon a pile of live ashes which had been left on one of the crosswalks within the park. In holding the city liable for such damage the court concluded that the principle of law which requires a municipality to exercise ordinary care in the maintenance of its sidewalks is applicable to footpaths, sidewalks and crosswalks within public parks. The court in the Emmons case points out the premise upon which the city was held liable in the Ackeret case, as follows:

"In Ackeret v. City of Minneapolis, 129 Minn. 190, 151 N. W. 976, L. R. A. 1915D, 1111, Ann. Cas. 1916E, 897, the city was held liable for a defect in a walk or foot path maintained in its park, but this holding was predicated upon the exception mentioned. One division of the syllabus reads: 'Cities and villages are liable for injuries resulting from dangerous conditions in their streets; but, with this single exception, municipalities are not liable in damages for negligence in performing their governmental functions, unless such liability has been imposed by statute.' The decision points out that the pathway there involved was not merely for purposes of pleasure and recreation, but was a thoroughfare for passing from one part of the city to another. Liability is not imposed by the mere fact that the city and park commission are charged with the duty of maintaining the parks and are given the authority to provide the funds needed therefor."

See **Hensley, Incorporated, v. Town of Gowrie, Ia.**, 212 N. W. 714.

From these cases, and the law as stated by the court therein, a municipality may be held liable in carrying on recreational activities within its

parks if, in connection therewith, injuries are caused under circumstances similar to those wherein the city was held liable in the Ackeret case, supra.

In determining the question of liability for negligence causing injuries when carrying on recreational activities, such liability must be determined by the application of the law, as stated in the foregoing case, to the facts in each case, as such facts shall be found to exist.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Tracy City Attorney.
August 9, 1951. 844-F-3

LICENSES

132

Electricians—State licensed electricians—Municipal electrician licenses may also be required — M. S. 1949, Sections 326.25, 326.26, 326.262, 326.32.

Laws 1951, Ch. 475 and 555.

Opinion Mar. 8, 1951, reversed. Opinion May 14, 1937, adhered to.

Opinion

Reconsideration has been given to an opinion dated March 8, 1951, file 188-B, and written by an Assistant Attorney General in which he held "that a person licensed as an electrician by the State Board of Electricity may pursue his calling in any municipality in the state without further qualification."

I find that an earlier opinion of this office dated May 14, 1937, file 188-B, recognized the validity of an ordinance requiring a city license by a master electrician. This ruling has at no time been expressly reversed by the Attorney General or made of no effect by legislation or judicial determination.

The practice in this state of licensing electricians by municipalities, which has continued for so many years without interruption, should not in my opinion be declared illegal at this late date by the Attorney General. If the practice is to be terminated it should be by court decisions or the enactment by the legislature of legislation requiring such termination.

It is, therefore, herein held that the opinion of this office dated March 8, 1951, is hereby superseded to the extent that it is inconsistent herewith.

J. A. A. BURNQUIST,
Attorney General.

Corporation Counsel, St. Paul.
July 11, 1951. 188-B

133

Trailer coach parks—The fees required to be paid by occupied trailer coaches in a trailer coach park are not in lieu of taxes; L. 1951, C. 428. Where the required fees imposed upon an occupied trailer coach are not collected from the occupant thereof by the licensee of a trailer coach park, the latter's license may be revoked, under Section 5 of said act.

Questions

1. "Is the $1.50 per month required to be collected by the licensee of a trailer coach park from each occupied trailer coach in lieu of a personal property tax?

2. "What authority does the trailer park owner have for assessing a tax since he is not a governmental agent and does not have governmental responsibilities and authority to issue a tax receipt to the trailer owner?

3. "What would be the penalty if the trailer owner refused to pay the trailer park owner the $1.50 in view of the fact that there is no penalty clause in the law applicable to the trailer owner where he is in a park?"

Opinion

The purpose of L. 1951, C. 428, is expressed in its title. It reads in part as follows:

> "An act relating to trailer coach parks; to promote the health, safety and welfare of persons living in trailer coaches in trailer coach parks; requiring monthly and annual licenses therefor and providing for the allocation of such license fees between the counties and the municipalities concerned; * * * "

The term "trailer coach" as used in the act means any vehicle used or so constructed as to permit its being used as a conveyance upon the public streets or highways and subject to tax or registration, as such, under the provisions of Minnesota Statutes 1949, Chapters 168 or 169, and shall include self-propelled or nonself-propelled vehicles as designed, constructed, reconstructed or added to by means of an enclosed addition or room in such manner as will permit the occupancy thereof as a dwelling or sleeping place for one or more persons, having no foundation other than wheels, jacks or skirtings. (Section 1, Subd. 2) Section 2 of the act requires the person establishing, maintaining, conducting or operating a trailer coach park as defined by the act to obtain a license from the state department of health. Section 4 of the act requires the licensee of the trailer coach park to collect a fee of $1.50 per month from each occupied trailer coach occupying space within the licensed trailer coach park with certain exceptions thereto not here material. The fees so collected by the licensee of the trailer coach

park are remitted to either the treasurer of the municipality in which the trailer coach park is located or the treasurer of the county if the trailer coach park is not located in a municipality. The collected fees are distributed by the treasurer as provided in said Section 4 of the act.

From the foregoing, it is our opinion that the legislature in imposing a monthly charge of $1.50 to be collected by the licensee of the trailer coach park from each occupied trailer coach did not intend that the payment thereof was in lieu of motor vehicle taxes or personal property taxes. Section 1, Subd. 2, in defining the term "trailer coach" definitely contemplates that the vehicle therein referred to would be taxed as a motor vehicle; and there is nothing in the act in any way indicating that the enclosed addition or room which may be added to the vehicle is in any way exempt from ad valorem taxation. Your first inquiry is therefore answered in the negative.

In view of the answer to your first question, no answer is required to your second question.

In reply to your third question, the law provides for no penalty to be imposed upon the occupant of the trailer coach. However, by Section 5 of the act, the licensee of the trailer coach park may have his license revoked if he fails to comply with the provisions of the act, and one of those provisions is that he collect and remit the $1.50 per month from each occupied trailer coach.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Minnesota Department of Health.
November 30, 1951. 238-i

LOCAL IMPROVEMENTS

134

Sewers—Third class cities having home rule charter containing express provisions for making local improvements which supplant all other provisions of law on same subject, held controlling over general statutory provisions—Turner v. Snyder, 101 Minn. 481.

Questions

1. Are the provisions of M. S. 1949, Ch. 428, applicable to Moorhead, a city of the third class operating under a home rule charter?

2. Is it necessary to have the signature of 51% of the owners of property within the proposed drainage district, or is it sufficient to have merely 51% of the owners of property abutting upon the street where the storm sewer will be laid or constructed?

Opinion

1. Section 141 of the Moorhead City Charter reads as follows:

> "The City of Moorhead shall have the power to make any and every type of improvement not forbidden by the laws of the state, and to levy special assessments for all such as are of a local character. The amounts assessed against benefited property to pay for local improvements may equal the cost of the improvements plus the necessary incidental expenses with interest paid, but shall in no case exceed the value of the benefits resulting to such property."

The following section (142), so far as material to the question considered, provides:

> "After this charter takes effect, all local improvements shall continue for the time being to be made under the laws and ordinances applicable thereto. The council shall prepare and adopt a comprehensive ordinance, prescribing the procedure which shall determine all matters pertaining to the making of local improvements thereafter, and such ordinance shall supplant all other provisions of law on the same subject, * * * ."

Ordinance No. 173, relating to local improvements, was adopted by the city council on November 10, 1947, pursuant to the charter provisions and requirements. Section 1 of this ordinance in part reads as follows:

> "The City Council of the City of Moorhead shall have the power to lay and maintain various types of pavement, gutters and curbs, sewers and sidewalks upon any of its streets, avenues or alleys, with any material which the Council may deem suitable * * * ."

The local improvements enumerated in said Section 1 include practically all types and kinds of local improvements that are common to municipal government. Section 1 of the ordinance also provides the manner and method of initiating the proceedings for local improvements. Sections 2, 3, 4, 5, and 6 relate to the manner and method of advertising for bids and awarding contract to the successful bidder. Sections 7, 8, and 9 thereof relate to the matter of assessments and re-assessments of the property.

The charter provisions and the provisions of the ordinance, above referred to, were adopted subsequent to the enactment of M. S. 1949, Ch. 428 (L. 1909, Ch. 379). The general rule of law is that the provisions of a home rule charter supplant the general law with reference to the same subject matter. **Turner v. Snyder,** 101 Minn. 481, 112 N. W. 868, **White Townsite Company v. City of Moorhead,** 120 Minn. 1, 138 N. W. 939.

Section 142, supra, of the city charter, which expressly provides that after the charter takes effect and upon the adoption of a comprehensive ordinance relative to local improvements, "such ordinance shall supplant all other provisions of law on the same subject," clearly manifests the intent that such provisions shall supplant and supersede the general laws on the

same subject. The ordinance provides the manner and method of making local improvements which are authorized and provided for in Chapter 428, supra. Storm sewers may be constructed under the ordinance, and the provisions of the ordinance relative to such local improvements are controlling over the provisions of M. S. 1949, Ch. 428. We therefore answer the first question in the negative.

2. Section 1 of the ordinance, so far as pertinent to the prerequisites of a petition for the proposed local improvement, provides that the same shall be signed by the "owners of real property abutting on the proposed improvement." These provisions of the ordinance are positive and require a majority of the owners of real estate **abutting** on the proposed improvement to sign the petition.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Moorhead City Attorney.
February 13, 1952. 387-B-10

135

Sidewalks—Replacing or repairs—Assessments—City charter requires that cost of replacing sidewalk be assessed against property benefited—Ch. 15, Sections 1, 2, 44 and 45 of city charter controlling—Ch. 7, Section 20 not applicable.

Facts

"In 1946 or 1947, the City of International Falls had constructed a sidewalk on a street in the City of International Falls, same having been duly platted, and dedicated to the City, and the expense of the improvement was defrayed by assessment upon the real estate benefited thereby, in accordance with the procedure authorized by Chapter 15 of the City Charter of International Falls.

"For some unknown reason, said construction was faulty, and resulted in the sidewalk being below grade, but apparently was accepted by the City upon completion, and that due to such defect in construction, whenever severe rainfall occurs, said sidewalk is covered by approximately twelve inches of water, and is unuseable, and impassable.

"The owners of property abutting, thereon, who have paid assessments as required under Chapter 15, now complain to the City, and wish to have said sidewalk repaired or reconstructed, but object to being assessed again for the costs of having same repaired or reconstructed.

"It also appears that it would be impossible to raise the sidewalk grade, by raising the blocks, and filling in same, because much of it is so thin that it would crack if attempted to be raised, so that only practical solution seems to be to tear the old sidewalk out, and raise the grade, and lay a new sidewalk."

Question

"May the Council, under Chapter 7 of the Charter of International Falls, relating to the general powers and duties of the City Council, and under Section 20 thereof, conferring upon the City Council the general and broad power to extend, widen, straighten, grade, or otherwise improve any street within the limits of the City, cause the same to be paid for out of the general fund of the city, in order to rectify a mistake without assessing the abutting property owners for the cost of same, where they had fully paid for the defective sidewalk, or must such improvement be made pursuant to Chapter 15 of our Charter?"

Opinion

Chapter 15 of the city charter relates to the method of making certain local improvements, and prescribes the manner of paying for the same by levying an assessment upon the real estate benefited thereby unless otherwise specifically provided for in the charter, Sections 1 and 2. Section 44 of this charter prescribes the procedure for constructing, laying or re-laying sidewalks. Such work may be done by the owner or by the city council as therein provided. Section 45 prescribes the procedure for making repairs and for assessing the cost of such repairs against the property benefited.

The aforesaid provisions pertaining to local improvements, which include constructing, laying and relaying sidewalks and repairing the same, are controlling upon the question submitted. Chapter 15 of the city charter should be complied with when replacing or repairing the defective sidewalk referred to in the question above stated.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

International Falls City Attorney.
June 30, 1952. 480-A

136

Streets — Establishment — Petition — Cost — Village council empowered to establish and improve a street either upon a petition therefor or upon its own initiative—Cost thereof may be paid out of general revenue fund, by special assessment or by issuance of tax anticipated certificates— M. S. 1949, Sections 412.211; 412.221, subd. 6; 412.261; 412.401 to 412.481, inclusive, considered.

Questions

1. Must the cost of obtaining the necessary right of way by condemnation proceedings for a village street, together with the cost of improving the same, be paid by an assessment against the property benefited?

2. May the village council proceed to establish and lay out a street within the village upon a petition therefor?

3. To what extent, if any, may the village council expend its funds for acquiring, establishing, constructing, and maintaining a village street?

4. How may the proceedings to establish a village street be brought up for review by the court?

5. What provisions of law are applicable to condemnation proceedings by a village to acquire the necessary right of way for a street?

6. Who are qualified to sign a petition for the establishment of a street?

Opinion

1. The village may pay the entire cost of acquiring the right of way for a street, together with the construction and improvement thereof, from the general revenue fund. M. S. 1949, Sections 412.211; 412.221, subd. 6; 412.431.

2. Section 412.221, subd. 6, grants broad and general powers to the village council over streets and other public grounds. Under this section the council could, upon its own initiative, proceed to lay out, establish and acquire the necessary right of way for a village street and pay for the cost thereof without levying a special assessment against the property benefited. Sections 412.401 to 412.481, inclusive, authorize a special assessment against the property benefited so as to pay the cost of the improvement. However, Section 412.431 provides that the cost of any such improvement, or any part thereof **may** be assessed upon the property benefited by the improvement, whether the property abuts on the improvement or not, based upon the benefits received. This section further provides that the council may pay such proportion of the cost of the improvement as the council may determine from the general ad valorem levies. Section 412.411 provides in part and in substance that the council may proceed by a four-fifths vote of all of the members of the council, or when there has been presented a petition by the owners of not less than 35 per cent in frontage of the real property abutting on the street, alley, or part of the street described in the petition. Under this section the necessary right of way for a proposed street may be petitioned for by the owners of not less than 35% of the frontage upon such proposed street.

3. For the purpose of acquiring the necessary right of way for a street, constructing, improving and maintaining the same, the council may expend for such purposes moneys in the general revenue fund not otherwise encumbered, the amount authorized under Section 412.261, or the amount accruing from special assessments under the provisions of Sections 412.401 to 412.481, inclusive.

4. The right of appeal to the district court from an assessment is provided for in Section 412.461. In addition thereto, the right to review the action of a village council, where it is claimed that the council has acted

unlawfully, arbitrarily, or capriciously, by appropriate proceedings in the district court exists independently of statute.

5. Sections 412.211; 412.221, subd. 6; 412.401 and the following sections relating to local improvements and special assessments. The council when proceeding to acquire the necessary right of way by eminent domain should comply with the appropriate provisions of M. S. 1949, C. 117.

6. The owners of real estate abutting on the street sought to be established.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Kenyon Village Attorney.
December 20, 1951. 396-G

137

Streets—Grades—Village is authorized to lower the grade of a street [M. S. 1949, Section 412.401]. It may pay part of the cost of such improvement pursuant to Section 412.431. If abutting property is flooded or damaged by changes in grade, the village may be liable therefor.

Facts

Pursuant to a petition of property owners, the Village Council of your village installed curbs on both sides of First Street South in your village. The property owners have also requested the paving of the street. The paving, however, has not been done by reason of drainage problems presented in connection therewith.

The installation of storm sewers has been considered as a means of solving the drainage problem. No action has been taken regarding such improvement by reason of the cost involved and the opposition of property owners thereto. The village engineer has suggested that, if a portion of First Street South at the top of a hill is lowered approximately 12 inches, the water from the west portion of the street will drain down hill and storm sewers will not be needed. In connection with the drainage problem presented, you have submitted several inquiries. The questions asked and our views in respect thereto are as follows:

Question 1

"Will the village be legally responsible for damages to the property owners at the crest of the hill if the lowering of the grade in front of their property decreases the market value of the homes and vacant lots along this section of the street?

Opinion

If by changing the grade of a street abutting property is in fact damaged, in our opinion the village responsible therefor would be liable for damages. See **Maguire v. Village of Crosby**, 178 Minn. 144, 226 N. W. 398. In that case the court said:

> "Under our present constitution (Art. 1, Section 13) a change of a street grade which damages abutting property cannot be made without compensation first paid or secured."

Question 2

> "Will the village be legally responsible for damages caused to property owners at the foot of the hill if their property should be flooded because of the water flowing down the hill? At the present time there is some drainage down this hill but the lowering of the grade at the crest would cause additional surface water from the west to flow down the hill."

Opinion

In answer to this question, we refer you to an opinion of this office dated July 17, 1946, to the Faribault City Attorney (file 844-b-8), a copy of which is herewith enclosed for your information. From such opinion and cases cited therein, you will note that a municipality has been held liable for damages caused by flooding. See also **Poynter v. County of Otter Tail**, 223 Minn. 121, 25 N. W. (2d) 708, and the cases discussed therein.

Question 3

> "Can the village assume all or a part of the cost of the lowering or raising of the curb, which change will be necessary along a portion of the street if the crest of the hill be lowered?"

Opinion

This question is answered by a portion of the new village code relating to local improvements and special assessments. M. S. 1949, Section 412.401, et seq. In the case of a local improvement pursuant to such statutory provisions, the cost of any such improvement, or any part thereof, may be assessed upon property benefited by the improvement, whether the property abuts on the improvement or not, and the village council may pay such proportion of the cost of the improvement as the council may determine from general ad valorem levies. See M. S. 1949, Section 412.431.

Question 4

> "Could any of the property owners successfully maintain an injunction action to prevent the cutting down of the crest of the hill?"

Opinion

The provisions of the new village code apply to your village. See M. S. 1949, Section 412.901. A local improvement which contemplates the lowering or cutting down of a street and the paving and other work in connection

therewith, in our opinion, is authorized by M. S. 1949, Section 412.401. If the property of an abutting property owner is taken, damaged or destroyed by reason of such improvement, the village is liable therefor as indicated in our answers to Questions 1 and 2. Under such circumstances, and assuming that the improvement is carried out in accordance with the applicable statutory provisions, we doubt that abutting property owners could successfully maintain a proceeding to enjoin the village council from undertaking a local improvement authorized by law.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Cold Spring Village Attorney.
March 29, 1952. 396-G-6

138

Streets—Paving—Village may enter into cooperative agreement with county for street paving under M. S. 1949, Section 412.401 et seq. and assess cost of improvement against property benefited—Section 412.421, subd. 4, Section 412.431.

Facts

The village of Howard Lake contemplates paving one of its principal streets under an agreement with Wright County whereby the village will pay for the tar and the machinery rental, and the county will pay for the labor. The approximate cost to the village will be $2,500. Wright County will supervise the work and will award the contract therefor in the same manner as other contracts for road improvements are awarded and let by the county.

The village desires to levy a special assessment against the property benefited under the provisions of M. S. 1949, Section 412.401 et seq. Attention is directed to M. S. 1949, Sections 429.30 and 429.31.

Question

"In light of the fact that Subdivision 4 is entitled 'Cooperation with state or federal government,' do you feel that the procedure set out in Sections 412.401 et seq. may be followed when a contract is made with a county?"

Opinion

It is our opinion that the village may proceed under the provisions of M. S. 1949, Section 412.401 et seq. and enter into a cooperative agreement with the county for the proposed street improvement under the provisions of Section 412.421, subd. 4, which provides:

"Whenever such work is done under a cooperative agreement with the state or another political subdivision by the terms of which the state or other subdivision is to act as agent for the village, it shall not be necessary to comply with subdivisions 1 and 2 provided the procedure followed in letting the contract for the work complies with the law applicable to the state or other political subdivision with which the agreement has been made by the village."

The term "with the state or another **political subdivision**" means a political subdivision of the state which includes a county. The use of the words "or federal government" in the heading of this subdivision does not and cannot change the common and accepted meaning of the term "political subdivision" used therein.

The cost of the proposed improvement may be assessed against the property benefited under the provisions of Section 412.431.

Having reached the conclusions above stated, it is not necessary to consider Sections 429.30 and 429.31 above referred to.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Howard Lake Village Attorney.
June 19, 1951. 396-G-10

139

Streets—Petition— Hearing—Towns—Subject to M. S. 1949, Section 368.01 —Granted certain village powers, and in exercising such powers must comply with certain statutory provisions relating to villages—Notice to be published in official newspaper.

Facts

"Mounds View Township has within it a platted portion upon which more than 1,200 people reside and accordingly it is empowered, under Section 368.01 of the Minnesota Statutes Annotated, to exercise certain functions of a village under Chapter 412.

"Some of the residents of the town wish to have certain town roads improved or paved, and the Town Board wishes to assist them in this matter as far as possible. Section 412.221, Subdivision 6, gives the Town Board the power to pave, repair, and maintain streets, and there is apparently no limitation in that section on such power. However, Sections 412.401 through 412.481 provide a procedure for Local Improvement and Special Assessments. These sections provide in general that the Village Council, or in this case, the Town Board, has power to improve the street and pay any portion of the costs which it sees fit out of the general fund, assessing any remaining portion of the cost against

the property benefited in accordance with the benefits. If improvements of streets are requested by a petition of the abutting property owners pursuant to the statute, there must be two weeks publication of a Notice of Hearing, and then a public hearing held on such petition. If a petition is not filed, the same notice must be given but then there must be four-fifths vote of the Council to make such an improvement."

Questions

"(1) What type of improvement falls under the power given in 412.221, Subdivision 6, and what type of improvement comes under the provisions of 412.401 through 412.481? In other words, would an improvement of one block of a street be considered a local improvement upon which a public hearing would be necessary, or could such an improvement be made under 412.221 without any such notice?

"(2) Since the Town Board consists of only three members, it would appear that if no petition is filed for a local improvement, there must be publication of a Notice of Hearing and a unanimous vote of the Town Board in the event no petition is filed for the improvement. Is that correct?

"(3) Is it completely within the discretion of the Town Board to determine what portion of any improvement shall be paid out of the general funds of the Town Board? In other words, can the Town Board determine that eighty per cent of a particular improvement shall be paid from the town funds and twenty per cent assessed against the property benefited?

"(4) Section 412.191, Subdivision 4, apparently applies to Mounds View Township and requires publication of ordinances in 'The Official Newspaper.' Subdivision 3 of this section provides for a selection of an official newspaper but does not specifically apply to Mounds View Township. Should the Town Board select an official newspaper for publication of its ordinances?"

Opinion

(1) No distinction is made in the "type" of improvement falling within Section 412.221, subd. 6, and the provisions of Section 412.401 through Section 412.481. These statutes refer to the power of a village relating to paving and do not conflict with each other. Section 412.221, subd. 6, contains the general powers relating to improvements of streets. Sections 412.401 through 412.481 set forth the procedural requirements for making such improvements.

The general authority of the township of Mounds View over streets and other public places is granted under Section 412.221, subd. 6. Sections 412.401 et seq. provide the manner by which this general authority shall be exercised in making certain public improvements. Section 412.411, subd. 1, provides that "No action shall be taken for the making of any such improvement, other than for the preparation of preliminary plans and estimated

cost, until after the council has held a public hearing on the proposed improvement following publication * * * ." We find no statutory authority by which the town could pave one block of a street without the public hearing as required by statute.

(2) Section 412.411, subd. 1, provides: " * * * In every case where there has been no such petition the resolution may be adopted only by a vote of four-fifths of all the members of the council." Since the board of the township of Mounds View consists of only three members, it is obvious that a unanimous vote of the town board is necessary in order to authorize the improvement.

(3) Section 412.431 provides:

> "The cost of any such improvement, **or any part thereof**, may be assessed upon property benefited by the improvement, whether the property abuts on the improvement or not, based upon the benefits received. The council may pay such proportion of the cost of the improvement **as the council may determine** from general ad valorem levies. The improvement of two or more connecting streets or two or more types of improvement in or on the same street may be included in one proceeding and conducted as one improvement." (Emphasis added.)

Opinion of the Attorney General dated August 25, 1950, file 387-G-8, reads in part:

> "The statute (412.411) is purely permissive, not mandatory. If the council determines not to assess any part of the cost of the improvement it may do so. It may determine to pay the entire cost from the general fund of the village. The council is not required to levy a general ad valorem tax to pay the village's share of the cost of any particular improvement. It may do so if it so determines, but the council is not required to do so. The council may, if it so determines, pay the cost of the improvement out of the general fund of the village."

It is a matter within the discretion of the town board and unless exercised in an arbitrary or capricious manner would be controlling.

(4) Section 412.191, subd. 4, is made applicable to the township of Mounds View by reason of Section 368.01. Section 412.191, subd. 4, refers to the publication of ordinances in the "official newspaper." Although Section 368.01 speaks in terms of conferring "power" and "authority," the provisions of Section 412.191, subd. 4, relate solely to a duty. Section 412.831 provides for the selection of an official newspaper by village councils. The provisions of Section 412.831 must be considered as in connection with the provisions of Section 412.191, subd. 4.

Section 412.411, subd. 1, requires that a notice of the proposed public improvement be given by publication in the official newspaper. In order to meet the requirements of these statutes relative to publications in an official

newspaper, it necessarily follows that the requirements of Section 412.831 with respect to designating an official newspaper should be complied with by the town board.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Attorney for Mounds View Township.
April 11, 1951. 396-F-1

OFFICERS

140

Assessor—Bond—Failure to file—De facto officer—Acts of valid—Cannot compel payment of compensation but may retain compensation paid for services actually and in good faith rendered; deputy appointed by entitled to compensation—M. S. A. 273.05, 273.06, and 273.08.

Facts

"Pursuant to a home rule Charter provision the City of Granite Falls appointed an assessor for that land lying in Chippewa County in the City of Granite Falls, Minnesota. The assessor so appointed received his books and blanks of assessment from the County Auditor of Chippewa County, but did not file his bond as required by M. S. A. 273.05 before he received his books of assessment. The assessor then appointed a deputy assessor who filed his bond as required and undertook his duties as deputy assessor in preparing the lists and assessments.

"The assessor did attend the school required by statute and received his instructions from the Auditor at the time he received and signed for the books. He did discuss with the council on several occasions the problems involved in assessing the portion of land in Chippewa County, and with the assessor for that portion of land in Yellow Medicine County. The Assessor further conferred with the county supervisor of assessments. When the assessor appointed the deputy assessor, he instructed him on the proper procedure to follow in assessing, and assisted the deputy assessor when possible and necessary. Neither the deputy assessor nor the assessor has received any compensation.

"The assessor filed his bond June 27, 1951, and said bond contains an oath of office."

Questions

(1) "Does the failure of the assessor to file his bond within the time specified by law prevent him from exercising his duties of assessor if his bond and oath of office are duly filed before the First Monday in July?

(2) "Does the acceptance of the report of the assessor's assessments and lists by the Board of Equalization for the said City validate all assessments made and reported to the Board of Equalization of said City by the assessor or the deputy assessor if the assessor's bond is filed before the First Monday in July?

(3) "If the assessor's bond is filed by the First Monday in July, is the assessor entitled to compensation?

(4) "If the assessor's bond is filed by the First Monday in July, is the deputy assessor entitled to compensation?"

Opinion

(1)

The assessor is required to perform his duties during April, May, and June of each year. M. S. A. 273.08. The assessor here involved did not file the bond and oath required by M. S. A. 273.05 until June 27th. Notwithstanding that, and upon the basis of the facts stated, I am of the view that the assessor involved was an officer de facto during the material time prior to June 27, 1951.

The acts of a de facto officer are valid as to the public and third persons and cannot be attacked collaterally. See 5 Dunn. Minn. Dig., Section 8017; see **State v. Bryant,** 174 Minn. 565, 219 N. W. 877.

(2)

This question is answered by the answer to your question (1).

(3)

A de facto officer may not compel payment of his compensation. See **State ex rel. Egan v. Schram,** 82 Minn. 420, 85 N. W. 155. However, compensation which has been paid a de facto officer cannot be recovered by public authorities, at least where, acting in good faith, he actually renders the services for which he is paid. See 43 Am. Jur., Public Officers, Section 491; 151 A. L. R. 960.

(4)

This question is answered in the affirmative. A de facto officer may make valid appointments of subordinates. **State ex rel. Carlson v. Strunk,** 219 Minn. 529, at p. 534, 18 N. W. 2d 457. Presumably the deputy assessor involved was appointed by the assessor under M. S. A. 273.06. The deputy assessor has performed the work assigned to him. It was no fault of his that his principal failed to file the assessor's bond and oath required by

Section 273.05. The deputy assessor, in the circumstances, is entitled to such compensation as may be prescribed by the resolution of your city council. See Section 15, C. 2, Charter of the City of Granite Falls.

LOWELL J. GRADY,
Assistant Attorney General.

Granite Falls City Attorney.
June 29, 1951. 12-A

141

Assessor—Compensation—Hennepin County—M. S. 1949, Section 412.131, as amended by Laws 1951, Ch. 166—Opinion dated June 10, 1949, reversed.

Facts and Question

You refer to the opinion of this office dated June 10, 1949 (file No. 12-b-1), addressed to the Village Attorney of the Village of Golden Valley, and ask for a reconsideration of the question there presented.

Opinion

In the June 10, 1949, opinion this office ruled that the provisions of Minnesota Statutes 1949, Section 412.131, relating to the compensation of village assessors, did not apply to village assessors in Hennepin County. The writer of that opinion reasoned that because the repealer section in the 1949 Village Code (Minnesota Statutes 1949, Section 412.911) did not expressly repeal the provisions of Minnesota Statutes 1949, Section 273.04, which specifically relates to the compensation of assessors in Hennepin County, those specific provisions prevailed over the general provisions in Section 412.131.

However, the writer of the June 10, 1949, opinion overlooked another section in the 1949 Village Code (Section 412.921) which specifically provides that Section 273.04 shall no longer apply to villages.

It is therefore our opinion that the ruling of the June 10, 1949, opinion is incorrect, and accordingly it is hereby reversed.

The ruling of this office now is that the compensation of village assessors in Hennepin County is governed by the provisions of Minnesota Statutes 1949, Section 412.131, as amended by Laws 1951, Chapter 166. That section, so far as here pertinent, reads as follows:

> "The assessor may be compensated on a full-time or part-time basis at the option of the council but his compensation shall be not less than $100 in any one year, if fixed in a lump sum, or $6 per day, if fixed on a per diem basis. If his compensation is not fixed by the council, the assessor shall be entitled to compensation at the rate of $6 per day for

each day's service necessarily rendered, not exceeding 90 days, and mileage at the rate of five cents per mile for each mile necessarily traveled in going to and returning from the county seat of the county to attend any meeting of the assessors of the county legally called by the county auditor, and also for each mile necessarily traveled in making his return of assessment to the proper county officer and in attending sectional meetings called by the county assessor or county supervisor of assessments, except when mileage is paid by the county. In addition to other compensation, the council may allow the assessor five cents per mile for each mile necessarily traveled in his assessment work."

J. A. A. BURNQUIST,
Attorney General.

St. Louis Park Village Attorney.
May 16, 1951. 12-B-1

142

Assessor—Compensation—Town and portion of village lying therein not separated for assessment purposes—Jurisdiction of respective assessors—Whether village can contribute to compensation of town assessor— M. S. 1949, Section 412.131.

Facts

The village of Osakis is located in both Douglas and Todd counties, with the principal part of the village lying in Douglas County and a small part lying in Todd County. The portion of the village lying in Douglas County is a separate assessment district and the property therein has always been assessed by a duly elected village assessor. The property in the portion lying in Todd County has been assessed by the town assessor of Gordon Township. Local elections are participated in by all voters in the village whether they reside in Todd or Douglas County. In state or national elections those residing in that portion of the village lying in Douglas County vote in Osakis but those residing in the portion of the village located in Todd County vote in Gordon Township in that county. Gordon Township is now complaining that it has to pay the assessor for doing this work in the village and that it derives no benefit from this expense.

Questions

1. Can the Village of Osakis appoint the Village Assessor to assess village property located in Todd County?

2. Can the Village Council appoint the assessor of Gordon Township to act for the village in assessing the village property located in Todd County and pay him for his services?

Opinion

Special Laws 1881, Chapter 34, entitled "An act to Incorporate the Village of Osakis in Douglas County, provides that certain described territory in the counties of Douglas and Todd[1] shall constitute the village of Osakis, under the provisions of Chapter 139 of the 1875 General Laws. General Laws 1875, Chapter 139, entitled "An Act to Provide for the Organization of Villages in the State of Minnesota," provides that any village organized thereunder shall constitute one road district and that the territory comprised within the prescribed limits of the village shall constitute one election district. But it is silent as to whether the village shall constitute a separate assessment district.

By General Laws 1893, Chapter 199, any incorporated village in the state might, at any annual or special election, by an affirmative majority of the votes cast at the election, be made a separate assessment district. Chapter 199 provided further that if the proposition carried by a majority vote, then within ten days after the election the village recorder must notify the county auditor of the county in which the village was located and the county auditor after that time must keep the records and tax list separate and distinct from the town or towns in which the village was located. Chapter 199 was the source of Minnesota Statutes 1945, Section 413.05, and, with some amendments, has remained on the statute books until it was repealed in 1949 by Laws 1949, Chapter 119, Section 110, and replaced by Minnesota Statutes 1949, Section 412.081, Subdivision 2.

You state in your letter of April 20, 1951, that the village records were destroyed by fire some years ago and that the records of the county auditor at Alexandria fail to disclose any action taken by the village of Osakis to become a separate assessment district.

Under these circumstances, it seems doubtful that the village of Osakis, or any part thereof, ever legally became a separate assessment district.

Minnesota Statutes 1949, Section 412.131, provides that the village assessor shall assess and return as provided by law all property taxable within the village, "if a separate assessment district," and the assessor of the town within which the village lies shall not include in his return any property taxable in the village. This office previously has ruled that where the village is not a separate assessment district the town assessor shall assess the property of the village and that there is no authority in the law for the village to contribute anything toward the payment of the town assessor's compensation.

Opinion dated July 21, 1944, File 12-B-1.

Opinion dated May 17, 1950, File 12-C-1.

Upon the hypothesis that the village of Osakis has never legally become a separate assessment district, your questions must both be answered in the negative. All property in the portion of the village lying in Douglas County

[1]By Special Laws 1887, Chapter 362, entitled "An Act to Annex Certain Territory to the Village of Osakis, in the County of Douglas, State of Minnesota," certain other territory in Douglas County not theretofore included within the corporate limits of the village was annexed to, included in, and made a part of the plat of the village.

will have to be assessed by the town assessor of the town in which it lies, and all property in the portion of the village lying in Gordon Township in Todd County will have to be assessed by the town assessor of that town. The village will not be able to make a contribution to the compensation of either town assessor.

This situation easily can be rectified by having the village proceed, under Minnesota Statutes 1949, Section 412.081, Subdivision 2, to become a separate assessment district.

If, upon further investigation, records are found which establish that some time after 1893 the village of Osakis did become a separate assessment district, then I am sure you will find that the limits of that district were made coterminous with the village limits, thus including the territory lying within Todd County. In such case, of course, the village assessor has authority to assess and return as provided by law all property taxable within the entire village limits, including the territory lying in Todd County. See Minnesota Statutes 1949, Section 412.131.

CHARLES P. STONE,
Assistant Attorney General.

Osakis Village Attorney.
April 26, 1951. 12-B

143

Assessor—Vacancy—Appointment—City councilman not eligible to appointment to office of city assessor—His ineligibility not affected by resignation—May be de facto officer—Opinions of Sept. 10, 1943, and July 25, 1947, distinguished.

Facts

"The City of Little Falls is a fourth class city operating under a home rule charter. One of the charter officers is an assessor who is elected. Recently the assessor resigned, creating a vacancy in the office. The Council set a time at which it would consider applications for the office of assessor. The night of the meeting at which the applications for assessor were opened, one of the councilmen resigned. His resignation was accepted and he took no further part in any council proceedings. Subsequent to his resignation the applications for position of assessor were opened and read and the councilman who resigned had applied for the position. The remaining eight members of the council then voted on filling the vacancy and the councilman who had resigned received a majority of the votes. There was no understanding or agreement that the councilman would be appointed assessor if he resigned."

Question

"Was the councilman legally appointed as assessor and may he continue to hold office as such?"

Opinion

Minnesota Statutes 1949, Section 471.46, provides:

"No county, city, village, borough, town or school district officer shall be appointed to fill a vacancy in any **elective** office if he has the power, either alone or as a member of a board, to make the appointment; **and his ineligibility shall not be affected by his resignation before such appointment is made.** This section shall not prevent the appointment of a member of a city or village council to a different office on the council."

The office of city assessor is an elective office in the City of Little Falls. See Charter, C. 2, Section 4.

A vacancy in the office of city assessor is required to be filled by appointment by the city council. Little Falls Charter, C. 2, Section 7.

Had the councilman involved not resigned as councilman, or had his resignation not been accepted by the council, prior to attempted appointment of him by the council as city assessor, the councilman involved would be clearly ineligible under the express provisions of M. S. 1949, Section 471.46, for the appointment as city assessor. The statute expressly provides that **"his ineligibility shall not be affected by his resignation before such appointment is made."** Effect must be given to that portion of the statute last above quoted and emphasized. See Attorney General's opinion of February 11, 1947 (126h). A holding that the councilman involved by virtue of his resignation from the council became eligible to the appointment involved would be based upon an utter disregard of the language of the statute.

Accordingly, I am of the view that the councilman involved was not eligible for appointment to the vacancy in the elective office of Assessor of the City of Little Falls, and his appointment was without legal authority. It does not necessarily follow, however, that he may not "continue to hold office as such" assessor. If he has assumed the office of assessor and is performing the duties thereof, he may be a de facto officer until such time as competent authority in the proper proceeding determines that he is not entitled to exercise the powers and duties of the office involved. See Thorpe on Public Officers, Section 636, p. 601.

The factual situation here considered is different from that involved in Attorney General's opinion dated September 10, 1943 (470L). The last cited opinion holds that a member of the village council, upon resignation from such office, is eligible for appointment to a vacancy in the office of village clerk. That conclusion was predicated upon the last sentence of what is now M. S. 1949, Section 471.46.

The fact situation here considered is likewise to be distinguished from that considered in Attorney General's opinion dated July 25, 1947 (12f-1), holding that a member of the county board, upon resignation, was eligible

to appointment to the office of supervisor of assessments or county assessor. The offices involved in the latter opinion to which the appointment was intended to be made were appointive offices, not an elective office as here involved.

LOWELL J. GRADY,
Assistant Attorney General.

Little Falls City Attorney.
March 26, 1951. 12-A-3

144

Assessor—Vacancy—Failure to elect assessor in even numbered year—Vacancy in office—How filled—M. S. 1949, Section 212.34.

Facts

The village of Dunnell was organized under the general law and consists of a separate election district. Through inadvertence the notice of the December, 1950, election failed to state that an assessor was to be elected, and as a result no assessor was elected.

Question

What action should the village council take in view of this situation?

Opinion

Minnesota Statutes 1949, Section 212.35, provides that the regular village election shall be held annually on the first Tuesday after the first Monday of December in each year, and that the assessor shall be elected in each even numbered year. Section 212.34 provides that the village assessor shall serve for a term of two years, the term commencing on the first business day of January following the election at which he is chosen.

The term of office of your village assessor who was serving in 1950 therefore expired on January 2, 1951. Since no assessor was elected for the term commencing January 2, 1951, a vacancy in that office was created.

Section 212.34 provides that vacancies in office shall be filled for the remainder of the term (which in this case would be until January 2, 1953) by the council, and that in case of a tie, the mayor shall fill the vacancy by appointment for the unexpired term. It provides further that if the vacancy is not filled by appointment by the council before May 1 following its occurrence, the county auditor shall appoint some resident of the county as assessor for such village.

It follows that at any time prior to May 1, 1951, your village council may appoint a village assessor for the unexpired term (until January 2, 1953). If the council has not acted by that date the appointment will have to be made by the county auditor.

Until an appointment is made either by the village council prior to May 1 or by the county auditor after May 1, the old assessor will continue in office as an officer holding over. Section 212.34 provides that all officers chosen and qualified as such shall hold office until their successors qualify.

It will not be necessary for the village council to adopt a resolution declaring a vacancy. The vacancy occurs automatically upon the expiration of an official's term when his successor has not been elected.

CHARLES P. STONE,
Assistant Attorney General.

Dunnell Village Attorney.
March 16, 1951. 12-B-5

145

County commissioners—Salaries and traveling expenses—Per diem—Special meeting—Payment of per diem for committee duties authorized by M. S. 375.06, as amended by L. 1951, Ch. 487—Whether special meetings are included is a question of fact—Mileage for attending meetings authorized.

Question

May the county commissioners receive a per diem of $5.00 and mileage for attending special meetings of the board?

Opinion

The 1950 census, which was filed in the office of the secretary of state on December 14, 1951, gives Polk County a population of 35,900. The salary of the county commissioners is fixed by M. S. 1949, Section 375.055, as amended by L. 1949, Ch. 423, subject to the salary adjustments as provided by L. 1951, Ch. 327.

Section 375.06, as amended by L. 1951, Ch. 487, reads as follows:

> "The several members of the county boards in counties having less than 75,000 inhabitants shall receive **$5.00** per day for each and every day necessarily occupied in the discharge of their official duties while acting on any committee under the direction of the board, and ten cents per mile, each way, for every mile necessarily traveled in attending such committee work. **Any committee may be comprised of all the members of the county board. The several members of the county boards** shall also be entitled to mileage of ten cents per mile, each way, for every mile necessarily traveled for attending meetings of the board, not to exceed 12 meetings in any one year; and, in addition, the chairman of the county board shall receive ten cents per mile, each way, for going to the county-seat to sign warrants during recess of the county board." (Emphasizing new matter added by amendment.)

Payment of mileage under the above act must be considered in conjunction with Section 350.11, as amended by L. 1951, Ch. 641, which in part reads as follows:

> "The maximum amount which shall be paid by the state, any department or bureau thereof, or any county, city, village, town, or school district, to any officer or employee, except sheriffs or deputy sheriffs, as compensation or reimbursement for the use by such officer of his own automobile in the performance of his duties shall not exceed seven and one-half cents per mile, * * *."

This act provides for reimbursement or compensation for the use, by a public officer, of his own automobile when engaged in the performance of his duties. Mileage and per diem which may be paid under Ch. 487, supra, constitute a part of the compensation of a county commissioner and not reimbursement for the use of his car as contemplated by said Ch. 641. In our opinion, county commissioners are entitled to mileage of ten cents a mile in attending committee meetings or meetings of the county board not exceeding 12 in any one year, as provided in said Ch. 487, and except as therein provided, mileage which a commissioner may receive as reimbursement or compensation for the use of his automobile is governed by said Ch. 641. In reaching this conclusion we have considered the rule of statutory construction as prescribed in Section 645.26.

Whether the board of county commissioners, when attending a special meeting, is acting as a committee within the purview of said Ch. 487 so as to be entitled to receive the per diem therein authorized depends upon the purposes for which the meeting was called, and the nature of the work transacted.

This office has held that county board members are not entitled to receive additional salary or per diem for attending special meetings of the county board. Opinions of Attorney General February 26, 1936, No. 111, 1936 Report, April 20, 1938, No. 117, 1938 Report.

In attorney general's opinion dated October 15, 1929, No. 273, 1930 Report, it is stated:

> "It would be impossible for this office to give a ruling which would fit any particular case without having all of the facts as to the exact nature of the work done, the length of time spent on it, and the authorization from the county board."

We believe that this quotation is applicable to that part of the question under consideration. The county board, under Ch. 487, supra, may sit as a committee unit. If, as such, it is functioning as a committee within the meaning and intent of said act then the members of the board are entitled to the per diem authorized by said act.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Polk County Attorney.
June 23, 1952. 124-A

146

County commissioners—Salaries and traveling expenses—Stearns County—M. S. 375.06 has no application in a county having less than 75,000 inhabitants if the assessed valuation of the county exceeds $20,000,000 but is less than $100,000,000—M. S. 375.06 and 375.05 (5) and (6). Attorney General's Opinion May 29, 1951 (124h) Limited.

Facts

"The Stearns County Board operated under Chapter 413 of the Session Laws of 1949 from January 1 to July, 1951. When the official census was filed it showed the population of Stearns County to be 70,681 or 681 above the figure which permitted operation under the above section. This section permitted the commissioners $3.00 per day and 5c per mile for necessary travel with a limit of $550.00 per member for any one year.

"Session Laws of 1951, Chapter 487, provides that where the population is under 75,000 that the commissioners be paid $5.00 per day and 10c per mile for necessary travel and the board operated under said section from July to December, 1951, and made said charges in accordance therewith. * * *

"Members of the public examiner's office during the later part of December, 1951, informed the county board members and the auditor that Stearns County should operate under Minnesota Statute 375.05, Section 6, which eliminates the $5.00 per day and 10c per mile provision and allows only for actual mileage and expenses not to exceed in the aggregate the sum of $1200.00 for the five board members or the sum of $240.00 average for each commissioner per year."

Stearns County, we are advised, has an assessed valuation of approximately $35,000,000. That assessed valuation brings Stearns County within the range of Section 375.05 (5), rather than Section 375.05 (6), as indicated in your letter. That difference, however, as will appear from the opinion, does not affect the answer to your

Question

"Is Chapter 487, Session Laws of 1951, the section under which Stearns County Commissioners should collect their expenses?"

Opinion

Determination of the question submitted requires consideration of the histories of M. S. 375.05 and 375.06.

A clear distinction in law exists between compensation for mileage, which is an emolument of the office, and reimbursement for expenses actually and necessarily incurred and paid. That distinction must be kept in mind in the consideration of this opinion.

L. 1951, C. 487, is an amendment of M. S. 1949, Section 375.06. Section 375.06, in substance, provides that the county commissioners in counties having less than 75,000 inhabitants shall receive $5.00 per day for each day necessarily occupied in the discharge of their official duties while acting on any committee under the direction of the county board and 10c per mile for every mile necessarily traveled in attending such committee work and, in addition thereto, 10c per mile for every mile necessarily traveled in attending meetings of the board, not to exceed 12 meetings in any one year. M. S. 375.06 is not a **reimbursement** statute. It is not an **expense** statute. It is a statute providing **compensation.** The compensation is $5.00 per day for days necessarily occupied in committee work **and** 10c per mile for every mile necessarily traveled in attending such committee work and also 10c for every mile necessarily traveled in attending meetings of the board, to the number limited by the statute. The travel that a county commissioner is required to undergo for the purposes stated under Section 375.06 is thus, by the statute, **compensated.** That compensation is measured by the number of miles the commissioner necessarily travels in the performance of committee work or in attendance upon board meetings. It is not a matter of reimbursement for actual expenses. The rate per mile specified by the statute is to be paid for travel regardless of the actual expense that the commissioner may incur for such travel.

Section 375.06 had its origin in L. 1907, C. 296. It was carried into G. S. 1913 as Section 685, into G. S. 1923 and Mason's M. S. 1927 as Section 657, into M. S. 1945, and later into M. S. 1949, as Section 375.06. Its only amendment since 1913 has been by L. 1951, C. 487. The only effect of the amendment last cited, so far as here material, was to increase the per diem allowance from $3.00 to $5.00 per day. The purpose and scope of M. S. 1949, Section 375.06, was neither changed nor enlarged by its 1951 amendment.

The history of what is now M. S. 375.05 might be considered in two phases: (1) that antedating L. 1945, C. 526, and (2) that postdating L. 1945, C. 526.

M. S. **1945,** Section 375.05, dealing with salaries of county commissioners, provided in its portions here material as follows:

> "Each commissioner shall receive from the county in full for all his services **an annual salary,** as follows:
>
> "* * *
>
> "(5) In counties whose assessed valuation is more than $20,000,000, and does not exceed $40,000,000, the sum of $600, which amount shall be paid in lieu of all other charges or allowances, **except that such commissioners may be allowed and paid in addition thereto their actual and necessary traveling expenses incurred and paid by them in the discharge of their official duties; provided, that the total aggregate**

amount of the traveling expenses of all the county commissioners of any such county which may be so allowed and paid shall not exceed the sum of $1,200 in any one year; * * *."[1]

The emphasized portion of the statute is purely a **reimbursement** provision. The expenses there specified are reimbursable to the county commissioner and may be received by him in addition to the salary prescribed by law.

It is sufficient for the purposes of this opinion to trace the history of what is M. S. 1945, Section 375.05, back only to Rev. L. 1905, Section 423. The cited section of the Revised Laws was carried forward, with its amendments, into G. S. 1913, Section 684, thereafter into G. S. 1923 and Mason's M. S. 1927 as Section 656, and finally into M. S. 1945 and M. S. 1949 as Section 375.05.

At this point consideration of **Nelson v. County of Itasca** (1915), 131 Minn. 478, 155 N. W. 752, becomes material. That case involved the construction of G. S. 1913, Section 685, now M. S. 375.06, and G. S. 1913, Section 684, which later became M. S. 1945, Section 375.05. Plaintiff was a county commissioner of Itasca County. The assessed valuation of Itasca County was then more than $20,000,000 but did not exceed $100,000,000. Its population was less than 75,000. Plaintiff claimed that he was entitled, under G. S. 1913, Section 685, now M. S. Section 375.06, to per diem and mileage while acting on a committee under direction of the county board. He brought suit to recover the same. A demurrer to the complaint was sustained by the trial court on the ground that plaintiff was limited to the salary and compensation fixed by G. S. 1913, Section 684, which was, in substance, later embraced in M. S. 1945, Section 375.05 (6). The Supreme Court affirmed. It held that G. S. 1913, C. 685, now M. S. 375.06, was not applicable to Itasca County and that plaintiff was entitled only to the annual salary specified in G. S. 1913, Section 684, plus his **actual and necessary traveling expenses, limited as in that section prescribed.**

The **salary** provision of M. S. 1945, Section 375.05 (5), so far as the same applied to Stearns County, was repealed by L. 1945, C. 526, now coded, with its amendments, as Section 375.055.[2] See M. S. Section 375.055, subd. 3. However, L. 1945, C. 526, Section 5, preserved the right of any county commissioner to collect and retain any fees, **per diem payment, or other payment** which he was then authorized by any other provision of law to collect and retain in addition to the stated amount of his annual salary. See M. S. 375.055, subd. 4.

Note 1: A substantially similar **reimbursement** provision is contained in **M. S. 1945**, Section 375.05 **(6)**, applicable to counties "whose assessed valuation is more than $40,000,000, and does not exceed $100,000,000." Accordingly, under **M. S. 1945**, Section 375.05 **(5)** and (6), county commissioners in counties whose assessed valuation was more than $20,000,000 and did not exceed $100,000,000 were entitled to receive, in addition to their stated annual salary, only "their actual and necessary traveling expenses incurred and paid by them in the discharge of their official duties," unless, of course, some legislative act of limited application and otherwise providing applied to a particular county within the range of the assessed valuations stated.

Note 2: Under 375.055, subd. 1 (g), the annual **salary** of county commissioners in counties with 60,000 but less than 100,000 inhabitants is fixed at the rate of $1,000 and $25.00 for each $1,000,000 taxable valuation or major fraction thereof and $2.00 for each full or fractional congressional township, with the aggregate not to exceed $1,500.

At the time of the enactment of L. 1945, C. 526, a county commissioner of Stearns County was not authorized by **M. S. 1945, Section 375.06**, to collect and retain the per diem payment or the mileage compensation in that statute prescribed in addition to his stated salary because M. S. 1945, Section 375.05 (5), authorized, in addition to the stated annual salary, the payment to such commissioners of **only** the "actual and necessary traveling expenses," limited as therein prescribed. See **Nelson v. County of Itasca, supra.**

The county commissioners of Stearns County are no longer entitled to the per diem payment and mileage compensation provided for by L. 1949, C. 413, for the obvious reason that Stearns County is no longer within the classification prescribed by that act.[3] But the mere circumstance that Stearns County has outgrown the classification prescribed by L. 1949, C. 413, does not render Section 375.06 applicable to Stearns County. The **reimbursement** provisions of M. S. 375.05 (5) and (6) are still in force and effect. The law announced in **Nelson v. County of Itasca, supra**, is still the law.

Accordingly, I am of the view that:

(1) M. S. 375.06 has no application to counties whose assessed valuation is more than $20,000,000 and does not exceed $100,000,000, and

(2) In those counties having an assessed valuation within the range stated in (1) next above, the county commissioners may be allowed and paid, in addition to their annual salaries, only their actual and necessary traveling expenses as provided in Section 375.05 (5) and (6), and then only to the limits therein prescribed.

In Attorney General's opinion dated May 29, 1951 (124h), reference is made to L. 1951, C. 487. It is there stated that that act "applies only in counties having a population of less than 75,000 inhabitants" and that the "compensation provided in Section 375.06 is in addition to that provided in Section 375.05." These statements are correct as applied to counties having less than 75,000 inhabitants and an assessed valuation of less than $20,000,000. But they are not applicable to counties of less than 75,000 inhabitants whose assessed valuation is more than $20,000,000 and less than $100,000,000. I am authorized to say that the opinion of the Attorney General of May 29, 1951, file 124h, is hereby so limited in its application.

M. S. 375.06 not being applicable to Stearns County, your specific inquiry is answered in the negative.

You ask this further

Note 3: L. 1949, C. 413, is limited in its application to counties having a population of not less than 55,000 nor more than 70,000 and consisting of not less than 35 nor more than 49 congressional townships. This act of limited application had its origin in L. 1933, C. 26, amended by L. 1937, C. 248, and by L. 1943, C. 402. Implicit in the enactment of the legislative acts of limited application referred to in this footnote was the legislative recognition, it seems to me, that M. S. Section 375.06 had no application to the counties within the limited classification of those acts, even though the population of those counties was less than 75,000 inhabitants. If Section 375.06 had applied to those counties, there would have been no necessity for including the per diem and mileage provisions in L. 1949, C. 413; L. 1943, C. 402; L. 1937, C. 248, and L. 1933, C. 26.

Question

"In the event you answer question number 1 in the negative, would it be possible to have remedial legislation passed at the 1953 session of the legislature to legalize the overpayment?"

The answer to this question rests with the Legislature, rather than with the Attorney General.

LOWELL J. GRADY,
Assistant Attorney General.

Stearns County Attorney.
January 24, 1952. 124-H

147

Probation officers—Appointment made by court—Soldier's Preference Law not applicable—Salary fixed by court with approval of county board, and may be decreased during tenure—May be removed at pleasure of appointing authority—M. S. A. 260.09.

Fact

The County Probate Judge contemplates appointing a county probation officer under the provisions of M. S. A. Section 260.09.

Questions

"First, would such an appointment be subject to the state laws pertaining to Veteran's preference?

"Second, if Veteran's preference does not apply can such probation officer be removed at the discretion of the probate judge making the appointment?

"Third, what assurance of tenure would such officer have under either Veteran's preference or otherwise? Would it not still be contingent on the county commissioners' power to lower or discontinue his salary appropriation?"

Opinion

1. So far as material, M. S. A. Section 260.09 reads as follows:

"The court shall have authority to appoint one or more persons of good character to serve as probation officers during the pleasure of the court. Such probation officers shall act under the orders of the court in

reference to any child committed to their care, and in the performance of their duties shall have the general powers of a peace officer; and it shall be their duty to make such investigations with regard to any child as may be required by the court before, during or after the trial or hearing, and to furnish to the court such information and assistance as may be required; * * *."

The probation officer acts under the control of the court. He is required to make such investigations with regard to any child as the court shall direct, and to furnish such information and assistance as the court may request. The duties to be performed by the probation officer, which are subject to the control and direction of the court, clearly establish a relationship of trust and confidence, and render inapplicable the soldier's preference act. Section 197.45 et seq. **State ex rel. Castel v. Chisholm**, 173 Minn. 485, 217 N. W. 681; **State ex rel. Tamminen v. Eveleth**, 189 Minn. 229, 249 N. W. 184; **State ex rel. Cassill v. Peterson**, 194 Minn. 60, 259 N. W. 696.

We answer the first question in the negative.

2. Section 260.09 provides in part that the probation officer appointed by the court shall serve "during the pleasure of the court." The statute is definite and the language is free from ambiguity. It grants to the court, as the appointing power, the authority to remove the probation officer whenever the court shall determine. Furthermore, it is the general rule that, unless otherwise provided, appointive officers may be removed at the pleasure of the appointing officer whether the appointment is for a fixed term or not. See 5 Dunnell's Minn. Digest, Section 8010.

The second question is answered in the affirmative.

3. A public officer has no contract or vested right to the continuance of his office or its emoluments. His salary or fees may be reduced or taken away entirely. See 5 Dunnell's Minn. Digest, Section 8007, and cases cited.

Section 260.09 further provides:

"In counties of more than 100,000 population, a majority of the judges of the district court may direct the payment of such salary to probation officers as may be approved by the county board. In other counties probation officers shall receive the same fees as constables for similar services, including all travel, and in addition thereto such salary as may be fixed by the judge and approved by the county board."

In your county, under this statute, the salary of the probation officer is to be fixed by the judge and approved by the county board. Obviously, the salary of the probation officer could not be paid unless there are funds available therefor. The availability of the funds for such payment rests with the county board. It is for the county board to determine and to appropriate money for the conduct of the business of the county, including the salary of the probation officer.

We believe that if the county board should fail to provide the necessary funds for the payment of compensation for the probation officer, such action should be deemed as a disapproval by the board of the amount of the salary as fixed by the court.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Itasca County Attorney. 104-B-8
March 20, 1952. 85-C

148

Register of deeds—Appointment—Vacancy—Board cannot fill until vacancy occurs—M. S. 1949, 375.07, 375.08.

Facts

"The Register of Deeds of Mahnomen County, Minnesota, this day submitted to the County Board at its regular meeting his resignation from the office of Register of Deeds of Mahnomen County, Minnesota, to take effect on July 1, 1951.

"The Mahnomen County Board in regular monthly session today (June 5, 1951) accepted said resignation as tendered."

Questions

"1. Can the Mahnomen County Board make an appointment to fill such vacancy in said office prior to July 1, 1951, to take effect on said July 1, 1951?

"2. Must the Mahnomen County Board wait until its next regular meeting to be held on Monday, July 2, 1951, to fill such vacancy (July 1, 1951, falling on a Sunday)?

"3. If the Mahnomen County Board shall act to fill the vacancy in the office of the Register of Deeds at its next regular meeting on Monday, July 2, 1951, is it necessary that the chairman or clerk of said Board serve a notice on each member personally in the same manner as a district court summons is authorized to be served, at least one day prior to the meeting of said Board calling a meeting of said Board for the purpose of filling the vacancy in said office?"

Opinion

The first question is answered "no." Section 375.08 applies.

"When a vacancy occurs in the office of * * * register of deeds," the county board shall fill the same by appointment. That vacancy will not occur until the resignation is effective.

The county board is without power to fill a vacancy until it occurs. So, it follows that the vacancy cannot be filled until July 1. July 1 occurs on Sunday. There will be no business to be done in the office of register of deeds on Sunday. The following business day is July 2. But the regular meeting of the county board as fixed by law, M. S. 1949, 375.07, occurs on the second Monday in July, which is July 9. The vacancy in the office may be filled on that day, July 9, or if the board chooses to act under its authority conferred by Section 375.08, it may meet on July 2, or any other day before July 9 after the vacancy exists, and if all members are present, no notice of a meeting need be given. The vacancy may then be filled. But this same section provides for one day's notice of a county board meeting. If such notice is given, then the county board could act even though all members were not present.

There is no need for haste in the matter because the last sentence in Section 375.08 provides that the chief deputy is authorized to perform the duties of the office until the vacancy is filled by appointment.

You will note that your last question assumes that the meeting contemplated to be held on July 2 is a regular meeting. That is erroneous. The regular meeting is July 9. The rule may be stated that no notice of a regular meeting need be given. Notice is required for a special meeting unless all members are present at the special meeting, in which case it does not become important whether or not there was any notice. Notice is given to procure the attendance of the members.

CHARLES E. HOUSTON,
Assistant Attorney General.

Mahnomen County Attorney.
June 7, 1951. 373-A-4

149

Register of deeds—Recording—Contract for deed—Registered titles—Where certificate of title shows outstanding contract for deed, the holder of an assignment of the contract, when presenting the assignment for registration, need not furnish evidence of payment of mortgage tax on contract which is on file and bears endorsement of payment of tax—M. S. 1949, 287.08.

Facts

1. A certificate of title is outstanding showing X to be the owner subject to a contract for deed wherein A is named as purchaser. A quitclaim deed is presented to the registrar for registration and to be shown upon the certificate of title as a memorial. A deed is executed by A, unmarried, as grantor, to X, as grantee.

2. A certificate of title is outstanding showing X to be the owner subject to a contract for deed wherein A and B are named as purchasers. An instrument in writing is presented to the registrar for registration and to be shown as a memorial upon the certificate of title. This instrument is a deed or assignment of the vendee's interest. It is executed by A, as grantor (or assignor), to B, as grantee (or purchaser). When A and B are joint tenants and A dies, a certificate of death of A and an affidavit of identity with evidence of no unpaid inheritance tax are presented so that by statute and by rule of court the registrar may show the transfer of vendee's interest by survivorship, from A to B.

Question

Should the registrar accept such instruments for registration without proof that the mortgage registration tax on the contract for deed has been paid, particularly in the case of the release by A to X and of the transfer from A to B by survivorship?

Opinion

An executory contract for the sale of land, under which the vendee is entitled to or does take possession thereof, is a mortgage within the meaning of M. S. 1949, C. 287. M. S. 1949, 287.02. It is subject to tax. Section 287.05. Such tax is payable at or before the time when the mortgage is filed for record or registration. The treasurer's receipt countersigned by the auditor, endorsed upon the mortgage, is conclusive proof of payment of the tax. Section 287.08.

The registrar is without authority to register an assignment or satisfaction of such mortgage unless the tax shall have been paid. Section 287.10.

On March 17, 1932, file 349-A-9, the Attorney General rendered an opinion wherein the opinion was expressed that a certified copy of a final decree of the probate court assigning a contract for deed on which the mortgage tax had not been paid could be recorded in the office of register of deeds without payment of the mortgage tax. But it may be noted that the opinion is silent on the question whether evidence of such record may be received in evidence by a court without payment of the tax. Nor is it stated in the opinion that before payment of the tax, such record is notice. See Section 287.10.

> "* * * when the tax on the mortgage is paid, then any assignment or other instrument relating to such mortgage is entitled to record, may be received in evidence, and is of such validity as it would have been had no mortgage registration tax statute existed." **Van Dam v. Bakker,** 162 Minn. 124, 202 N. W. 343.

So, the practical problem for the registrar appears to be: Is there evidence of payment of the tax on the mortgage? If the contract for deed is on file in the office of registrar, as it should be (Section 508.48), the registrar has in his possession the evidence showing that the tax has been paid. If the tax has not been paid, he will not have it on file. Section 287.10. It, therefore, appears that the only time when this question will arise is when the

contract was made before the enactment of this statute in 1907, or where the contract was not registered. The statement of facts excludes the case where the contract was not registered. If the contract was made before the enactment of the law, the tax does not apply.

It is my opinion that where the registrar has in his own possession the evidence showing that the tax has been paid, he should not require any further evidence of such payment for the reason that the statute states that the endorsement of evidence of payment by the treasurer countersigned by the auditor is conclusive.

CHARLES E. HOUSTON,
Assistant Attorney General.

Examiner of Titles, Hennepin County.
February 13, 1951. 373-B-9-e

150

Register of deeds—Recording—Contract for deed—Where village acquires real estate under contract for deed from a private party to be used for municipal purposes, the mortgage registry tax, as provided for under M. S. A. 287.05, must be paid as a prerequisite to recording of the contract.

Taxation—Same.

Facts

A village has purchased improved real estate under a contract for deed from a private party. These premises will be used by the village exclusively for municipal purposes, such as a municipal liquor store, council rooms, office for the village clerk, fire hall, library, and for the storage of personal property. The balance of the purchase price is $84,000 which, according to the terms of the contract, is to be paid at stated times and solely from revenue derived from the operation of the municipal liquor store. The full faith and credit of the village has been pledged for the payment of the balance of the purchase price which, as stated, amounts to $84,000.

Question

May the register of deeds record such contract for deed without payment of the mortgage registry tax as required by M. S. A. 287.05?

Opinion

So far as material, Section 287.05 provides:

"A tax of 15 cents is hereby imposed upon each $100, or fraction thereof, of the principal debt or obligation which is, or in any contingency may be, secured by any mortgage of real property situate within the state executed, delivered, and recorded or registered; * * *."

Municipal liquor stores are established pursuant to statutory authority and in the exercise of the police power to accomplish governmental purposes. **Stabs v. City of Tower**, 229 Minn. 552, 559. It has been held by this office that a village has the power to purchase real estate on a contract for deed where the deferred payments are to be made only out of the profits accruing from the operation of the store. Attorney General's Printed Report 1948, No. 162.

Maintaining and providing offices for municipal officers, library room, fire hall and storage space for municipal property is a governmental function. Consequently, the real estate and the personal property owned by the village for the purposes aforesaid are, by the provisions of Minn. Const., Art. IX, Section 1, exempt from taxation. However, the vendor under the contract for deed with the village being a private party, his real and personal property are not exempt from taxation under the constitutional provision above referred to.

The mortgage registry tax required to be paid under Section 287.05, supra, is a tax upon the security and not on the debt secured. **Mutual Ben. Ins. Co. v. Martin County**, 104 Minn. 179, 116 N. W. 572.

Unless payment of the mortgage registry tax imposed under said Section 287.05 is excepted or exempted by other statutory provisions, the same must be paid in full before the contract for deed may be recorded. Section 287.10.

Exemption from the payment of such tax is expressly provided in Section 287.06 which, in part, provides:

> "* * * provided, that this chapter shall not apply to mortgages taken in good faith by persons or corporations whose personal property is expressly exempted from taxation by law, or is taxed upon the basis of gross earnings or other methods of commutation in lieu of all other taxes."

The vendor in the instant case, being a private party, is not a person or corporation whose personal property is expressly exempt from taxation by law. The village, being the purchaser, is under no legal obligation to record the contract for deed; neither is the vendor under any legal obligation to do so. He may, should he choose, omit to record the contract. However, the vendor may not enforce any right under the contract or use the same as evidence unless the mortgage registry tax has been paid. Section 287.10. See **Lassman v. Jacobson**, 125 Minn. 218, 221, 146 N. W. 350.

From the foregoing we conclude that payment of the mortgage registry tax, as required under the provisions of said Section 287.05, must be paid before the contract for deed may be recorded in the office of the register of deeds.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Renville County Attorney.
May 19, 1952. 373-B-17-d

151

Register of Deeds—Recording—Records of federal tax lien—Release thereof —Entitled to filing although unacknowledged—Minn. St. 1949, Sections 272.48, 386.39.

Facts

"The Register of Deeds has recently received Certificates of Federal Tax Lien Discharges from the Collector of Internal Revenue in St. Paul for recording. (Their form 669.) These were in certificate form but not acknowledged before any officer authorized by law to take acknowledgments.

" * * * the Collector issued a general letter to the Register of Deeds."

Question

"Whether or not such unacknowledged certificates are entitled to record?"

Opinion

Minnesota Statutes 1949, Section 386.39, provides:

"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."

The authority for filing a certificate of federal tax lien is not found in Section 386.39. As it is expressly otherwise provided by law in Minn. St. 1949, Section 272.48, it comes within the exception in Section 386.39. Section 272.48 refers only to the instrument as a notice of lien and is silent as to the form of the notice. The statute contemplates that the form of the notice shall be that prescribed under the applicable federal laws. There is no requirement in Section 272.48 that the notice shall be acknowledged.

It is our opinion that a register of deeds must accept for record a certificate of the Collector of Internal Revenue of the existence of a federal tax lien without an acknowledgment of its execution unless the acknowledgment is required by federal law. It follows that a release of such certificate need not be acknowledged to be entitled to record by the register of deeds unless it is so required by federal law.

We are advised that the General Counsel of the Bureau of Internal Revenue has ruled that there is no federal statutory provision which requires the acknowledgment of either the notice of the federal tax lien or of the certificate of discharge of a federal tax lien.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Lake of the Woods County Attorney.
August 15, 1951. 373-B-11

Editorial Note: Section 272.48 amended by L. 1953, C. 488, S. 1.

152

Register of Deeds—Salary—Compensation—Authorized by M. S. A. 357.18—In addition to fees collected, is not salary but guaranteed income—L. 1951, C. 327, relating to salary increases, does not apply to register of deeds in counties covered by Section 357.18.

Question

In the event that the county board of Beltrami County should pass a resolution increasing the salaries of elective county officers under authority of Laws 1951, Chapter 327, would the register of deeds get the increase?

Opinion

The register of deeds does not hold a salaried office. His compensation is by way of fees. He is given a guaranteed income by Section 357.18, but this income is not salary.

> "Salary is a fixed compensation, which is paid at stated times. Dane v. Smith, 54 Ala. 47, 50." 38 W. & P. 38.
>
> "A 'salary' is a periodical allowance made as compensation to a person for his official or professional services, or for his regular work. Board of Com'rs of Teller County v. Trowbridge, 95 P. 554, 555, 42 Colo. 449." 38 W. & P. 38.

W. & P. gives various other definitions along the same line.

In my opinion, the sum to be paid by the county under authority of Section 357.18 is not salary but is a guaranteed income in addition to fees in the event that the fees do not reach the sum guaranteed in the law.

CHARLES E. HOUSTON,
Assistant Attorney General.

Beltrami County Attorney. 373-A-4
June 26, 1951. 104-A-9

153

Register of Deeds—Salary—After death of officer—Salary cannot be paid for services of public officer after the officer dies—M. S. 1949, 181.58, as amended by L. 1951, C. 531.

Facts

On June 12, 1951, the register of deeds died. M. S. 1949, 181.58, as amended by L. 1951, C. 531, permits payment to the surviving spouse of an indebtedness owing to the deceased in such amount as may be due, not exceeding $500. This may be done where no executor or administrator of the estate of the deceased has been appointed.

Question

Is the salary due and which may be paid to the surviving spouse to be prorated on his monthly salary and cover only the period from the first of the month to the 12th day of June, or is it the entire salary for the month of June that is to be paid?

Opinion

In the language of the statute, the amount to be paid is such an amount as may be due. He earned nothing after he died, so there could not be more due than the amount that he earned from the beginning of the month until he died. If he earned a salary, it must have been an annual salary. The fact that it was payable monthly does not entitle the surviving spouse to the entire month's salary because he lived part of the month. Salary is a compensation for service. Compensation for service should not be paid where service is impossible to be rendered.

CHARLES E. HOUSTON,
Assistant Attorney General.

Otter Tail County Attorney.
July 9, 1951. 359-A-21

154

Sheriffs—Assistants—Compensation—No statutory authority provided for payment of compensation to persons assisting sheriff in dragging for drowned persons—M. S. A. 387.03 and 357.21 considered.

Facts

During the past few months it has been necessary for the sheriff to hire persons to aid and assist him in dragging for drowned persons. You have referred to M. S. A. Sections 387.03 and 357.21 and submit this

Question

How much compensation may be paid to persons so assisting the sheriff?

Opinion

M. S. A. 1951 C.A.P.P. Section 387.03, provides:

"The sheriff shall keep and preserve the peace of his county, for which purpose he may call to his aid such persons or power of his county as he deems necessary. He shall also pursue and apprehend all felons, execute all processes, writs, precepts, and orders issued or made by lawful authority and to him delivered, attend upon the terms of the district court, and perform all of the duties pertaining to his office, including searching and dragging for drowned bodies and searching and

looking for lost persons **and when authorized by the board of county commissioners of his county he may purchase boats and other equipment including the hiring of airplanes for such purposes."**

This law requires a sheriff to keep and preserve the peace of his county. In order to perform this statutory duty he may call to his assistance such persons or power of his county as he deems necessary. This law also requires the sheriff to search and drag for drowned bodies and to look for lost persons.

By the 1951 amendment, Chapter 302, the legislature added the above emphasized language which provides: "and when authorized by the board of county commissioners of his county he may purchase boats and other equipment including the hiring of airplanes for such purposes." No power or authority is granted to the sheriff to hire or employ persons to assist him in searching for drowned bodies or lost persons, the authority to call persons to the aid of the sheriff being limited by the express language of the statute to the preservation of the peace of his county.

The 1951 amendment permits the sheriff, when authorized by the county board, to purchase boats and other equipment and to hire planes for the purpose only of searching for drowned bodies or lost persons, but does not grant to either the sheriff or the county board authority to hire or employ persons to assist the sheriff for such purposes. If the legislature had intended to grant such authority to either the county board or to the sheriff it could have so provided in the 1951 amendment. We cannot enlarge the statutory powers of the sheriff; that is a matter for the consideration of the legislature.

Section 357.21, as amended by Laws 1951, Chapter 339, provides, among other things, for the payment of fees for sheriff's aids in criminal cases. When persons are called by the sheriff to aid him in a criminal case or to assist him in preserving peace within his county compensation may be paid under the provisions of Section 357.21, supra. From the facts submitted in the instant case, the provisions of this statute authorizing compensation to sheriff's aids in criminal cases do not apply.

We are not advised of any statute authorizing payment of compensation to persons who have been called to assist the sheriff for the purposes as recited in the above statement of facts.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Polk County Attorney.
July 28, 1952. 390-A-1

155

Sheriff—Assistants—Compensation and reimbursement—Conveying persons to place of detention—Feebleminded—Insane—Senile—Epileptics—Convicts—M. S. 1949, 525.754, Laws 1951, Ch. 339.

Statement

Laws 1951, C. 339, Section 1, provides compensation to a sheriff who does not receive a salary on a per diem basis for the services which he performs and provides that he shall be reimbursed for expenses incurred in transportation of a person committed by the probate court to an institution. When the person transported is a female, the sheriff is required to deputize a suitable woman to act as his deputy. She is compensated at the same rate as the sheriff and reimbursed for her expenses.

Question

Is the court authorized to allow $5 in all cases covered by the title of Chapter 339, or just in the specific cases mentioned in the body of the act? In all other cases, does Section 525.754 (M. S. 1949) apply?

Opinion

The title of the act is not the law enacted. The law enacted follows the enacting clause.

The only situation in which the sheriff is entitled to the per diem compensation is where he does not receive a salary. The deputy would not be entitled to compensation where the sheriff is not entitled to compensation.

In my opinion, where the sheriff receives a salary, M. S. 1949, 525.754, does not apply so as to give him additional compensation. In a county where the sheriff receives no salary, the 1951 act provides that he receives a greater compensation than does Section 525.754. In that respect, the 1951 statute is inconsistent with the former statute and would necessarily supersede it.

Questions

1. Does L. 1951, C. 339, supersede M. S. 1949, 525.754?

2. Is the court authorized to allow $5 in all cases covered by the title of C. 339, or just in the specific cases mentioned in the body of the act?

3. In other cases, does Section 525.754 still apply?

Opinion

M. S. 1949, 525.754, fixes at $3 a day the compensation of the authorized assistant of the person conveying to the place of detention the patient there mentioned. "The patient" is the person described in Section 525.749, subd. 2, and includes mentally ill, senile, inebriate, mentally deficient, or epileptic.

L. 1951, C. 339, amends M. S. 1949, 252.07. It provides that the woman who accompanies the committed female feeble-minded and epileptic patient to the place of confinement shall be paid $5 per day. In so far as the two provisions are inconsistent, the later enactment controls. M. S. 1949, 645.26,

subd. 4. So, L. 1951, C. 339, fixes the compensation of a woman who accompanies the committed female feeble-minded or epileptic patient to the place of confinement, but in other commitments mentioned in Section 525.754 the compensation there provided, $3 per day, still applies.

CHARLES E. HOUSTON,
Assistant Attorney General.

Scott County Attorney.
June 21 and 27, 1951. 390-A-8

156

Sheriff—Deputy—Appointment of attorney at law as deputy sheriff—Limitations imposed by M. S. 1949, Section 387.13, upon his practice as an attorney.

Question

"May a lawyer, duly admitted to practice and practicing in the State of Minnesota, be appointed and serve as deputy sheriff, under Section 387.13?"

Opinion

M. S. 1949, Section 387.14, provides for the appointment of deputy sheriffs.

M. S. 1949, Section 387.13, so far as here pertinent, provides:

"No sheriff, deputy sheriff, or coroner shall appear or practice as an attorney, solicitor, or counselor in any court, or draw or fill up any process, pleading, or paper for any party in any action or proceeding, nor, with intent to be employed in the collection of any demand or the service of any process, advise or counsel any person to commence an action or proceeding * * * ."

Eligibility to appointment to the position of deputy sheriff is not destroyed by the circumstance alone that the appointee is an attorney at law. So, the question is not one of eligibility. If an attorney is appointed as deputy sheriff and he qualifies as such, then the limitations imposed by Section 387.13 upon his practice as an attorney attach. Those limitations are voluntarily incurred by the appointee by his acceptance of the position of deputy sheriff. The disability imposed by the statute to "appear or practice as an attorney, solicitor, or counselor in any court, or draw or fill up any process, pleading, or paper for any party in any action or proceeding" is not restricted in its application to those legal matters in connection with which the deputy sheriff or his principal has performed some official act or service.

LOWELL J. GRADY,
Assistant Attorney General.

Waseca County Attorney.
July 18, 1951. 390-B-1

157

Sheriff — Expenses — Conveying probation violator to state reformatory — Payable by State Board of Parole if placed by court on probation to that board—M. S. 1949, Sections 637.06, 610.38, 640.52. Opinion of March 1, 1939 (390-c-9), superseded.

Facts

The convict in the matter in which you submit a question as to the expenses of the sheriff in transporting him from Montana to St. Cloud, Minnesota, was sentenced to the State Reformatory in that city on April 18, 1949. Among the orders of the court at that time was one by which the defendant was placed on probation to the State Board of Parole. On April 4, 1950, after being on probation to said board for nearly one year, the members thereof found the defendant had violated certain conditions of his probation and adopted a resolution to the effect that his stay of sentence be revoked and annulled upon formal order of the court and "that the sheriff apprehend said defendant, and upon being furnished with a certified copy of this order and the usual necessary commitment papers, take" him "to the State Reformatory at St. Cloud, Minnesota, for confinement under said sentence." On the 10th day of May, 1950, the judge concurred in the resolution of the Board of Parole. Pursuant to the order of the court, a warrant of commitment was issued. It was then learned that defendant had been convicted on a charge of forgery in Montana and was confined in its penitentiary. You then caused a detainer to be placed against him, and, on the expiration of his term in Montana, the Sheriff of Todd County went to Deer Lodge of that state, the location of its penitentiary, where the sheriff took the defendant into custody under the warrant of commitment, transported him to Long Prairie, Minnesota, and thence to the reformatory at St. Cloud, Minnesota.

Question

"Does the State of Minnesota or the County of Todd pay the sheriff's expenses in returning the prisoner from Deer Lodge, Montana, and transporting him to the reformatory at St. Cloud?"

Opinion

Unless otherwise noted, the sections herein cited are those of Minnesota Statutes 1949.

Section 637.06 reads in part as follows:

" * * * The written order of the board of parole, certified by the chairman of the board, shall be sufficient to any peace officer or state parole and probation agent to retake and place in actual custody any person on parole or **probation to the state board of parole** * * * ." (Emphasis supplied.)

Under the statutory provision above quoted the Board of Parole adopted the resolution resulting in vacating the stay of sentence by the court, the apprehension of the defendant in Montana, his return to Minnesota, and the confinement of the convict at the St. Cloud Reformatory.

Under Section 610.38 it is provided that, when a person is placed by the court on probation under the supervision of the State Board of Parole, "the custody of the person so placed on probation shall vest in that board with the same power as is exercised over persons on parole from the state prison or state reformatory."

Under Section 640.52 it appears clear that, if a person is convicted, it was not intended by the legislature that the county shall pay the expenses incurred in conveying him to the penal institutions of the state. In the case under consideration it is obvious that, if the convict had not been placed on probation to the Board of Parole, but conveyed directly from the county seat to the reformatory, the authorized expenses in connection therewith should be paid out of the state treasury.

However, the prisoner here considered was placed on probation to the Board of Parole, and under Section 610.38 that board has the same power over a person so placed on probation as is exercised over persons on parole from state prison or state reformatory. If a parolee from the state prison or reformatory is ordered by the Board of Parole to be retaken and placed in custody, expenses therefor are to be paid out of its funds. The same rule, I believe, should be applied in the payment of expenses necessary in taking into custody by the Board of Parole one placed by the court on probation to that board, as, under Section 610.38, the board has the same power over him as is exercised over parolees from the prison or reformatory.

It is, therefore, my opinion that the expenses of the sheriff, under the facts which you submit, should be paid by the Board of Parole out of the expense fund appropriated to that body.

In so far as an opinion of March 1, 1939 (390-c-9) is inconsistent herewith, it is hereby superseded.

J. A. A. BURNQUIST,
Attorney General.

Todd County Attorney.
March 28, 1951. 390-C-9

158

Sheriff — Expenses — Cost of transportation of convict committed to YCC charged to appropriation of L. Ex. Sess. 1951, C. 1, Sec. 19, item 3a, current expense.

Opinion

When a person has been convicted of a crime and by sentence committed to the custody of the Youth Conservation Commission, it is the sheriff's duty to deliver him to the Commission. Such delivery entitles the sheriff to the compensation and reimbursement mentioned in L. 1951, C. 553, M. S. A. 260.125, subd. 13. The state auditor will issue the warrant for such payment and charge it against the appropriation to the Youth Conservation Commission found in L. 1951, Ex. Sess., C. 1, Sec. 19, item 3a, current expense.

CHARLES E. HOUSTON,
Assistant Attorney General.

Youth Conservation Commission.
June 20, 1951. 390-C-9

159

Sheriff—Mileage—For use of his automobile in the performance of his official duties for the county not to exceed 10c per mile—M. S. 1949, 387.29, Laws 1951, Ch. 375.

Facts

"The Stearns County Board of Commissioners have heretofore set the mileage that they allow to the sheriff at 8c per mile for necessary travel in all criminal matters and the transportation of prisoners. The same having been set by authority of Section 387.29, 1950 Cumulative Annual Pocket Part, M. S. A.

"The Sheriff has requested the board that he be paid at the rate of 15c per mile for the first 30 miles and 10c per mile thereafter, as provided by Chapter 375 of the 1951 Session Laws, Subdivision 24 (Section 357.09)."

You make the observation:

"Quoting from subdivision 24, it states the sheriff shall be allowed the above figure 'except if otherwise specifically fixed,' which I interpret as in the case of Stearns County, the Board of Commissioners have specifically fixed his mileage at 8c per mile under Section 387.29, Cumulative Annual Pocket Part, 1950."

Question

"What mileage is the sheriff allowed for travel in criminal matters and for transportation of prisoners?"

Opinion

In considering this problem we must bear in mind the difference between reimbursement for use of the sheriff's automobile which is provided in M. S.

1949, 387.29, and mileage to be paid to the sheriff as provided in M. S. A. 357.09, L. 1951, C. 375 (24).

Mileage allowed to a public officer is compensation to the officer. It is not reimbursement for expense. 27 W. & P. 171.

Section 387.29 specifically provides for the highest rate of compensation which the county board may pay the sheriff for use of his own automobile in the performance of his official duties. This has no reference to the compensation to which the sheriff may be entitled for services rendered for others than the county. That is specified in Section 357.09 (24).

When the sheriff uses his automobile for travel on his official duties for the county, he receives a salary for his services, and the limit that he may receive for the use of his car is provided in Section 387.29, 10c per mile.

There is enclosed a copy of an opinion of the Attorney General from file 124H, dated December 27, 1949, which discusses the distinction between compensation and reimbursement.

CHARLES E. HOUSTON,
Assistant Attorney General.

Stearns County Attorney.
June 28, 1951. 390-A-12

160

Vacancies—Accused of infamous crime—A public office becomes vacant under the terms of M. S. A. 351.02 (5) when the incumbent has been found guilty by the verdict of a jury upon the trial of an indictment or information accusing him of an infamous crime.

Facts

J. G., village clerk, was indicted by the grand jury and tried in St. Louis County. On November 8, 1952, the jury returned a verdict of guilty. The statute under which the indictment was drawn is M. S. A. 613.64. Such village clerk was thus determined to be guilty of wrongfully receiving or disposing of money. Sentence has not been imposed. Presumably, the delay is to permit the defendant to move for a new trial before sentence.

The problem which you present is whether a vacancy in the office of village clerk has occurred by reason of the verdict or whether that vacancy does not occur until judgment is entered.

Questions

"1. What is the meaning of conviction as used in M. S. 351.02, Subd. 5?

"2. Is there a conviction under the statute where a jury has returned a verdict of guilty as charged but the judge has not imposed the sentence?

"3. Where a village clerk has been convicted of felony by a jury and a sentence has not been imposed, may the party serve as village clerk until such time as a sentence is imposed upon him?"

You call attention to M. S. A. 351.02, where it is provided:

"Every office shall become vacant on the happening of either of the following events, before the expiration of the term of such office:
" * * *

"(5) His conviction of any infamous crime, or of any offense involving a violation of his official oath; * * * "

You call attention to previous opinions of the Attorney General, a decision of our Supreme Court, McQuillin Municipal Corporations, and W. & P.

All these and many other books have been examined.

Opinion

The forbidden conduct specified in M. S. A. 613.64 is a felony.

In **Warren v. Marsh**, 215 Minn. 615, 11 N. W. 2d 528, the court said on page 622 of the Minnesota report:

" * * * The word 'conviction' includes a plea of guilty as well as a finding of guilty. * * * "

And on the same page:

" * * * The term 'conviction' is also generally considered to include a plea of guilty as well as a finding of guilty after trial. See 9 W. & P. (Perm. ed.), p. 594. * * * "

The term "infamous crime" is considered in opinion of Attorney General, File 490d, January 20, 1941, 1942 Report of the Attorney General, No. 192, where it was said:

" * * * Whether or not a crime is infamous within the meaning of this statute is not determined by the nature of the offense, but by the consequences to the individual. Any crime punishable by imprisonment in the state prison is infamous. 16 C. J., p. 60; Attorney General ex rel. O'Hara v. Montgomery, 267 N. W. 550 (Mich.). Violations of federal law may be infamous crimes. Opinion 101, Attorney General's Report, 1930, Opinion 399, Attorney General's Report, 1934, State ex rel. Attorney General v. Irby, 81 S. W. (2) 419, 296 U. S. 616. There is some authority to the contrary. State ex rel. Mitchell v. McDonald, 145 So. 508 (Miss.). The question is, whether the crime is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment ultimately awarded is an infamous one. In re Classen, 140 U. S. 200 at 205. The fact that the sentence has been suspended has never been regarded by us as sufficient to remove the disqualification. It is the fact of conviction, not the fact of imprisonment which disqualifies. Opinion to Hauser April 3, 1939, (490-d) (No. 88,

1940 Report). In the case under consideration a presidential pardon is necessary. 20 R. C. L. 564, Johns v. Alcorn, 56 Miss. 766, Opinion 399, Attorney General's Report, 1934."

That opinion held that upon a plea of guilty of felony, a coroner automatically vacated his office.

Another opinion, same file, November 7, 1928, No. 205, 1928 Report, said:

"The law which declares a public office vacant upon the conviction of the incumbent is based upon considerations of public policy and welfare. The law deals with the office rather than with the incumbent personally, and was enacted to protect the interests of the public in having public affairs administered by persons of good repute. When a person is convicted of a felony he immediately loses the presumption of innocence which he previously enjoyed, and is thereafter presumed to be guilty unless and until his conviction is set aside. Hence, though he may in fact be innocent and though his conviction may thereafter be set aside, he has inevitably lost to some extent the confidence of the public, and his usefulness as a public officer has thereby become materially impaired. If a convicted official be in fact innocent, the loss of his office is, of course, a personal misfortune to him, but that consequence cannot be avoided. The interests of the public are paramount to those of the individual, and must be given first consideration. The incumbent of an office has no inalienable personal right thereto. He takes the office subject to all the conditions imposed by law, including the condition that the office shall become vacant in case of his conviction of an offense within the terms of the statute above mentioned."

We find some diversity of opinion on the subject of when a person is convicted, whether it is upon the rendering of the verdict, or the entry of the judgment. All of the following citations have been considered:

Egan v. Jones, 32 P. 929, 21 Nev. 433;

People v. Adams, 55 N. W. 461, 95 Mich. 543;

Emmertson v. State Tax Commission of Utah, 72 P. 2d 467, 93 Utah 219, 113 A. L. R. 1174;

Attorney General ex rel. O'Hara v. Montgomery, 267 N. W. 550, 275 Mich 504;

State v. Garrett, 188 S. W. 58, 135 Tenn. 617, L. R. A. 1917B, 567;

People v. Ward, 66 P. 372, 134 Cal. 301;

Quintard v. Knoedler, 2 A. 752, 53 Conn. 485, 55 Am. Rep. 149;

People v. Lyman, 68 N. Y. S. 331, 33 Misc. 243;

Commonwealth v. Lockwood, 109 Mass. 323, 12 Am. Rep. 699;

State ex rel. Anderson v. Fousek, 91 Mont. 448, 8 P. 2d 791, 84 A. L. R. 303;

State ex rel. Blake v. Levi, 109 W. Va. 277, 153 S. E. 587;

McKannay v. Horton, 151 Cal. 711, 91 P. 598, 13 L. R. A. (N. S.), 661, 121 Am. St. Rep. 146;

Bishop, Statutory Crimes, Section 348;
4 Blackstone Com., 362;
CONTRA:
Faunce v. People, 51 Ill. 311;
Commonwealth v. Kiley, 23 N. E. 55, 150 Mass. 325;
State ex rel. Butler v. Moise, 18 So. 943, 48 La. Ann. 109, 35 L. R. A. 701;
Smith v. Commonwealth, 113 S. E. 707, 134 Va. 589, 24 A. L. R. 1286;
Commonwealth v. Minnich, 95 A. 565, 250 Pa. 363, L. R. A. 1916B, 950;
People ex rel. Bierbaum v. Jennings, 240 N. Y. S. 91, 135 Misc. 809;
24 A. L. R. 1290.

This office rendered an opinion on July 12, 1926, File 359a-20, following the Supreme Court of California in the case of **McKannay v. Horton,** 151 Cal. 711, 91 P. 598, which court held that "it is entirely immaterial whether or not judgment has been given upon the conviction, or whether or not the execution of any judgment so given has been stayed by an appeal."

For more than 26 years that opinion of this office has not been reversed or been modified by the legislature or courts and is, therefore, herein adhered to by the holding that an office of an official incumbent is vacated when a verdict of guilty is returned.

CHARLES E. HOUSTON,
Assistant Attorney General.

Hibbing Village Attorney.
November 18, 1952. 471-M

OFFICERS AND EMPLOYEES

161

Attorney—Public utility commission—May not employ attorney to defend suit against village and members of commission — M. S. A. 412.331, 412.361, 412.221, subd. 5.

Facts

Under authority of M. S. A. 412.331, there exists in the village of Princeton a public utilities commission. A suit is pending wherein the village and members of the commission are named as defendants.

Questions

"1. Can the Commission retain counsel and pay for his services from the funds under its control?

"2. Is it an obligation of the village attorney to undertake the defense of said Commission and the members thereof without being delegated to so do by the Village Council?

"3. Must the Village Council if requested by the Commission or its members appoint counsel to represent the Commission or its members?"

Opinion

1. The public utilities commission is an instrumentality of the village government but it is not a corporation. It is a part of the government. The powers of the commission are stated in M. S. A. 412.361. Among such powers, the power to sue or defend a suit is not enumerated. The commission is not a legal entity in the sense that a corporation is. **State v. Gorman,** 117 Minn. 323, 136 N. W. 402, held that the water, light and power commission of the city of East Grand Forks, being a governmental department of the city, the city attorney is its legal adviser and it has no express or implied authority to employ its own attorney, thereby creating a liability against the city. The first question is answered in the negative.

2., 3.

"The village council shall have power to provide for the prosecution or defense of actions or proceedings at law in which the village may be interested and it may employ counsel for the purpose." **M. S. A. 412.221, subd. 5.**

It is impractical to attempt to answer your second and third questions without seeing the complaint. We do not know what the allegations of the complaint are. We do not know the relief sought to be obtained as stated in the prayer. It may be that the allegations of the complaint are such that it shows on its face that the individuals named are sued as officers of the village and that the relief sought is to restrain those officers from doing, or threatening to do, some certain thing.

CHARLES E. HOUSTON,
Assistant Attorney General.

Princeton Village Attorney.
April 22, 1952. 779-A-5

162

Clerk—Deputy—Designation of tenure in appointment of deputy clerk does not invalidate appointment; tenure of deputy at will of the clerk and limited by term of clerk; not removable by council; continuing consent of council to deputy's appointment not required during appointing clerk's term of office—M. S. 412.151.

Facts

"In January, 1951, the Village Clerk appointed a deputy Village Clerk for a period of two (2) years, with the consent of the Village

Council. A question now arises as to the effect of the designation of the two (2) year term.

"The clerk's term does not expire until December 31, 1952."

Question 1

"Was such an appointment, by reason of a designation of the two (2) year period, void?"

Opinion

No.

M. S. 412.151 authorizes the village clerk to appoint a deputy clerk. The pertinent provision of that statute is:

" * * * With the consent of the council, he [the village clerk] may appoint a deputy for whose acts he shall be responsible and **whom he may remove at pleasure.**"

The clerk appointed the deputy. The council consented. It was a valid appointment. The fact that a tenure was specified in the appointment does not affect its validity. The tenure of the deputy clerk does not extend beyond the will of the clerk. The designation "for a period of two (2) years" may be disregarded. See McQuillin, Municipal Corporations, 3d Ed., Vol. 3, Section 12.115.

Question 2

"The clerk having appointed the deputy clerk in January, 1951, with the consent of the Council, is that consent binding upon the present Council, a new mayor and one (1) new trustee having been elected in December, 1951?"

Opinion

Yes.

The clerk appointed the deputy. At the time the appointment was made the village council consented thereto. The appointment was valid. The deputy's term of office is limited by that of his principal, the clerk, and the deputy may be removed by the clerk at any time during that period. See McQuillin, Municipal Corporations, 3d Ed., Vol. 3, Section 12.33. The term having been legally created, consent of the council is not required for its continuance during its term.

Question 3

Does the fact that the appointment of the deputy clerk is for a period of two years make the deputy clerk removable by the village council?

Opinion

This question is answered in the negative.

A deputy village clerk is removable only by his principal, the village clerk. See opinion of December 21, 1951 (470c).

LOWELL J. GRADY,
Assistant Attorney General.

Village of Crystal Attorney.
February 18, 1952. 470-C

Editorial Note: Section 412.151 amended by L. 1953, C. 735, S. 3.

163

Clerk—Deputy—Removal—Deputy clerk is subject to removal by the village clerk and not by the village council.

Question

May a village council remove a deputy village clerk who has been appointed by the village clerk with the consent of the village council?

Opinion

We think the question is answered by consideration of M. S. 1949, Sections 412.111 and 412.151. The first of said sections authorizes the village council, except as otherwise provided, to remove any appointive officer or employee when in its judgment the public welfare will be promoted by the removal. The second of said sections, however, authorizes the village clerk to appoint a deputy with the consent of the council for whose acts he shall be responsible and whom he may remove at pleasure.

Your inquiry is therefore answered in the negative. You will note, however, that by said Section 412.111 the compensation of the deputy village clerk is fixed by the village council.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Village of Crystal Attorney.
December 21, 1951. 470-C

164

Labor—Hours—Holidays—Council has authority to determine hours, terms and conditions of employment—M. S. A. 645.447, subd. 5, specifies the holidays as determined by the legislature—No public business shall be conducted upon a holiday except in case of necessity—Whether a necessity exists is for determination by city council.

Facts

M. S. A. Section 645.44, Subd. 5 [CAPP], enumerates the holidays as prescribed by the legislature. One of the ordinances of the City of Hopkins in part provides:

> "Municipal employes, whether working on a full-time, hourly, daily or monthly basis, may observe six holidays unless such employees are required to be on regular duty. The six holidays shall be: New Year's Day, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day. The City Hall shall be closed for business on the six holidays specifically listed above."

On the five holidays specified in the state law, but not included in the city ordinance, the city employees work as usual and are paid as usual.

Questions

1. "Is it compulsory under the State law for the City to close the City Hall and terminate all its municipal activities on all of the holidays listed in the State law?"

2. "If your answer to the foregoing question should be in the affirmative, is it possible for the City to deduct from the pay of its employees for the time lost by their not working the five holidays which are included in the State law but which are not included in the City ordinance?"

Opinion

M. S. A. Section 645.44, subd. 5, reads as follows:

> "'Holiday' includes New Year's Day, January 1; Lincoln's Birthday, February 12; Washington's Birthday, February 22; Memorial Day, May 30; Independence Day, July 4; Labor Day, the first Monday in September; Christopher Columbus Day, October 12; Christmas Day, December 25; the Friday next preceding Easter Sunday, commonly known as Good Friday; Thanksgiving Day; and Armistice Day, November 11. No public business shall be transacted on those days, except in cases of necessity, nor shall any civil process be served thereon."

1. By this law the legislature has declared that no public business shall be transacted on any days designated in the law as a holiday, except in cases of necessity. It is for the proper officers of the city to determine whether public necessity requires the transaction of city business on any of the holidays stated in the aforesaid statute.

2. The city council may adopt reasonable rules and regulations prescribing, among other things, hours of work, wages to be paid, length of vacations, and holidays for its employees. The question of whether city employees should be paid for the days designated as a holiday in the afore-

mentioned statute involves conditions of employment rather than a legal problem. We think the disposition thereof rests with the discretion of the city council.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Hopkins City Attorney.
November 19, 1952. 270-D

165

Labor relations—Adjustment panel—Appointment—A majority number of public employees may request the appointment of an adjustment panel—The inadequacy of compensation paid to public employees is a grievance within the meaning of the act regardless of any decision of a village council pertaining to the wages or compensation of said public employees—Laws 1951, Ch. 146, Section 7.

Facts

"One of the Village of Hibbing Employees' Union has demanded that an Adjustment Panel under L. 1951, C. 146 be set up. The members of this union are in the minority. There are two other unions to which other employees of the Village of Hibbing belong. A number of other Village employees do not belong to any union. The grievance that the above union sets forth is the decision of the Village Council that public funds do not permit a raise in wages at the present time for Village employees."

Question 1

"May a minimum number of employees demand the setting up of said Adjustment Panel and set forth an alleged grievance in behalf of all public employees?"

Opinion

L. 1951, C. 146, prohibits certain public employees from striking and provides machinery for the adjustment of grievances of certain public employees. Section 7 thereof reads as follows:

"In order to avoid or minimize any possible controversies by making available full and adequate governmental facilities for the adjustment of grievances, the governmental agency involved, at the request of the public employees, shall set up a panel of three members, one to be selected by the employees, one by the governmental agency, and the two so selected to select a third member. Provided, that if after five days, the two members cannot agree upon the third member, the senior or presiding judge of the District Court of the County wherein the dispute has arisen may appoint such third member upon application by

either of the appointed members in writing by giving five days' notice thereof in writing to the other member. * * * The panel shall meet within fifteen days. * * * "

In answering your first question, it is our understanding that the alleged grievance or grievances in question affect, as stated in your question, "all public employees." The statutory section above quoted provides that at the request of public employees a panel of three members shall be set up as therein prescribed. It is our opinion that by the use of the words "at the request of public employees" when all of them are affected by an alleged grievance, is meant at the request of a majority of all employees, and that in the same situation by the use of the words "one to be selected by the employees," is meant one to be selected by a majority of all such employees. The provision in L. 1951, C. 146, Section 7, requiring the setting up of the adjustment panel therein prescribed, is mandatory.

Question 2

"Does the decision of the Village Council that public funds are not available for wage raises constitute a grievance for the adjustment of which such Adjustment Panel may be selected under the act?"

Opinion

Section 1 of the act prohibits a public employee from striking or participating in a strike. Section 2 of the act reads in part as follows:

"Nothing contained in this act shall be construed to limit, impair or affect the right of any public employee * * * to the expression * * * of a view, grievance, complaint or opinion on any matter related to the conditions or compensation of public employment or their betterment, * * * ."

Although the act does not define "a grievance" as such, we think that the foregoing language as used in Section 2 of the act indicates that the matter of compensation of a public employee is "a grievance" of the kind and type which an adjustment panel appointed pursuant to Section 7 of the act is authorized to consider. If public employees believe that their compensation is inadequate, they may request the appointment of an adjustment panel, notwithstanding the fact that the village council has decided that funds are not available to raise the wages or compensation of the employees.

J. A. A. BURNQUIST,
Attorney General.

Hibbing Village Attorney.
November 15, 1951. 270-d

166

Labor relations—Leave of absence—To attend labor union convention not authorized—U. S. C. A. Title 42, Sec. 302 (5); M. S. 1949, 393.07, as amended by L. 1951, C. 620, Sec. 1.

Question

"May the county welfare board of Hennepin County grant time off with pay to employees who are delegates to and who as such delegates desire to attend the convention of the State Federation of Labor to be held at Duluth?"

Statement

"This involves the consideration of two propositions of law, namely, (1) the authority of local welfare boards to grant leaves of absence with pay in view of the merit system rules which have been adopted by the director of social welfare, and (2) whether granting leaves of absence with pay for such a purpose violates the rule of law which prohibits the expenditure of public funds for private purposes.

"As to the first (1), attention is called to provisions of the Federal Social Security Act requiring the establishment and maintenance of personnel standards, typical of which is that contained in U. S. C. A. Title 42, Sec. 302(5), also M. S. 1949, Sec. 393.07, Subd. 5, which provides for the setting up by the director of social welfare of permanent standards on a merit basis for all county welfare board employees and gives him exclusive direction and control over the same. Particularly applicable are Rules 1440, 1441 and 1442 of the Personnel Standards and Practices for County Welfare Boards adopted by the director of social welfare as revised May 1, 1945. Our view on this phase of the matter is contained in a letter to our welfare board."

Opinion

The federal government participates in the cost of certain forms of public assistance, for example, old age assistance. The Congress of the United States has enacted certain laws which embody the conditions which a state must meet before there can be any payment to the state from federal funds as a contribution to the cost of such programs. One of those conditions is that the state must

> "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 administrator 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 Administrator to be necessary for the proper and efficient operation of the plan"; U. S. C. A. Title 42, Section 302(5).

To insure compliance by the state of Minnesota, the legislature of this state has enacted the following provision which is applicable to Hennepin county. M. S. 1949, Section 393.07, as amended by L. 1951, C. 620, Sec. 1, which provides, so far as material here:

"The county welfare board provided for in Section 393.01, subdivision 3, shall be charged with the duties of administration of all forms of public assistance and public welfare within the purview of the federal social security act and which now are, or hereafter may be, imposed on the director of social welfare by law, of both children and adults, including aid to dependent children, old age assistance, and aid to the blind. The duties of such county welfare board shall be performed in accordance with the standards, rules and regulations which may be promulgated by the director of social welfare in order to comply with the requirements of the federal social security act and to obtain grants-in-aid available under that act."

The state director of public welfare has duly promulgated certain regulations establishing personnel standards and practices for county welfare boards which, of course, include the Hennepin county welfare board, and which are binding upon that welfare board. The rules relating to leaves of absence are found in part IV of the regulations as rules 1440 to 1445, inclusive. The county welfare board only has authority to grant to its employees a leave of absence which is authorized by rules 1440 to 1445, inclusive. The leaves of absence provided for in these rules are leaves of absence without pay, vacation leave, sick leave and military leave. There is no rule relating to leaves of absence which authorizes a county welfare board to grant a leave of absence with pay to an employee under the conditions stated in your inquiry.

For these reasons, your question is answered in the negative.

We therefore concur in the conclusion which is expressed in your opinion of September 14, 1951, to the Hennepin County Welfare Board.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Hennepin County Attorney
September 29, 1951. 125-A-64

167

Union dues—Salary deduction—When authorized by contract between a city and its employee, city may deduct part of employee's salary as union dues and remit the same to the union pursuant to M. S. 1949, Section 571.66 and M. S. 1949, Section 181.06, as amended by L. 1951, C. 213.

Question

Is the City authorized to deduct the amount of union dues from the salary of one of its employees and remit said dues to the labor union of which such employee is a member when requested so to do by such city employee?

Opinion

The matter of an employee of the city requesting the city to deduct union dues from his salary and remitting the same to a union relates to the assignment of wages of a public employee.

M. S. 1949, Section 571.66, reads in part as follows:

> "Subdivision 1. Any officer or employee of a county, town, city, village, or school district, or any department thereof, has the same right to sell, assign, or transfer his salary or wages as is now possessed by any officer of or person employed by any corporation, firm, or person."

Wage assignments in private industry are governed by M. S. 1949, Sections 181.04 to 181.07, as amended by L. 1951, C. 213. Section 181.06, as amended, reads in part as follows:

> "Every assignment, sale, or transfer, however made or attempted, of wages or salary to be earned or to become due, in whole or in part, more than 60 days from and after the date of making such transfer, sale, or assignment shall be absolutely void. A written contract may be entered into between an employer and an employee wherein the employee authorizes the employer to make payroll deductions for the purpose of paying union dues, * * * for periods longer than 60 days."

In view of the foregoing statutory provisions, a city employee may enter into a contract with the city wherein the employee authorizes the city to make a payroll deduction from his salary to be remitted to the union to which he belongs in payment of his dues.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Austin City Attorney.
October 9, 1952. 270-D

168

Leave of absence — In the absence of tenure provisions relating to county employees, the appointing authority may grant a leave of absence; but if such leave is granted, there is no assurance that the employee will be returned to his position upon his return from leave.

Questions

"May county employees be given a leave of absence, say for example for one year, and if so, who has the authority to grant such a leave?

"Is it the elected county officials for employees in their respective offices and the County Board for employees appointed by them, or by the County Board for all employees?"

Opinion

The term "leave of absence" signifies temporary absence from duty with intention to return, during which time remuneration is suspended. See 24 W. & P. 1951 Supp. 148.

Unless the tenure of a county employee is fixed by law, he serves at the pleasure of the appointing authority. Such appointing authority may grant a county employee a leave of absence. But unless the right of the employee to return to his position at the termination of the leave is fixed under some tenure system, he has no assurance that he will be restored to his position when he returns.

Except for employees in the county welfare department of your county who are under a merit system established by rules and regulations of the state director of social welfare, and except for county employees on leave of absence in the armed forces under M. S. 1949, Section 192.261, we are unaware of any provisions of law which would assure a Washington County employee on leave that his position would be open upon his return.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Washington County Attorney.
August 24, 1951. 125-A-33

169

Salary—Payment—Maintenance man at water and light plant—In charge of maintaining fire fighting equipment—Fire fund—Use of—M. S. Sections 88.04, 412.111.

Facts

"The Village of McKinley has a population of 196. It owns its own water system. It purchases electricity from the Minnesota Power and Light Company and distributes it to the consumers. It employs only two regular employes whose duty it is to look after the water and light system, water pumping plant and other facilities in connection with furnishing water and light to the inhabitants of the Village. They also are in charge of keeping in repair and maintaining the fire fighting equipment, Village hydrants, and a water supply which is used in the event of fire."

Question

"The Village Council would like to know whether it is legal for the Village to pay a portion of the salary of these two men out of the Village fire fund."

Opinion

Under M. S. 1949, Section 412.111, the "council may * * * appoint such * * * employees, and agents for the village as may be deemed necessary for the proper management and operation of village affairs" and "may prescribe the duties and fix the compensation of all * * * employees, and agents, when not otherwise prescribed by law."

This opinion is written on the assumption that the "fire fund" referred to in your communication is the one authorized by M. S. 1949, Section 88.04, which provides that a tax collected as therein provided "shall be known as the fire fund and kept separate and apart from all other funds and used only in paying all necessary and incidental expenses incurred in enforcing the provisions of sections 88.02 to 88.21." That section also provides that the amount that may be expended from such fund for the support of any municipal fire department is limited to $500 in any one year.

As provided in above cited Section 412.111, the village council may prescribe the duties of its employees and fix their compensation when not otherwise prescribed by law. If the duties assigned to such employees are necessary and incidental to the enforcement of the provisions of M. S. 1949, Sections 88.02 to 88.21, such expenditures may be made out of such "fire fund," with the limitation above mentioned that, if the proposed expenditure is for the support of a municipal fire department, the amount of such "fire fund" to be used therefor may not exceed $500 per annum.

It is also clear that no part of the "fire fund" under consideration may be expended to pay salaries for work which is not necessary and incidental to the enforcement of the above cited provisions. However, I believe it is the legislative intent to permit payment from such "fire fund" for the performance of those duties of the employees in question which pertain to keeping in repair the fire-fighting equipment necessary and incidental to the carrying out of the purposes stated in Section 88.04, and, if some of the hydrants to which you refer have been constructed by the village as a protection against the fires intended to be prevented by the enactment of that section, the keeping in repair and maintaining thereof could, I believe, be considered as "necessary and incidental" in the enforcement of the provisions under consideration, but to pay out of the "fire fund" the salaries for services to departments established primarily for purposes other than fire protection would justify a conclusion that such payment would be illegal.

Therefore, it is my opinion that, subject to the limitation hereinabove referred to, if the village council can determine what proportion of the services of its two employees shall be devoted to duties which, as above stated, the council shall, in the exercise of sound discretion and not arbitrarily, find necessary and incidental to the enforcement of the above cited provisions, they may be paid out of the "fire fund" in question for such proportion but

that no payment shall be made out of the "fire fund" for services that are not necessary and incidental to the enforcement of M. S. 1949, Sections 88.02 to 88.21.

J. A. A. BURNQUIST,
Attorney General.

McKinley Village Attorney.
January 18, 1952. 469-A-13

170

Surety—Bonds—Must be furnished by village clerk, treasurer and justices of the peace—M. S. 1949, 412.111.

Question

Is the village clerk or treasurer required to furnish a bond even though the village council does not demand it?

Answer

M. S. 1949, 412.111, provides in part as follows:

" * * * The council may require any officer or employee to furnish a bond conditioned for the faithful exercise of his duties and the proper application of, and payment upon demand of, all moneys by him officially received. Unless otherwise prescribed by law the amount of such bonds shall be fixed by the council. **The bonds furnished by the clerk, treasurer, and justices of the peace shall be corporate surety bonds.** * * * "

The requirement, that the bonds furnished by the clerk, treasurer and justice of the peace shall be corporate surety bonds, indicates that it is the intention of the law that these officers, at least, be required by the village council to furnish bonds even though other village officers need not be required to do so.

It is, therefore, our opinion that the village council must require that its clerk, treasurer, and justices of the peace shall furnish a bond to the village and fix the amount thereof and that thereupon they shall furnish the bond required of them.

IRVING M. FRISCH,
Special Assistant Attorney General.

Clay County Attorney.
February 4, 1952. 401-B-22

171

Surety — Bonds — Propriety of town board members acting as sureties on assessors' bond—Town officer may not become surety on a bond running to town—M. S. 1949, Section 365.37.

Question

"May members of a township board properly act as sureties upon the bond of the township assessor?"

Opinion

The question is answered in the negative.

Minnesota Statutes 1949, Section 367.23, provides that the surety bond would be executed to the town and approved by the chairman of the town board. Under Section 366.05 all actions for penalties and forfeitures under the bond would be prosecuted in the name of the town, by the town board.

The bond of a town official and his surety create a contractual relation to the town. Such a relationship, where a town officer becomes a surety on a town bond, would offend the principle of public policy. Furthermore, M. S. 1949, Section 365.37, prohibits any supervisor, town clerk or town board member from becoming a party to or directly or indirectly interested in a contract with the town.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Hubbard County Attorney.
April 10, 1951. 401-B-21

OFFICES

172

Incompatible—Clerk of district court and court commissioner are not incompatible—Opinion October 14, 1909, File 358-B-1(a) modified.

Question

"May a duly elected and qualified Clerk of Court of a county in Minnesota be appointed to the office of court commissioner?"

Opinion

In **Kenney v. Goergen**, 36 Minn. 190, 31 N. W. 210, the court had for consideration the question of whether the offices of deputy clerk of the district court and court commissioner were incompatible, and consequently could not be held by the same person. On page 192 of the opinion the court said:

"We can see no ground for holding these two offices incompatible at common law. The one is not subordinate to the other, and neither officer can interfere with or has any supervision over the other. There

is no such inconsistency in the functions of the two offices as would necessarily prevent one person from properly performing the duties of both."

The clerk of district court may, with the approval of the judge, appoint deputies, for whose acts he shall be responsible, and whom he may remove at his pleasure. M. S. 1949, Section 485.03.

A "deputy" is but the shadow of the officer appointing him, and does all things relating to his official duties in the name of the officer himself, and not in his own name. **Wilkerson v. Dennison,** 113 Tenn. 237, 80 S. W. 765. See Vol. 12, Words and Phrases, Permanent Edition, pages 198 and 199.

This office has held that the offices of deputy clerk of the district court and court commissioner are not incompatible. Opinion of Attorney General, Jan. 31, 1930, No. 301, 1930 Report. Also, that the offices of clerk of the district court and court commissioner are not incompatible as a matter of law. Opinion of Attorney General, July 5, 1927, File 358b-1(a). A contrary conclusion was expressed in opinion of Attorney General, October 14, 1909, File 358b-1(a).

We do not find that there has been any modification of the conclusion reached in the **Kenney v. Goergen case,** supra, which we believe is determinative of the question submitted, and which requires an affirmative answer.

Opinion of Attorney General, October 14, 1909, is modified so as to conform to this opinion.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Pipestone County Attorney.
February 28, 1952. 358-B-1-a

173

Incompatible—County commissioner and member of board of directors of conservancy district are incompatible—M. S. A. Ch. 111.

Question

Are the offices of county commissioner and member of the board of directors of a conservancy district organized under M. S. A. Ch. 111 incompatible?

Opinion

Public offices are incompatible when their functions are inconsistent, their performance resulting in antagonism and a conflict of duty so that the incumbent of one cannot discharge with fidelity and propriety the duties of both. See Dunnell's Minn. Digest, Section 7995.

A conservancy district, created under M. S. A. Ch. 111, is a body corporate endowed with the power to sue and to be sued, and to incur debts and obligations as authorized by law. Section 111.07.

The board of directors of such district has full authority to let contracts for the construction of improvements in accordance with the order of the court and as prescribed in the conservancy act. Section 111.14.

Section 111.21 (1951 C.A.P.P.) in part provides:

> "The board of directors may enter into contracts or other arrangements with the United States government, or any department thereof, with persons, railroads, or other corporations, with public corporations and the state government of this state or other states, with drainage, conservation, conservancy, or other improvement districts, in this state or other states, for cooperation or assistance in constructing, maintaining, and operating the works of the district, or for the control of the waters thereof, or for making surveys and investigations or reports thereon; * * *."

Section 375.09 in part provides:

> "No county commissioner shall be appointed or elected by the board of which he is a member to any office or position of trust or emolument, and no commissioner shall receive any money or other valuable thing as a condition of voting or inducement to vote for any contract or other thing under consideration by the board, or become a party to, or directly or indirectly interested in, any contract made by the board; * * *."

Under the aforesaid statutory provisions circumstances might arise where the interest of a county and the conservancy district would be antagonistic and in conflict with each other. Consequently, it would not be proper for a member of the county board to serve as a member of the board of directors of a conservancy district. We therefore answer your question in the affirmative.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Kittson County Attorney.
June 6, 1952. 358-A-3

174

Incompatible—Special municipal judge and village attorney are incompatible —M. S. 1949, Section 488.05.

Facts

On December 4, 1951, "A" was elected special municipal judge of the Village of Hibbing, and on January 3, 1952, "A" was appointed village attorney.

Question

Whether or not these positions are incompatible so that a person cannot hold both of them.

Opinion

The question is answered in the affirmative. This office has previously held that the office of municipal judge and that of city attorney were incompatible. Opinions dated June 17, 1925, August 13, 1923, and January 14, 1915, file No. 358-b-2.

However, you refer to the fact that "A" has only been elected as a special municipal judge, and for that reason we further discuss the question.

You point out that M. S. 1949, Section 488.05, which relates to judges of municipal court, provides in part:

> " * * * provided, that any such special municipal judge shall not be prohibited from practicing in the municipal court or in any other court, but he shall not sit in the trial of any cause or proceeding wherein he may be interested, directly or indirectly, as counsel or attorney, or otherwise."

You then state that you believe, in view of this prohibition of the statute, no incompatibility would arise unless "A" were to prosecute a matter when "A" sat as judge, which, of course, "A" would not do.

> "It is immaterial on the question of incompatibility that the party need not and probably will not undertake to act in both offices at the same time. The admitted necessity of such a course is the strongest proof of the incompatibility of the two offices."

42 Am. Jur. "Public Officers," Section 70, p. 936. It will be noted that, under Section 488.05, supra, it is provided that the special municipal judge shall act only in the absence or disability of the municipal judge. Accordingly, if the municipal judge were absent or disabled, it would be "A's" duty to act. In the case of **Howard v. Harrington**, 114 Me. 443, 96 Atl. 769, L. R. A. 1917A, the court considered a fact situation involving the determination of the question of the incompatibility of the offices of mayor and judge of the police court. It pointed out that as mayor it would be his duty to prosecute certain classes of offenses, if any of them has been committed, in the police court, and that as judge of the police court it would be his duty to hear and determine complaints. The court stated:

> "He cannot be both prosecutor and judge. The duties are repugnant. He can only perform the duties of one office by neglecting to perform the duties of the other. **It is not for him to say in a particular instance which he will perform and which he will not. The public has a right to know with certainty.**" (Emphasis added.)

In support of this conclusion see **People ex rel. Chapman v. Rapsey**, 16 Cal. Rep. (2d) 636 (1940), 107 Pac. (2d) 388, **State ex rel. v. Hines**, (Wis. 1927), 215 N. W. 447, and **State ex rel. v. Jones**, (Wis. 1907), 110 N. W. 431, 8 L. R. A. (NS) 1107.

DONALD C. ROGERS,
Assistant Attorney General.

Hibbing Village Attorney.
January 17, 1952. 358-B-2

175

Incompatible — Village assessor and village clerk — Village operating under Plan A of village code are not incompatible—M. S. A. Sections 412.151, 412.581.

Question

"Are the offices of Village Clerk and Village Assessor incompatible in a village such as Heron Lake, which is operating under Plan A, where the Clerk is not a member of the Council and both officials are appointive?"

Opinion

The duties of a village clerk of a village operating under Plan A of the village code are prescribed in M. S. A. Section 412.151. The duties of a village assessor consist of assessing property for the purposes of taxation. The village clerk and village assessor are both appointed by the council by virtue of Section 412.581. The duties of the clerk, as prescribed by said Section 412.151, are not antagonistic or in conflict with the duties performed by the village assessor. Consequently, it is our opinion that the offices of village clerk and village assessor are not incompatible and may therefore be held by the same person.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Worthington Village Attorney.
November 20, 1952. 358-E-2

176

Incompatible—Village council members and member of board of adjustment relating to airport zoning — Duties thereof are incompatible with the duties of the village council membership—M. S. 1949, Section 360.071.

Facts

"The Village of Cook and the County of St. Louis have joined in the creation of a joint zoning board for the zoning of the Cook Municipal Airport as provided under Minnesota Statutes 1949, Section 360.063. Section 360.071 of this statute provides that the joint airport zoning board shall appoint a board of adjustment."

Question

"May the Village Council of the Village of Cook be appointed as the board of adjustment by the joint airport zoning board?"

Opinion

M. S. 1949, Section 360.071, provides for a board of adjustment to hear and decide appeals and other matters taken pursuant to M. S. 1949, Section 360.068, from the decisions of the administrative agency concerned with airport zoning regulations and established pursuant to M. S. 1949, Section 360.063.

The administrative agency referred to in the facts submitted is a joint airport zoning board created pursuant to M. S. 1949, Section 360.063, Subdivision 3.

Whether members of the village council of the village of Cook can be appointed to the board of adjustment depends upon whether the offices of village councilman and member of the board of adjustment are incompatible.

Public offices are incompatible when their functions are inconsistent, their performance resulting in antagonism and a conflict of duty, so that the incumbent of one cannot discharge with fidelity and propriety the duties of both. **State ex rel. Hilton v. Sword,** 157 Minn. 263, 264, 196 N. W. 467. There is nothing in M. S. 1949, Section 360.071 to indicate that a village councilman is ineligible for appointment as a member of the board of adjustment. However, M. S. 1949, Section 360.072, provides in part as follows:

> " * * * any governing body of a municipality or county, or any joint airport zoning board, which is of the opinion that a decision of a board of adjustment or action of the commissioner is illegal may present to the district court of the county in which the airport involved, or the major portion thereof, is located a verified petition setting forth that the decision or action is illegal, in whole or in part, and specifying the grounds of the illegality."

This statutory provision authorizing a village council to question a decision of a board of adjustment by proceeding in the district court has the effect of placing councilmen in a position of questioning their own decision if they were members of the board of adjustment.

In view of the foregoing, it is our opinion that the village council membership of the village of Cook cannot be appointed to the board of adjustment by the joint airport zoning board. By reason of the statutory provision

referred to, a person holding a common membership on the council and on the board of adjustment would not be in a position to render the service the law exacts. See the **Sword** case, supra.

It is also pointed out that by M. S. 1949, Section 360.068, Subdivision 1, the village council may appeal to the board of adjustment from a decision of a joint airport zoning board when it is of the opinion that such decision is an improper application of airport zoning regulations of concern to such village council. If the members of the village council were permitted to serve on a board of adjustment under this statute, the village council members would be in a position to decide their own appeal.

Your inquiry is therefore answered in the negative.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Commissioner of Department of Aeronautics.
February 8, 1951. 358-E-9

ORDINANCES

177

Number—Incorrect number or number given out of consecutive order to particular ordinance does not affect the validity of the ordinance.

Facts

"As you know, I am village attorney of the village of Kenyon. As such I draw ordinances for the village. These ordinances are numbered, and the practice has been that when I draw an ordinance, I call up the clerk and find out what the number of the last ordinance is on record, and so I have taken the next number for the new ordinance.

"I find upon checking today that the clerk has given me the wrong number in a number of instances and hence that we have a few ordinances now with the wrong number. The number given the ordinance is referred to in the affidavit of publication of the ordinance, and it is also printed at the beginning of the ordinance and is part of the published ordinance. * * * The number appears only in the heading and not in the body."

Question

"Is it your opinion that we should repass the ordinances that are numbered wrong and amend them by changing the number?"

Opinion

I see no necessity for the reenactment of the ordinances involved.

M. S. 412.191, Subd. 4, deals with the enactment of village ordinances. It requires merely that ordinances "shall be suitably entitled and shall be substantially in the style. 'The Village Council of..... ordains:'."

There is no provision in the statute cited, nor in any other statute with which I am familiar, which requires that ordinances be numbered. Ordinances are numbered as a matter of convenience only and not as a matter of necessity. The number is no part of the ordinance or its title. The validity of the ordinance is not affected by the circumstance that because of clerical mistake it bears an incorrect number or one out of consecutive order. In pleading an ordinance of the village, it is sufficient to refer to the ordinance "by its title and the date of its approval." Minnesota Rules of Civil Procedure, Rule 9.04; cf. M. S. 544.20. If the council nevertheless desires to correct the clerical error involved by official record, that might be accomplished by the enactment of a brief ordinance simply renumbering the ordinances involved.

LOWELL J. GRADY,
Assistant Attorney General.

Kenyon Village Attorney.
November 20, 1952. 477-A-1

178

Pinball machines — Persons under 21 may not play any game of skill or chance in any dancehouse, concert saloon, place where intoxicating liquors are sold or given away, or any place of entertainment injurious to the morals. City may provide by ordinance that in places other than those above enumerated, persons under 16, 18, or 21 may not play machine and may provide penalties for players and owners.—M. S. 1949, Section 617.60.

Questions

1. "Is there any age under which a person is prohibited from playing these pin ball machines?

2. "If there is no law regulating the age prohibiting one from playing a pin ball machine, may the City of Mankato by an Ordinance provide that anyone under the age of 16 or 18 or 21, may not play such pin ball machines under penalty to the player and also provide a penalty to the owner or the party in possession of such pin ball machine, for violating the City Ordinance."

Opinion

In respect to question 1 you are referred to M. S. 1949, Section 617.60, which states:

> "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."

This statute forbids a person under the age of 21 years to play any game of skill or chance in the enumerated places. A pinball machine is a game of skill or chance. Thus, this statute is controlling in so far as the enumerated places are concerned.

In reply to your second question, it is our opinion that subject to the requirements contained in Section 617.60 the City of Mankato may, by ordinance, provide that in any places other than those enumerated in Section 617.60, any person under the age of 16 or 18 or 21 may not play such pinball machines. The ordinance may also provide a penalty as to the player and the owner, or party in possession of the machine.

DONALD C. ROGERS,
Assistant Attorney General.

Mankato City Attorney.
May 4, 1951. 733-D

179

Toilet facilities—May by ordinance require reasonable toilet facilities in 3.2 beer tavern—May abate nuisances—M. S. 1949, Section 340.01; Section 145.22 as amended by L. 1951, C. 235; Section 412.221, Subd. 23.

Opinion

It is our opinion that the village may, by ordinance, establish reasonable requirements for the furnishing of toilet facilities by a 3.2 beer tavern. Under the provisions of M. S. 1949, Section 340.01, the governing body of the village is granted the authority "to license and regulate the business of vendors at retail or wholesale of non-intoxicating malt liquors * * *." It will thus be noted that the authority granted is one not only to license but to regulate.

> "Under a grant of police power to license and regulate a business, the municipal authorities have power to determine where and within what limits the business may be conducted. * * * They may impose

reasonable restrictions as to the time, place and manner of conducting the business. * * * " **(Power v. Nordstrom,** 150 Minn. 228, 230, 184 N. W. 967.)

It is interesting to note that the ordinance of the City of Minneapolis provides that each tavern where malt liquor is sold must maintain one toilet room for each sex. It further provides that in a restaurant where malt liquor is sold and which has a floor area of more than 600 feet there shall be maintained at least one toilet room for each sex, except businesses catering only to men, and in each restaurant where the floor space is less than 600 square feet there shall be maintained for public use at least one toilet room. This indicates the differentiation there made in order to recognize the reasonableness of the ordinance.

The question of the reasonableness of the ordinance in so far as it might require separate facilities for men and women is one that would have to be determined from all the facts relating to the conduct of the business.

Your attention is invited to M. S. 1949, Section 145.22, as amended by Session Laws 1951, Chapter 235. It will be there noted that when any nuisance, source of filth, or cause of sickness is found on any property, the health officer of any municipality can order removal of the same. It will further be noted under the village code that Section 412.221, subd. 23, grants to the village council the power by ordinance to define nuisances and provide for their prevention or abatement. When you refer to the inadequacy of the present facilities we, of course, have not been advised as to the fact situation. Under the power granted in subd. 23, the council can define a nuisance and provide for its abatement. Again, of course, an ordinance of this type will be subject to the general test of reasonableness.

DONALD C. ROGERS,
Assistant Attorney General.

Lanesboro Village Attorney.
July 17, 1951. 217-C

180

Violations—Penalty—Village Council may prescribe violation is punishable by a fine or by imprisonment, but may not impose a double penalty— M. S. 412.231.

Statement

"In the statutes of this state prior to passing of the village code which is now Chapter 119 of the Laws of 1949, it was provided that violation of ordinances should be punishable by a fine of so and so, 'and in default of the payment of the fine and costs, the violator should be imprisoned, etc.'

"Section 30 of [Chapter 119 of] the Laws of 1949 says that violation of any ordinance shall be punishable by fine or imprisonment."

Questions

1. "In the opinion of your office, does Section 30 [of Chapter 119 of Laws 1949] repeal that other provision where it seems that there could be no imprisonment if the fine and costs were paid?"

2. "What is our authorized form for punishment under the ordinances?"

Opinion

The statute applicable prior to the enactment of L. 1949, C. 119, was M. S. 1945, Section 412.16. M. S. 1945, Section 412.16, was expressly repealed by L. 1949, C. 119, Section 110 (now coded as M. S. 412.911). The statute now applicable is L. 1949, C. 119, Section 30 (now coded as M. S. 412.231). In its entirety it provides:

> "The village council shall have power to declare that the violation of any ordinance shall be a penal offense and to prescribe penalties therefor. No such penalty shall exceed a fine of $100 **or** imprisonment in a village or county jail for a period of 90 days, but in either case the costs of prosecution may be added."

Under the statute it is within the power of the village council to prescribe that a violation of an ordinance is punishable by a fine **or** by imprisonment within the limits specified in the statute. The prescription by the council may not impose a double, instead of a single or alternative, penalty. See **State ex rel. Salter v. McDonald,** 121 Minn. 207, 141 N. W. 110; **State ex rel. Erickson v. West,** 42 Minn. 147, 43 N. W. 845.

LOWELL J. GRADY,
Assistant Attorney General.

Kenyon Village Attorney.
February 21, 1952. 477-A

181

Zoning—Amendment—Two-thirds vote required to amend zoning ordinance enacted under M. S. 1949, Section 412.221, subd. 29 — Village Code — (M. S. 412.011-412.921); 412.191, subd. 1, 4; 462.01; 412.921.

Facts

"The Village of Brooklyn Center enacted a Zoning Ordinance on August 23, 1950, containing the following provision:

> 'Any amendment to this ordinance shall require a two-thirds vote of the entire Village Council.' "

Questions

"(1) Does the state law require a two-thirds vote of the entire Council in order to amend a zoning ordinance for a village?

"(2) If two-thirds vote is not required by state law, is the provision in the present village zoning ordinance nevertheless binding upon the council?"

Opinion

The zoning ordinance involved was enacted subsequent to July 1, 1949, the effective date of L. 1949, C. 119, the Village Code, now coded as M. S. Sections 412.011-412.921.

M. S. Section 412.221 deals with the specific powers of the village council. Subd. 29 thereof authorizes a village council to enact a zoning ordinance.

M. S. Section 412.191, subd. 1, provides that the "village council shall consist of the mayor, clerk and the three trustees." Subd. 4 of the last cited section prescribes that "[e]very ordinance shall be enacted by a majority vote of all the members of the council **except where a larger number is required by law.**" The question then becomes: To enact an ordinance amending a village zoning ordinance enacted subsequent to the effective date of the Village Code, is there any law requiring a larger numbr than "a majority vote of all the members of the council"? There is.

M. S. Section 462.01 is a general act authorizing cities of the classification therein specified "or any village in this state, acting by or through its governing body" to enact a zoning ordinance. That statute specifically authorizes the governing body of the municipality so enacting the zoning ordinance thereafter to **"alter the regulations or plan, such alterations to be made only by a two-thirds vote of all the members of the governing body of such city or village."**

M. S. Section 462.01 had its origin in L. 1929, C. 176, Section 1. It was in effect at the time of the enactment of the Village Code. It is still in effect. Although several statutes of general application were rendered inapplicable to villages by Section 111 of the Village Code (M. S. Section 412.921), Section 462.01 was not included within the last cited section of the Village Code, nor was Section 462.01 in any manner affected by the enactment of the Village Code. The legislative purpose expressed in Section 462.01, providing that an ordinance amending an existing zoning ordinance shall require for enactment a two-thirds vote of all the members of the governing body is obvious. To say that a zoning ordinance enacted by a village council under the authority of Section 412.221, subd. 29, may be altered or amended by an ordinance enacted by less than a two-thirds vote of all the members of the village council would ignore the phrase "except where a larger number is required by law" contained in Section 412.191, subd. 4, and hereinabove quoted.

Accordingly, your first question is answered in the affirmative. That answer renders unnecessary consideration of your second question.

LOWELL J. GRADY,
Assistant Attorney General.

Village of Brooklyn Center Attorney.
August 29, 1951. 477-A-34

182

Zoning—Billboards—Town board and zoning board not authorized to grant permits for maintaining billboards or placing advertising within limits of trunk highway—M. S. A. Section 160.34, subd. 3.

Facts

The town board and zoning board of the town of Eden Prairie adopted a resolution requiring strict enforcement of the zoning ordinance of the town which was adopted by the town board on December 14, 1948, pursuant to M. S. 366.10 to 366.18. The resolution in part provides:

> "That no advertising or other signs or billboards or structures shall be erected and/or maintained in the residential-farming district or the Town of Eden Prairie other than the following: signs not exceeding 12 square feet in area pertaining only to the sale, rental or lease of the premises upon which the same are displayed; bulletin boards nine (9) square feet in area identifying public and semi-public buildings and for the posting of legal notices; and name plates not exceeding three hundred (300) square inches, provided, however, that in that part of such district devoted to farming, advertising signs, billboards and structures may be erected and maintained by Special Use Permit granted therefor and such signs and structures may also be erected and maintained in the Commercial and Industrial districts upon such permit being granted therefor. Directional signs of size, design and location approved by the Building Commissioner may be erected and maintained in any district."

Trunk highways No. 169 and 5 extend through the town of Eden Prairie. You asked the following:

Question

May the town board and the zoning board restrict or eliminate the erection of large outdoor advertising signs and billboards along trunk highways No. 169 and 5 unless the persons desiring to maintain such signs first obtain a special permit and pay the required fee of $10.00 for each sign?

Opinion

For the purpose of this opinion it is assumed that under the permits which might be granted by the town board and the zoning board the billboards will be within the limits of trunk highways No. 169 and 5. Municipalities have the right to regulate and control billboards upon public highways. See **State v. Wong Hing,** 176 Minn. 151, 222 N. W. 639; **Thomas Cusack Co. v. City of Chicago, et al.,** 242 U. S. 526; **St. Louis Poster Advertising Company v. City of St. Louis, et al.,** 249 U. S. 269.

The trunk highway system of this state was established under the provisions of Minnesota Constitution, Art. XVI, Section 1. Pursuant to this constitutional provision appropriate legislation was enacted so as to carry out the purposes of this provision of the constitution. Under such legislation the trunk highway system was, by legislative enactment, placed under the control of the commissioner of highways. M. S. 1949, Section 160.06. General supervision and control by the commissioner of highways over a trunk highway established pursuant to the constitutional provision is not limited to the traveled portion thereof but extends to the entire right of way. **Otten v. Big Lake Ice Company,** 198 Minn. 356, 270 N. W. 133. The general highway act, M. S. 1949, Ch. 160, gives the commissioner of highways power to regulate and supervise the trunk highways within and without the limits of cities and villages through which they extend. **Automatic Signal Advertising Company v. Babcock,** 166 Minn. 416, 208 N. W. 132.

Maintaining billboards and advertising within the limits of a public highway is prohibited by M. S. A. 160.34, subd. 3. In our opinion the town board and the zoning board are without power to grant special permits so as to authorize the maintenance of billboards or advertising within the limits of trunk highways No. 169 and 5.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Town Attorney, Town of Eden Prairie.
June 23, 1952. 441-H

183

Zoning— Building—Towns (possessed of village powers under M. S. 368.01) —Building and zoning—Exercise of power to regulate construction of buildings (M. S. 412.221, subd. 28) and power to zone (subd. 29) should be by separate ordinance—Board of supervisors may employ building inspector and provide for his compensation out of general town funds, if available—M. S. 366.01. Town has no authority to include within building code enacted under subd. 28 provisions for licensing of builders, contractors, and subcontractors.

Statement

"Section 368.01, Minnesota Statutes 1949, provides that towns having the qualifications set out therein shall have certain of the powers possessed by villages. Among the powers possessed by qualified towns are those set forth in Section 412.221, Subdivisions 28 and 29, Minnesota Statutes 1949."

Question

"Under the two subdivisions referred to above, may the Board of Supervisors of a town qualifying under Section 368.01 enact by ordinance a building code providing for and requiring reasonable construction standards and land usage for residential and commercial construction in the town?"

Opinion

M. S. 412.221 defines the specific powers of the council of all villages of the state. In its portions material to your inquiry, this section provides as follows:

"Subd. 28. The village council shall have power by ordinance to regulate the construction of buildings.

"Subd. 29. The village council shall have power by ordinance to regulate the location, height, bulk, number of stories, size of buildings and other structures, the location of roads and schools, the percentage of lot which may be occupied, the sizes of yards and other open spaces, the density and distribution of population, the uses of buildings and structures for trade, industry, residence, recreation, public activities, or other purposes, and the uses of land for trade, industry, residence, recreation, agriculture, forestry, soil conservation, water supply conservation, or other purposes. For these purposes it may divide the village into districts or zones of such numbers, shape and area as may be deemed best suited to carry out the purposes of this subdivision. All such regulations shall be uniform for each class and kind of buildings and for the use of land throughout each district, but the regulations in one district may differ from those in other districts."

The power conferred by subd. 28 is different from that conferred by subd. 29. One is the power **"to regulate the construction of buildings,"** whereas the other is the power to zone and thereby to regulate the specific matters specified in subd. 29. The two powers are separate and distinct. Your question seems to involve elements of a building ordinance and elements of a zoning ordinance. The exercise of each of the separate powers involved should be by separate ordinance.

The board of supervisors of a town having the qualifications specified in M. S. 368.01 has the power by ordinance to regulate the construction of buildings within the town. See M. S. 368.01; 412.221, subd. 28.

The board of supervisors of a town having the qualifications specified in M. S. 368.01 has also the power by ordinance to zone and thereby to regulate the matters specified in 412.221, subd. 29.

See opinions of the Attorney General dated January 31, 1946, No. 156 in the 1946 Report; opinions dated July 10, 1950, and July 11, 1950, file 441-H.

Question

"If such a town may enact a building code as above, may the Board of Supervisors hire a building inspector under such conditions of employment and for such compensation as shall be deemed reasonable by the Board of Supervisors?"

Opinion

Implicit in the authority conferred upon the board of supervisors by ordinance to regulate the construction of buildings is the authority to provide for the administration and enforcement of the ordinance. If the board of supervisors in the circumstances stated is of the view that it is necessary or expedient to employ a building inspector for the purposes stated, it may do so and provide for compensation of such employee out of the general funds of the town if funds for that purpose are available. See M. S. 366.01.

Question

"Pursuant to a building code and as a part thereof, may such a town provide for the licensing of contractors, builders and sub-contractors for regulatory purposes only and not for revenue?"

Opinion

In McQuillin, Municipal Corporations (3d Ed.), Vol. 9, Section 26.200, we find this statement of the general rule:

"Permits to erect new buildings or to make material alterations or additions on existing buildings usually are required under municipal building codes or ordinances. The purpose of the requirement is to obtain compliance with these codes and ordinances, and also, in many instances, with zoning and fire district ordinances. Requiring a permit for the erection, alteration and repair of all kinds of buildings is not only reasonable but useful, and, indeed, the requirement may well be regarded as essential to the welfare and prosperity of the community.
* * *

"Ordinances relative to building permits must be reasonable and uniform in operation, avoid discrimination, and not vest arbitrary power in offices, departments or officials administering them. They must be so drawn as to treat all applicants alike."

The foregoing rule, however, deals with so-called building permits required under a building code or ordinance and does not deal with the question of including within a building code provisions for the licensing of builders,

contractors, and subcontractors. The authority conferred by Section 412.221, subd. 28, is to regulate the construction of buildings and not for the licensing of persons who may be engaged in that construction. Whether the town involved would have the authority by ordinance to provide for the licensing of builders, contractors, and subcontractors within the township under the general welfare clause contained in Section 412.221, subd. 32, and embraced within the operative effect of Section 368.01, is a question neither presented by your inquiry nor considered herein.

Generally, on the question submitted by you, your attention is also invited to **Village of Golden Valley v. Minneapolis, Northfield and Southern Railway**, 170 Minn. 356, 212 N. W. 585.

LOWELL J. GRADY,
Assistant Attorney General.

Township of Minnetonka Attorney.
June 3, 1952. 441-H

Editorial Note: Section 366.01 amended by L. 1953, C. 459, S. 1; Section 368.01 amended by L. 1953, C. 462, S. 1.

ORGANIZATION

184

Incorporation—Validity—Counties—May not spend funds to investigate or pass upon the validity of the incorporation of a village under M. S. 412.011 et seq.

Facts

"A petition has been presented to the county board, Cass County, asking the board to investigate the incorporation of the Village of Chickamaw Beach. This village was incorporated November, 1950.

"The petitioners claim that there was not the required number of legal residents of the territory proposed to be incorporated, in as much as the census included a number of non-residents."

Question

Does the county board have authority to conduct an investigation to determine the validity of the incorporation of this village?

Opinion

The question is answered in the negative. It is not a part of the functions of the county board, and county funds may not be expended for such purpose. See enclosed copy of Attorney General's opinion dated May 15, 1950, File 484e-1.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Cass County Attorney.
April 6, 1951. 484-E-1

185

Incorporation and Boundaries — Annexation — Detachment—Petition—Petition by owners of affected land, including state-owned land, is a condition prerequisite to exercise by village councils of authority conferred by that statute—M. S. 412.061.

Facts

"The Villages of Lauderdale and Roseville in Ramsey County are contiguous. The owners of certain property lying north of Lauderdale in Roseville have indicated that they desire to have their property detached from Roseville and made a part of Lauderdale. The area involved is one block wide along the north Lauderdale boundary, and comprises a total of about 6 blocks.

"The owners desiring the adjustment of boundary have circulated petition pursuant to the provisions of Sec. 412.061, M. S. A. It now appears that the owners of several lots in the area do not wish to join in the petition. * * *

"It appears that some of the land in the area affected is owned by the State of Minnesota. It also appears that the owners of several lots may not be willing to join in the petition, although a large majority desire the change of boundary."

Statement

Although your inquiry does not expressly so state, it appears from the tenor thereof that all of the area involved is platted property. For the purposes of this opinion, we assume that to be the fact.

Question 1

"Does Section 412.061, M. S. A. require the petition provided for in said section as a condition precedent to detachment of territory by one village and the annexation by the other?"

Opinion

This question is answered in the affirmative.

M. S. 412.061 relates to the adjustment of boundaries by two abutting villages. So far as here material, it provides:

"Territory in one village abutting on another may be detached from the first and annexed to the second in the following manner. The **owner or owners of the affected land** may petition the councils of both villages for such change. If the council of the village in which the land is located finds that the change will be for the benefit of the village and the land affected, it **may** by ordinance declare such land detached

from the village and the detachment shall become effective at the date specified in the ordinance **but not before** the council of the other village has adopted an ordinance annexing the land to it."

The power conferred by the statute upon the village councils may not be exercised except upon the compliance with the conditions specified in the statute. One of those conditions is that the "owner or owners of the affected land * * * **petition** the councils of both villages for such change."

Question 2

"If question '1' is answered in the affirmative, does the said statute require that 100 per cent of the owners of the land being detached and annexed join in said petition?"

Opinion

This question is likewise answered in the affirmative.

The statute provides for the petition by the "owner or owners of the affected land." There is nothing in the language of the statute that suggests a legislative intention that a petition subscribed by less than all of the owners of all of the affected land is sufficient for the purposes of this statute.

Question 3

"Are * * * [state] owned lands * * * to be included for purposes of determining which owners of lands affected shall join in the petition under Sec. 412.061, M. S. A.?"

Opinion

Yes. See answer to question 2. State-owned lands, if affected by the petition, are not excepted from the operation of the statute here considered.

LOWELL J. GRADY,
Assistant Attorney General.

Attorney for Village of Lauderdale.
April 10, 1952. 484-E-2

Editorial Note: Section 412.061 amended by L. 1953, C. 735, S. 1.

186

Incorporation and Boundaries—Annexation—Detachment—Taxation—Abutting villages—Land detached from one village and annexed to another is not subject to taxation for payment of indebtedness of annexing village existing prior to annexation. M. S. 412.061 only statute applicable to such detachment and annexation.

Facts

"Villages A and B abut on each other. Under the provisions of Minnesota Statutes, Section 412.061, a portion of the territory in Village A is detached from Village A and annexed to Village B. At the time of the change both villages have pre-existing bonded debts."

Question

"Would this territory also be subject to taxation for the pre-existing bonded indebtedness of Village B to which it has been attached?"

Opinion

M. S. 412.061 relates to the adjustment of boundaries by two abutting villages. It provides for the detachment of property from the first village and its annexation to the second village upon the conditions therein prescribed. So far as here material the statute provides:

> " * * * The land affected shall be subject to taxation for the payment of interest and principal on all pre-existing bonded indebtedness of the village from which it was detached to the same extent as if it were still a part of that village."

The creation of municipal corporations, change in their boundaries by annexation or severance of territory, and the conditions upon which such creation or change may be made involve questions purely of legislative policy. See **State ex rel. Smith v. Village of Gilbert**, 127 Minn. 452, 149 N. W. 951. The legislature has the power, if not in violation of any constitutional right, to change the boundaries of a municipality without apportioning its indebtedness. See **State ex rel. Board of County Commissioners v. Demann**, 83 Minn. 331, 86 N. W. 352.

The statute here considered makes express provision that the land detached from the first village and annexed to the second village shall be subject to taxation "for the payment of interest and principal on all pre-existing bonded indebtedness **of the village from which it was detached**"; but it does not contain a provision that the land so detached from the first village and annexed to the second village shall be subject to taxation for the payment of the indebtedness of the annexing village existing prior to the time of the annexation. In these circumstances, I am of the view that consideration of the statute compels a negative answer to your question.

The situation here considered is to be distinguished from that involved in Attorney General's opinion dated February 24, 1948 (484e-1). Section 412.061 was not there involved, nor was any other controlling statute.

Question

"Is there any other Minnesota law under which such a change of territory could be effected?"

Opinion

M. S. 1945, Section 413.11, to which your letter refers, was expressly repealed by L. 1949, C. 119, Section 110, now coded as 412.911. I know of no statute, other than M. S. 412.061, applicable to the situation presented by your facts.

LOWELL J. GRADY,
Assistant Attorney General.

Itasca County Attorney.
April 16, 1952. 484-E-1

Editorial Note: Section 412.061 amended by L. 1953, C. 735, S 1.

PROPERTY

187

Cemetery—Burial vault—Village has authority to accept by grant a gift of real or personal property for a public cemetery—M. S. A. Section 501.11 (7)—May accept transfer by a public cemetery association of a cemetery under Section 306.025, and may own and maintain a municipal cemetery as provided in Section 412.221, Subd. 9 (CAPP); not authorized to accept as a gift a building used exclusively as a burial vault building and to assume an unpaid obligation of about $600 against such building.

Facts

"An unincorporated association operates a burial vault building here in the Village of Fosston. This building was built from funds raised by this association through popular subscription. The land on which the building is located is in the name of one of the members of this association. About $600.00 indebtedness on this building is owed to a local Finance Company."

Question

"Could the Village Council of Fosston under Minnesota Statutes, Section 412.221, subd. 9, pay off this indebtdness and assume the ownership and management of this burial vault building and ground?"

Opinion

A village, pursuant to M. S. A. Section 501.11, Subd. (7), is authorized to accept a gift of real or personal property for a public cemetery. Under Section 306.025, a village is authorized to accept a transfer of a cemetery lying wholly or partly within the village from a public cemetery association.

Under Section 412.221, Subd. 9 (CAPP), a village is empowered to acquire and maintain a municipal cemetery.

We are not aware of any statutory provision authorizing the village in the instant case to assume an obligation of about $600 now existing against the vault building proposed to be donated to the village.

In view of this conclusion, it is not necessary for us to pass upon the question of whether a vault building constitutes a cemetery within the purview of either Section 501.11, Subd. (7), or Section 306.025, supra.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Fosston Village Attorney.
November 13, 1952. 870-J

188

Real estate — Purchase — Contract for deed — City may not purchase real estate on contract for deed, deferred payments to be made in installments but in all matters of public indebtedness must strictly comply with M. S. A. Chapter 475—M. S. A. 475.52, subd. 1; 475.753 (L. 1951, C. 422, Section 9).

Facts

"A city of the third class governed by a Home Rule Charter has entered into a contract for deed to purchase land. The purchase price is stated in the contract to be $3,250.00. This amount is payable in seven annual installments. The City Council has authority, under its charter, to purchase land without a vote of the people when the amount involved is less than $5,000.00."

Question

"If it is your opinion that the requirements of M. S. A. Chapter 475 must be met, will you kindly inform me of the procedure that should be followed by this municipality to purchase land under contract for deed?"

Opinion

Public indebtedness in some charter cities is regulated by the charter. A city not governed by a home rule charter is, in respect to public indebtedness, governed by M. S. A. 475.52, subd. 1. All municipalities are subject to the provisions of M. S. A. Chapter 475 in the issuance of obligations and may incur indebtedness to the extent, but not in excess, of the debt limit in that chapter notwithstanding any home rule charter provisions or charter law adopted before April 1, 1951. M. S. A. 475.753 (L. 1951, C. 422, Section 9).

The opinion of the Attorney General, File 59A-40, October 3, 1938, stated that a municipality is not authorized to enter into a contract for the purchase of real estate on such a so-called installment plan as was described in the letter. The same file discloses an opinion dated December 8, 1932, wherein it is stated that a municipality has no right to purchase real estate on the installment plan. If this could be done, then the city by subterfuge could evade the statutes relating to public indebtedness.

There can be no doubt that the municipality contemplating the purchase of real estate on a contract for deed, whereby payments are deferred and the purchase price is paid in installments, is creating an obligation for the public to discharge from taxes to be levied in the future. Such obligations cannot be created except upon strict compliance with the requirements of Chapter 475.

CHARLES E. HOUSTON,
Assistant Attorney General.

Public Examiner.
April 25, 1952. 59-A-40

189

Real estate—Purchase—Option to buy—Town without authority to purchase an option to buy real estate—M. S. 1949, 365.10 (11).

Facts

"The Town will have available next October for the purchase of land for parks the sum of $5500.00 which has been levied by town meetings for that use. It is now desired to purchase a ten acre tract for a park, the purchase price of which is $9000.00. In this situation, it has been suggested that five acres of this tract be now purchased for $4500.00 and that the Town take a one year option for the purchase of the other five acre tract for which option they expect they would have to pay $500.00. If the next town meeting levies the necessary amount for such purchase then the option could be exercised and the land acquired. If, however, sufficient funds are not so levied the option would expire and nothing would be received by the Town for the $500.00 paid therefor." You make the following observations:

"It is my view that the Town Board would not be authorized to purchase such an option. It would not be using the funds in question for the purchase of land for parks, merely a purchase of the right so to do in the future. In the next place, if funds did not become available to exercise the option and complete the purchase, then the $500.00 paid would be lost and it could not be said that this amount had been used for the purchase of such lands. Then, too, the purchase of an option would not be a purchase of land such as would be the buying of land under a contract for deed.

"It is also argued that the Town Board could use funds out of its general fund to buy such an option if in the judgment of the Board money could be spared from that fund, also that if the option were purchased out of park funds and then not exercised, that funds could be transferred from the general fund to replace the amount so used. The Town Board has no authority to buy land unless a town meeting authorizes this to be done. It would seem that such a use of funds from the general fund would be an evasion of that rule."

Opinion

An option is a right to accept or reject an offer of sale within a specified or reasonable time. It does not give the holder an interest in the land, or obligate him to purchase it. It gives him rights in personam which he may sell or assign. It is an offer to sell, coupled with an agreement to hold the offer open for acceptance for the time specified. A mere unaccepted offer gives neither a right nor an estate which a purchaser is bound to notice. The usual option does not give a legal or equitable title. It gives a legal right, the exercise of which may result in the transfer of title. Dunnell's Minn. Dig., Section 10016.

The town meeting authorized the purchase of real estate. It did not authorize the purchase of an option, nor did it have that power. M. S. 1949, 365.10 (11).

I agree with your conclusion that the town is without authority to purchase an option to buy real estate.

CHARLES E. HOUSTON,
Assistant Attorney General.

Attorney for Town of Bloomington.
April 25, 1952. 434-A-6

190

Real estate—Purchase—Warehouse for storage of property owned by town—Building must be authorized by town meeting and money voted by town meeting—Tax levy by town board to provide money—Special town meeting may be held for purpose—M. S. A. 1949, 365.10 (9), 365.14; 212.03; 212.04; 212.05-212.15.

Facts

The Town of Great Scott has a town hall located on real estate which it owns in the Village of Kinney within the boundaries of the town. The town board believes it advisable to build a warehouse on this property. The purpose of building a warehouse is to provide a place in which to store telephone materials, snow-plows and various other equipment owned and used by the town.

Question

Would an election of the voters of the township be necessary to authorize the building of such a warehouse?

Opinion

The electors of the town have the power at the annual meeting of the town "To authorize the town board to purchase or build * * * and to determine by ballot, the amount of money to be raised for that purpose;". M. S. 1949, 365.10 (9).

Section 365.14 reads:

> "When any town shall have authorized the purchase or building of a town hall or other building for its use and determined the amount of money to be raised for that purpose the town board may levy a tax for the amount so authorized and make all necessary contracts for purchasing or building the same and shall have the control and management thereof."

It is the town meeting and not the town board that gives the authority and determines the amount of money to be raised. After these determinations have been made, then the town board levies the tax for the money authorized by the voters to build a warehouse.

Since the regular town meeting is in March and it may be that the people of the town consider it advisable to authorize the building before that time, a special town meeting may be called under authority of M. S. 1949, 212.03. This special town meeting is called whenever the supervisors, town clerk and justices of the peace or any two of them, together with 12 other freeholders of the town, file in the office of the town clerk a written statement setting forth the reason and necessity for such meeting and the particular business to be transacted thereat and that the interests of the town require that such meeting be held. Notice of such meeting is given as authorized and required by Section 212.04 and the meeting is organized and held as provided in Sections 212.05-212.15.

The rest of the steps to be taken are

(1) Calling of the meeting;

(2) The holding of the special town meeting at which the town meeting will (1) authorize the building of the warehouse and (2) determine the amount of money to be raised for that purpose;

(3) The town board will levy the tax under authority of Section 365.14 to build a building;

(4) The town board will make the necessary contracts for the building of the building.

It is necessary in order that the respective officers be properly authorized to do the things required that the statutory steps be carefully observed. Accordingly, it is advisable that the town board employ an attorney to assist in conducting these proceedings.

CHARLES E. HOUSTON,
Assistant Attorney General.

Attorney, Town of Great Scott.
August 18, 1952. 434-A-6

191

Real estate—Reversion—Breach of condition subsequent—Failure of town to use property as town hall may result in reversion—M. S. 1949, Section 500.20, Subd. 2; 541.023, and 412.081, Subd. 3, considered—**Permitting village partial use of town hall held no violation of condition subsequent.**

Facts

"In February, 1951, the Village of Arden Hills was incorporated out of the territory of the Township of Mounds View. The area covered by said Village of Arden Hills includes the land upon which the present Town Hall of the Township of Mounds View is situated.

"This property, which consists of .46 of an acre on State Highway 96, was deeded to the Town of Mounds View on October 2, 1883, by a deed of conveyance expressly providing that the conveyance was made on the condition that the property is to be used by second party as a town hall and 'that said property shall never be used for any other purpose and that as soon as said party of the second part shall fail to use said property for said purpose and attempts to use it for any other purpose, then said property shall immediately revert to said first party'."

Question

May the Town of Mounds View permit the village to use the town hall for village purposes without prejudicing the property rights of the town in the property?

Opinion

It is my opinion that, if the town continues to own and to use the real property involved as its town hall, its permitting the partial use of the premises by the village as a village hall for the conduct of the governmental purposes of the village would not be so inconsistent with the terms of the condition subsequent in question as to constitute a breach thereof and work a forfeiture of the estate granted.

Question

Are the provisions of M. S. 1949, Section 500.20, Subd. 2, "effective to release the restrictive covenants" contained in the deed of conveyance?

Opinion

Whatever may be the meaning of the above cited Section 500.20, Subd. 2, it would appear inadvisable to rely thereon for a release of any condition in the deed under consideration. It is my understanding that as yet no cause of action has arisen through a breach of the condition subsequent here involved. The constitutionality of legislation depriving a grantor of a right to have the property deeded by him on condition revert to him on the violation of such condition, without giving him an opportunity within a reasonable time after breach to bring an action to establish his right, would, I believe, be doubtful. To proceed to dispose of the town hall property on the theory that M. S. 1949, Section 500.20, Subd. 2, or Section 541.023 or Section 412.081, Subd. 3, in so far as they, or either of them, would eliminate the condition subsequent, is constitutional, without a decision of a court of last resort to that effect, might, in my opinion, result in the reversion of the property now owned and held by the Town of Mounds View.

In view of the position hereinabove taken, the other questions which you have submitted require, I believe, no further answer than the statement that, by the sale of the property by the town to the village, it should be assumed that the title to the premises will revert as in the deed provided and that the safest course to pursue is to continue in that assumption until it has been judicially determined that the breach of the condition subsequent here discussed will not result in forfeiture of the property subject thereto. Of course, if forfeiture results, neither the town nor the village will have any ownership in the property.

J. A. A. BURNQUIST,
Attorney General.

Township of Mounds View Attorney.
April 4, 1951. 434-C-8

192

Real estate — Sale — Library site — Under M. S. 412.211 village council, by majority vote, may sell real property held by the village in fee absolute if the interests of the village require such sale; vote of electors not required; broader authority than formerly conferred by M. S. 1945, Section 412.075.

Facts

"The Village of Hibbing is the owner of the [building containing the] public library located in North Hibbing in fee simple, subject to mineral reservations of record.

"The Library Board of the Village of Hibbing has obtained property in South Hibbing for the purpose of erecting a new library [building] thereon and has also let out contracts for preliminary plans and speci-

fications. At the present time the Library Board does not have sufficient funds in order to build the library for which plans they have contracted. In order to obtain additional revenue the Library Board has requested that the Village Council sell the real property upon which the library in North Hibbing is situated to local mining interests. Under the proposed sale agreement the Village of Hibbing will be able to use the old library until such time as a new library is completed and put into operation. The Village of Hibbing only intends to sell the real estate upon which the old library building is situated."

Question

"May the Village Council of the Village of Hibbing sell the real property on which the public library is situated in order to raise additional revenue for the purpose of building a new library by a majority vote of the Village Council or is it necessary that such sale of real property owned by the Village of Hibbing be referred to the voters for their determination as to whether or not it should be sold?"

Opinion

We assume that the title of the real property involved is vested in the village in fee absolute, without limitation or restriction of any kind as to its alienation.

M. S. Section 412.211 prescribes the general powers of all villages in this state. Among other things, it provides that the village—

"* * * may acquire * * * such real and personal property as the purposes of the village may require, by purchase, gift, devise, condemnation, lease or otherwise, and **may** hold, manage, control, **sell, convey,** lease, or otherwise dispose of such property **as its interests require.**"

You will note that the exercise of the authority conferred by this statute upon the village to sell and convey its property is conditioned only "as its interests require." Prior to the enactment of the village code, L. 1949, C. 119, embodying what is now M. S. 412.211, the exercise of the authority conferred by statute upon a village to sell, lease, and convey its property was subject to the condition that the property was no longer needed for corporate use. See M. S. 1945, Section 412.075. Under the statute prior to the enactment of the village code in 1949, if the village real property was no longer needed for corporate use, the village council had the authority to sell the real property without a vote of the electors. See **Penner v. Ulvestad,** 110 Minn. 59, 124 N. W. 371. See opinions of the Attorney General dated July 22, 1946, and July 25, 1946, file 469a-15. The authority conferred by 412.211 is broader than that which was conferred by M. S. 1945, Section 412.075.

If your village council, in the exercise of its fair and impartial judgment, determines that the interests of the village require that the real property here involved be sold, the village council, by a majority vote thereof, may sell and dispose of the land involved without a vote of the electors.

LOWELL J. GRADY,
Assistant Attorney General.

Hibbing Village Attorney.
February 28, 1952. 469-A-15

193

Real estate—Sale—Sanatorium—Tuberculosis sanatorium owned by two or more counties may be sold or leased under M. S. 1949, Section 376.54, proceeds therefrom to be divided proportionately between counties and state according to contributions made—No provision authorizing use of rentals for repairs or maintenance — County board of county wherein sanatorium is situated empowered upon discontinuance to sell or lease. Opinion, December 19, 1950, followed.

Facts

"For some years past Aitkin and Crow Wing counties have owned and operated a tuberculosis sanatorium at or near Deerwood, Minnesota, under the statutory provision for such a joint sanatorium.

"Due to the rapid progress in the treatment of tuberculosis it has become apparent that the sanatorium is no longer needed, and the County Boards of the two counties have voted to discontinue the sanatorium, and the sanatorium board of the sanatorium in question has also taken such action.

"The remaining patients in the sanatorium have been transferred to other sanatoriums, to-wit: The sanatorium at Nopeming and the State Sanatorium at Walker, Minnesota. The two County Boards have had several sessions together with reference to determining what should be done with the property owned by the two counties under their joint arrangement.

"The Division of Social Welfare of the State is desirous of having the sanatorium rented to some rest home organization. In the meantime, work is needed upon the buildings belonging to the organization and maintenance work is required, such as caretakers, etc. There are sanatorium funds in both counties."

Questions

"1. Can the two counties continue to expend these tuberculosis sanatorium funds for the upkeep and maintenance of the joint property and if so, what organization has the control of the expenditure thereof?

"2. Can the respective counties use the funds available for the sanatorium in the respective counties for the care of their respective tuberculosis patients that are now being taken care of elsewhere?

"3. If such sanatorium funds cannot be so used, what funds should be used to take care of these patients that are now being cared for elsewhere?

"4. If there are surplus funds in the sanatorium fund, can those funds be transferred from the sanatorium fund to the welfare fund and/or some other fund?"

Opinion

So far as pertinent, M. S. 1949, Section 376.54, provides:

"If the director of social welfare approves such discontinuance of operation, the county board of the county wherein such sanatorium is situated may sell the real and personal property pertaining to such institution or lease the same by good and valid instrument executed by the chairman of the board and the county auditor. The proceeds from such sale or lease shall be divided proportionately between the county or counties and the state, according to their respective contributions. The portion so received by a county shall be set aside as a fund to be used under the direction of the county board of the county receiving the same to assist in the treatment and care of tubercular patients from such county. The state's portion of such proceeds shall be deposited with the state treasurer and credited to the general revenue fund of the state."

Under this statute when the director of social welfare has approved discontinuance of the operation of the sanatorium the county board wherein the sanatorium is situated may sell or lease the real and personal property pertaining to the sanatorium. The lease shall be executed by the chairman of the board and the county auditor of such county. The proceeds derived therefrom shall be distributed to the counties and the state according to their respective contributions.

The statute does not authorize the use of the proceeds for either maintenance or upkeep. Without such statutory authority, we believe that the proceeds may not be used for such purposes, and that such proceeds should be distributed according to the statutory provisions.

Provision could be made in the lease so as to impose upon the lessee the duty to make repairs and to maintain the leased premises according to the provisions of the lease. The county board, which has authority under the statute to sell and lease the property, should collect the income according to the provisions of the lease and make distribution in accordance with the statute.

Question 2 is answered in the affirmative.

Question 3 is disposed of by our answer to the second question.

The fourth question was considered in an opinion to you dated December 19, 1950, file 556-A-7, to which we add that the income accruing to the coun-

ties under Section 376.54, supra, "shall be set aside as a fund to be used under the direction of the county board of the county receiving the same to assist in the treatment and care of tubercular patients from such county."

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Aitkin County Attorney.
April 6, 1951. 556-A-5

PUBLIC HEALTH

194

Ambulance service—If population is under 50,000, county may contract for ambulance for accident cases—M. S. 1949, Section 375.191.

Facts

"When motor vehicle accidents occur on the highways in the county and people are injured, either the Sheriff or the Highway Patrolman call a private ambulance service in Stillwater for an ambulance. The company rendering the ambulance service has billed our Sheriff for these ambulance calls, who in turn has submitted them to the County Board for payment."

Questions

"Are such charges for ambulance calls for such individuals valid claims against the county when such services have been requested by the Sheriff or a State Highway Patrolman?

"If such charges cannot be legally paid by the county, may the welfare board pay for such charges when it is determined that the individuals receiving the ambulance service are transients without funds or means to pay for the same?"

Opinion

You are referred to M. S. 1949, Section 375.191, which provides:

"Subdivision 1. The board of county commissioners of any county in this state, now or hereafter having a population of not more than 50,000 inhabitants, shall have authority to contract with the owner, owners, or operators of a licensed ambulance, upon such terms and conditions as may be agreed upon between them, for the use of ambulance service in case of accidents occurring within the confines of said county.

"Subd. 2. The board of county commissioners of any county to which this act applies is authorized to make all needful appropriations to carry out its provisions."

If the county commissioners desire to enter into a contract under the authority granted by said Section 375.191, then the county may reimburse the owner of the licensed ambulance in accordance with the terms and conditions of the contract to which the county commissioners agree.

DONALD C. ROGERS,
Assistant Attorney General.

Washington County Attorney.
October 5, 1951. 225-A

PUBLIC RECORDS

195

Evidence — Microfilms of records. When admissible in evidence — M. S. A. 600.135 — When may original records safely be destroyed?

Facts and Question

The Board of Education of Minneapolis desires to microfilm records and inquires whether it may do so and thereupon safely destroy originals.

You have advised the board that its authority is doubtful, in view of M. S. A. 15.07, 120.11, Subd. 5, and 600.135, L. 1951, C. 125. In consideration of the last cited section, you raise the question whether the preservation of the originals is required by law, and you consider it unsafe in view thereof to destroy the originals.

You have called attention to the practice in some public offices which microfilm records and destroy the originals, as it has been reported to you.

Opinion

M. S. A. 600.135, L. 1951, C. 125, establishes a rule of evidence. If an agency of government in the regular course of its business keeps records, as a school district does, and if in the regular course of its business it reproduces such records by microfilm, which accurately show the contents of the original, then the original records may, by authority of this act, be destroyed in the regular course of business, unless held in a custodial or fiduciary capacity or the preservation of the record is required by law. Before such microfilm can be used as evidence, a sufficient foundation must be laid for its use. Any lawyer who has tried cases knows the difficulties which may arise in the laying of a foundation for evidence.

The question whether such evidence is a satisfactory substitute for an original record is a question upon which the attorney for the district should pass. Whether he is satisfied with a substitute for a genuine document, he and not I should say. On the proof of a fact I should prefer the genuine

original document, rather than a photograph. Suppose two or more colors of ink are involved in the print or writing. Will the colors show in the photograph? More questions than mere admissibility of evidence are involved. The persuasion of which the instrument is capable should be considered.

School records are subject to inspection by the voters and certified transcripts thereof are evidence. M. S. A. 125.32.

School records should conform to the uniform system prepared by the State Board of Education. M. S. 120.11, Subd. 5.

It is the duty of the custodian of school records to make inspection thereof available to an officer or department of government having the duty of inspection. M. S. A. 15.07.

While under authority of Section 600.135, the board appears to have the power to destroy the records, no one can answer the question whether it may safely do so. Proof of facts is a difficult, technical and at times almost impossible accomplishment. It is in the difficult situation that the advocate reaches for the best evidence. When it has been destroyed, it is not available.

On the question whether a document is genuine, nothing can take the place of the original. Indentations on paper produced by writing are not shown in a photograph. Indentations of a seal are not shown. True, the copy may be received in evidence, but whether the original may safely be destroyed, no one can say.

In view of the foregoing it is for the board of education to determine, in the exercise of its discretion, which original records it deems it safe to destroy.

CHARLES E. HOUSTON,
Assistant Attorney General.

Minneapolis City Attorney.
June 2, 1952. 851

PUBLIC SAFETY

196

Fire and police—Station building—Village council not authorized to provide living quarters therein for chief of police and members of his family.

Facts

"At the recent election the citizens voted a bond issue for the purpose of erecting a fire station and a police station. Plans are in progress and the question has arisen as to whether it is permissible for the village to provide living quarters for the Chief of Police to reside in the new fire and police station. Newport has a voluntary fire department and, therefore, no one who can be called twenty-four hours a day. If living

quarters were provided for the Chief of Police and his wife in the new building, either the Chief of Police or his wife would be available twenty-four hours a day for telephone calls for either fire or police calls."

Question

May the council of the village of Newport incorporate in the plans for said proposed new building living quarters for the chief of police and his wife for the purposes above stated?

Opinion

Under M. S. A. Section 412.111 the village council is authorized to create such departments and advisory boards and to appoint such officers and employees for the village as it may deem necessary for the proper management and operation of village affairs. This statute also empowers the council to prescribe the duties and to fix the compensation of all officers, both appointive and elective, and employees when not otherwise prescribed by law. The authority of the council to appoint a chief of police and to prescribe his duties and fix his compensation emanates from this statute. No specific authority is thereby granted to the council to provide living quarters for the chief of police and his family either in a separate building or in the fire and police station building. We are not advised of any other law which grants such specific authority to the council.

The general village powers are stated in Section 412.211, and specific powers with respect to the construction and acquisition of buildings are set forth in Section 412.221, Subd. 3. No specific grant of power is given to the council in either of these statutes, nor in any other statute of which we are advised, to provide living quarters for the chief of police for the purposes above stated. In our opinion the council is not possessed of any such authority, nor is such power and authority incidental to either the general or specific powers granted to the council by virtue of the above statutes. No doubt it would be desirable as well as beneficial to provide living quarters for the chief of police and his family. We think that the authority to do so should come from the legislature by an appropriate amendment to the present law. In instances such as where living quarters are provided for the sheriff or a residence for the convenience of teachers, this is all done by virtue of authority granted by the legislature.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Newport Village Attorney.
December 8, 1952. 785

PUBLIC WORKS

197

Sewage disposal system—Governing body authorized to adopt ordinance so as to provide reasonable charges for use thereof and to establish a surcharge therefor on water bills to consumers—M. S. A., Sections 443.09, 443.10 and 443.11.

Facts

The Village of Hibbing, now subject to M. S. A., C. 412 (Village Code), has a Public Utilities Commission established by virtue of L. 1933, C. 111, as amended by L. 1949, C. 422, and L. 1951, C. 680. A sewage disposal system is owned and operated by the village for domestic and commercial purposes which benefits the inhabitants of the village.

The cost of the operation of the sewage system is about $20,000 a year. No charge or fee is required from the users of these facilities. The use thereof is beneficial to the inhabitants of the village, and it is the desire of the council to impose a reasonable charge for the use of such sewage facilities to be calculated upon the cost of operating and maintaining the same. All water in the sanitary sewer system comes from the purchasers of water through the public utilities commission which, by virtue of the aforementioned laws, has control and supervision of the municipal water system.

Questions

"May the Village of Hibbing impose a surcharge for all water sold by the Public Utilities Commission and collect the same through the Public Utilities Commission, said surcharge to be a reasonable one and for the purpose of absorbing the cost of operating, maintaining, repairing and utilizing the sewage disposal plant and system of the Village of Hibbing?

"If this question is answered in the affirmative, will it be necessary to pass an ordinance establishing such a surcharge or can this be done by resolution?"

Opinion

Both questions will be considered together and likewise answered. The controlling statutory provisions are found in M. S. A., Sections 443.09, 443.10 and 443.11. Section 443.09 deals with the power and authority of the governing body of any village which has installed a system of sewers, sewage pumping station, or sewage treatment or disposal plant or plants for public use, to charge just and equitable rates, charges, or rentals for the use of such facilities. Sections 443.10 and 443.11 deal with the disposition of the moneys received from the charges imposed and the manner of enforcing collection for sewer services.

We are primarily concerned with the authority granted to the governing body under the provisions of Section 443.09. This section grants authority to the governing body to adopt an ordinance so as to impose just and equi-

table rates, charges or rentals for the use of the municipal sewage facilities or for connection therewith by every person, firm, or corporation whose premises are served thereby, either directly or indirectly. Such charges shall be as nearly as possible equitable and in proportion to the services rendered. In fixing such charges, consideration shall be given to the quality of sewage produced and its concentration, strength of river, lake, bay, or other body of water, pollution qualities in general, and the cost of its disposal. In the instant case, the cost of operating and maintaining the sewage facilities would have a material and significant bearing upon the cost of the disposal of the sewage.

As bearing upon the charges for such sewage service, the statute last mentioned in part provides:

> "* * * The charges shall be fixed on the basis of water consumed, or on any other equitable basis the governing body may deem appropriate, and, if the council so directs, may be established as a surcharge on the waterbills of all water consumers in the municipality on the grounds that the sewage treatment is for the purpose of preventing pollution of sources of water supply, or on some other basis of measuring the use made of the aforesaid facilities. * * *"

Authority is specifically granted to establish as a surcharge on the water bills of all water consumers the charge as fixed for the use of such sewage facilities. The imposition of such charge would not offend or be antagonistic to the powers and duties of the public utilities commission granted to it under the laws above referred to.

Subject to the limitations and provisions contained in Section 443.09, supra, the first question is answered in the affirmative.

The action of the governing body in prescribing charges or rates for sewer service, as authorized by said last mentioned section, should be by adopting a proper ordinance, and not by resolution.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Hibbing Village Attorney.
April 25, 1952. 387

SOCIAL WELFARE

198

Hospitals—Community—Northwestern Hospital Association of Thief River Falls, if "open to all residents of the city on equal terms," could properly be recognized as "community hospital" within M. S. 1949, Section 447.045, Subd. 4, as amended by L. 1951, C. 424, and entitled to accept contribution not to exceed $200,000 from city's liquor dispensary fund for construction of new wing.

Facts

"The City of Thief River Falls is a city of the fourth class organized and operating under Chapter 8 of the Laws of Minnesota for 1895, M. S. A., Section 410, Appendix 2. The city owns and operates a municipal liquor dispensary.

"The Northwestern Hospital Association operates a hospital within the city limits and proposes to construct a new wing on the existing plant to provide additional hospital facilities. The voters of the city at the last general election voted in favor of contributing an amount not to exceed $200,000 from profits to be earned by its liquor dispensary toward the construction, equipping and maintenance of a community hospital."

Question

Is the Northwestern Hospital Association of Thief River Falls a community hospital within the meaning of the provisions of M. S. 1949, Section 447.045, Subd. 4, as amended by L. 1951, C. 424, so as to be entitled to contributions from the profits in the city liquor dispensary fund for the construction of a new wing on the existing plant?

Opinion

The legislature has not defined what constitutes a community hospital within the meaning of the subdivision in question. The Minnesota Supreme Court has not defined the term "community" as here used. Public money must, as a rule, be used for a public purpose and not donated to a private corporation, especially one organized for profit to its own stockholders.

The Northwestern Hospital Association of Thief River Falls, although a private corporation, is, according to its articles of incorporation, a nonprofit institution, organized for benevolent, charitable, and educational purposes in such manner that no part of its net earnings will inure to the benefit of any member, officer, or individual. It is connected with no religious order, sect, or society. It does not discriminate in favor of or against any doctor or group of doctors or members of any religious organization. If, in addition, the city council provides that the proposed contribution shall be made on condition that the hospital located in the City of Thief River Falls shall be "open to all residents of the city on equal terms," as required by Subd. 4, it could, in my opinion, be properly recognized by the city council as a community hospital within the meaning of above cited Section 447.045, Subd. 4, as amended by L. 1951, C. 424, and, therefore, be entitled to accept a sum not to exceed $200,000 from profits in the city's liquor dispensary fund for construction of a new wing of such hospital.

J. A. A. BURNQUIST,
Attorney General.

Thief River Falls City Attorney.
December 18, 1951. 1001-A

199

Hospitals—County board may accept gift of land with buildings thereon and equipment therein for hospital purposes—M. S. A. 376.01.

Facts

Ashton Memorial Hospital Association, a nonstock and nonprofit Minnesota corporation, has for many years owned and operated a public hospital at Pipestone. The county board appropriated moneys to the hospital association for the construction of the hospital. Since then the county board has from time to time appropriated moneys to the association for the maintenance of the hospital. Presently, because the hospital is in need of extensive repairs, the hospital association has tentatively offered to turn over all of the assets and property of the corporation to the county of Pipestone provided the same is operated and maintained as a county hospital.

Questions

1. "May Pipestone County receive as a gift from the above corporation all the property, real and personal, and assets of the corporation and thereafter own and operate it as a county hospital?"

2. "If so, must the electors of the county first approve of the action of the county pursuant to the provisions of Sections 376.01 to 376.07, inclusive, Minnesota Statutes 1949 as amended?"

Opinion

These questions will be considered in the order stated.

1. M. S. A., Section 376.01, reads as follows:

"It shall be lawful for the county board of any county in this state to acquire, by gift, purchase or condemnation proceedings instituted in the name of the county, lands in the county for hospital purposes for patients, other than insane, and to erect suitable buildings thereon and to improve and equip the same for such hospital purposes."

This act grants to the county board of any county of the state the power to acquire by gift, purchase or in condemnation proceedings **lands** in the county for hospital purposes for patients, other than insane, and to improve and equip the same for such purposes.

Should the word "lands" as used in this act be construed so as to include buildings situated thereon? For the reasons and upon the authorities hereinafter cited we believe that the word "lands" should be so construed.

According to Blackstone, "land" legally includes all castles, houses and other buildings for they consist of two things — land, which is the foundation, and the structure thereon. At common law, "land" includes all buildings of a permanent nature standing thereon. **Union Cent. Life Ins. Co. v. Tillery,** 152 Mo. 421. The word "land" in a conveyance of land includes the

buildings situated thereon. **Gibson v. Brockway**, 8 N. H. 465. The term "land" in a statute conferring power to condemn is to be taken in a legal sense, and includes both the soil and structures on it, and all interests therein. **Stauffer v. Cincinnati R. & M. R. Co.**, 33 Ind. App. 356, 70 N. E. 543, 544; Lewis Eminent Domain, Second Edition, Section 285.

The legislature, by the act under consideration, has granted power to the county board to condemn lands for hospital purposes. We do not believe that the legislature intended to restrict the power of the county board in that respect to vacant lands only, thereby precluding the exercise of such power to improved lands with buildings thereon when suitable for hospital purposes.

In ascertaining the intent of the legislature it is presumed that the legislature does not intend a result that is absurd, impossible of execution, or unreasonable, and that the legislature intends to favor the public interest as against private interests. M. S. A., Section 645.17.

From the foregoing we conclude that the first question should be answered in the affirmative.

2. The county board is not required to submit the question of accepting the gift from the hospital association to the electors for their approval, and we therefore answer the second question in the negative.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Pipestone County Attorney.
August 4, 1952. 1001-B

199-A

Nursing home — Board — Disbursements of — How made — M. S. A. 376.58, Subd. 4, L. 1951, C. 610, Section 4, Subd. 4 — Revolving fund not authorized.

Facts

"Todd and Wadena counties have established a county nursing home pursuant to the provisions of C. 610, Laws 1951 (M. S. A. 376.55, Subd. 2), and there has been created a nursing home board and an executive committee and a superintendent has been engaged. The county auditor has now been presented by an expenditure voucher for $250 to be paid to the superintendent for use as a so-called 'revolving fund' by which is meant a fund from which the superintendent can make expenditures in connection with operation of the nursing home."

Questions

1. "Is the creation of this fund, and the payment of expenditures by this means, permissible under Chapter 610?"

2. "Would the law be complied with if, after the superintendent had made expenditures from such a cash or revolving fund, the home board or committee would ratify or approve such expenditure, which could be done each month by auditing and taking action on all expenditures made from the revolving fund the previous month?"

Opinion

M. S. A. 376.58, Subd. 4, L. 1951, C. 610, Section 4, Subd. 4, specifies the manner in which disbursements shall be made by the county nursing home board. There is no other lawful method. The law creates no revolving fund. There is no such fund. The voucher presented to the auditor for the payment to the superintendent of $250 as a revolving fund is not authority to the auditor to make the payment.

With the wisdom of the law, the auditor is not concerned. But he is charged with the faithful discharge of his duties. For the performance thereof, he is accountable. It is his duty to refuse to honor the voucher.

I offer no suggestion of a method of accomplishing the wishes of those who seek to improve the procedure specified for the payment of the expenses. The law says how it shall be done. It is the business of the administrators of the law to follow the law. If it needs improvement, the attention of the legislature may be directed thereto.

CHARLES E. HOUSTON,
Assistant Attorney General.

Wadena County Attorney.
April 18, 1952. 904

200

Nursing home — County sanatorium — Established under Section 376.28, et seq. and discontinued under Section 376.54, may be converted into nursing home under L. 1951, C. 610.

Question

1. "May a county sanatorium, existing pursuant to the provisions of M. S. A. 376.28, et seq. and which is owned and operated jointly by two counties, be dissolved and cease functioning upon resolutions duly adopted?"

Answer

A sanatorium established under the provisions of M. S. 1949, Sections 376.28 et seq., may be discontinued by following the procedure set forth in Section 376.54.

Question

2. "May such tuberculosis sanatorium building be converted into a nursing home?"

Answer

Laws 1951, Chapter 610, Section 1, Subd. 2, provides in part as follows:

"The county board of any county, or any group of counties acting jointly, may establish a nursing home as provided in this act, by converting suitable existing county-owned buildings, * * *."

The tuberculosis sanatoriums established under Section 376.28, et seq., are county-owned buildings even though the state may have contributed funds toward their establishment and are entitled to proportionate reimbursement in the event of their sale or lease from the proceeds thereof. Laws 1951, Chapter 610, does not exempt from the provisions thereof county-owned buildings to which the state has contributed funds toward their erection.

It is therefore our opinion that a tuberculosis sanatorium discontinued under the provisions of Section 376.54 may be converted into a nursing home in accordance with Laws 1951, Chapter 610.

IRVING M. FRISCH,
Special Assistant Attorney General.

Wadena County Attorney. 556-A-5
September 10, 1951. 125-A-27

201

Nursing home—Maintaining nursing home for care and treatment of chronically ill and convalescent persons under L. 1951, Chapter 610, coded as M. S. A. 376.55 to 376.66, is a proprietary and not a governmental function — Purchasing liability insurance — Borwege v. City of Owatonna et al., 190 Minn. 394, followed.

Facts

The counties of Clay and Becker, through their respective county boards, have created a nursing home board under the provisions of L. 1951, Ch. 610, coded as M. S. A., Sections 376.55 to 376.66. Aged people are cared for in this institution. Some of the patients pay the nursing home board with their own funds and others, who receive old age assistance, pay to the board the old age benefit payments received by them. Many of the ambulatory patients do small jobs on the premises, such as raking leaves, gardening, and other like jobs. No compensation is paid for this labor or any other labor performed by any patients at the institution.

Questions

"1. Is the operation of this rest home a 'governmental function' or a 'proprietary function' in so far as such a designation would apply to the law of respondeat superior? In other words, could Clay and Becker counties or the rest home commission be held liable for the torts of its employees?

"2. Could Clay and Becker counties or the rest home commission be held liable for injuries received by any patients or voluntary workers in the conduct of recreational activities or voluntary work on the premises?

"3. May the rest home commission purchase liability insurance to protect the counties and the rest home commission from any such eventualities?"

Opinion

These questions may be conveniently considered together and likewise answered.

It becomes necessary at the outset to determine whether the operation of a county nursing home for the care of chronically ill and convalescent persons by one or more counties as authorized by L. 1951, Ch. 610, coded as M. S. A., Sections 376.55 to 376.66, constitutes a governmental as distinguished from a proprietary function. (Whenever sections are hereinafter referred to, the same will be as coded in M. S. A.)

No clear-cut differentiation between corporate or proprietary and public or governmental functions is possible. Each case must be considered and determined in light of the facts and existing circumstances. The immunity of a municipality from liability for its torts when performing a governmental function springs from the antiquated maxim: "The King can do no wrong." The modern tendency is against the rule of non-liability. **Augustine v. Brandt**, 249 N. Y. 198, 163 N. E. 732; **Evans v. Berry**, 262 N. Y. 61, 186 N. E. 203; 46 Harvard Law Review, 305.

Various tests have been applied to determine whether a particular municipal activity is governmental or proprietary. This legal problem was considered at length in an article appearing in the Minnesota Law Review, Vol. 26 (1942), beginning on page 296. Commencing on page 343 the writer refers to various municipal activities and distinguishes between governmental and proprietary functions. No specific municipal function similar to the activities authorized by the Act under consideration is pointed out by the author except the operation of a hospital by a city, which will be hereinafter considered.

Prior to the enactment of L. 1951, Ch. 610, there was no law authorizing a county as a unit or in conjunction with another county to establish a nursing home for the care and treatment of chronically ill and convalescent persons. The power and authority to carry on these activities by a county emanated from the law under consideration. We believe that the court will

take judicial notice of the fact that chronically ill and convalescent persons have been and now are cared for and treated in private institutions and hospitals. It is rather obvious from the provisions of this law, to which reference will be made, that the person who may receive care and treatment in a county nursing home is not dependent upon the financial status of the recipient. He may be possessed of wealth or destitute of all worldly goods. This is apparent from the act to which we shall now direct attention.

Section 376.55 in part provides:

"Subdivision 1. (a) Any county, or any group of counties acting jointly, are hereby authorized to establish a county nursing home, in this act also termed 'nursing home,' for the care and treatment of chronically ill or convalescent persons with the unanimous consent of the county board;

"(b) In addition to its usual meaning, the phrase 'chronically ill or convalescent persons' as used in this act includes persons who need nursing home care because old age or infirmity renders them unable to properly care for themselves;

"(c) Nursing homes established under this act shall be devoted primarily to the care and treatment of persons requiring welfare services.

"Subd. 2. The county board of any county, or any group of counties acting jointly, may establish a nursing home as provided in this act, by converting suitable existing county-owned buildings, or by acquiring by gift, purchase, or condemnation proceedings instituted in the name of the county, or counties, a suitable site, and erecting suitable buildings thereon, and to equip and maintain the same as a nursing home for chronically ill and convalescent persons; provided, however, that no new site shall be established or a new building constructed for a nursing home unless such question is submitted to a referendum vote of the people in the county or a group of counties acting jointly, and a majority of the people voting on such question shall approve the same, as provided by Section 376.04[,] Minnesota Statutes Annotated[,] as in the case of county hospitals."

Section 376.61 specifically prescribes those who may be received as patients, and reads as follows:

"No feeble-minded girl or woman under the age of 45 years shall be kept in, placed, or received in any county nursing home. No male under the age of 17 years or female under the age of 18 years shall be kept in such home. No person shall be required to become an inmate of any county nursing home as a condition, wholly or in part, of any public assistance grant."

It is apparent from the above quoted portion of the act that persons who may be cared for and treated at a nursing home are not limited and restricted to the poor or destitute, nor to persons having mental ailments or infirmities by reason of old age. That part of Section 376.61 which prescribes

that "No * * * woman under the age of 45 years shall be kept in, placed, or received in any county nursing home" is not to be accepted as even an inference that as to the opposite sex, old age begins at 45.

The foregoing provisions of the act impels the conclusion that the care and treatment which may be rendered at a county home is not necessarily limited and restricted to the poor and indigent, or to the aged, or those afflicted with mental infirmities. Obviously, persons in all walks and stations of life, as well as all ages, are not immune from becoming chronically ill. It is likewise obvious that all persons who survive accident or disease pass through a convalescent period.

One of the tests to be applied in determining whether a particular municipal activity is governmental or proprietary is the so-called "profit test." This test has been applied by our own court. In **Keever v. City of Mankato**, 113 Minn. 54, 61, 129 N. W. 158, 775, the court said:

> "The city operates the waterworks for profit, in the sense that it is voluntarily engaged in the same business which, when conducted by private persons, is operated for profit. The city itself makes a reasonable and varying charge. The undertaking is partly commercial. It is enough that the city is in a profit-making business. The city 'is exercising a special privilege for its own benefit and advantage, notwithstanding a portion of the water is used by the city for protection against fire and in promoting the public health'."

In the act under consideration the legislature has granted authority to fix and prescribe rates for persons receiving care and treatment at a county nursing home. Section 376.62. The only limitation upon the power to fix rates is the requirement of approval by the director of social welfare, and that the rates shall be uniform for all persons desiring to purchase similar care, except as to persons who are admitted as patients under Section 376.63. Consequently, the rates to be charged for the care and treatment of patients may be fixed at a level so as to make the institution self-supporting. No specific prohibition to the contrary appears in the act.

Power and authority is granted to the county board under Section 376.56 to levy an annual tax so as to provide funds to defray the net costs of maintenance and operation of such nursing home **after taking into consideration payments for the care of patients.** If the rates as fixed by the governing authority for the care and treatment of patients yield a return sufficient to meet the costs of maintenance and operation, then it would not be necessary to levy any tax.

The governing authority of a nursing home is empowered to appoint a superintendent and all employees for the management of the home, and to prescribe their compensation and duties. Section 376.60 (1) and paragraph (2) of this section provides:

> "The county nursing home board or its executive committee as herein provided is hereby authorized:
>
> "(1) To appoint a superintendent of the county nursing home and all necessary employees for the management and control of such county nursing home, and to prescribe their compensation and duties;

"(2) To arrange for physicians' services and other medical care for the chronically ill and convalescent patients in the home, and prescribe the compensation and duties of physicians so designated, provided that nothing herein shall preclude a patient from being attended by his family physician or physician of his choice serving the area in which the nursing home is located."

The powers conferred under the above section are comparable to those enjoyed and exercised by the governing bodies of private hospitals and institutions operated and maintained in part for the care and treatment of chronically ill and convalescent persons.

From the foregoing provisions of the act can it be said that the maintenance and operation of a county nursing home to attain the objects and accomplish the purposes authorized by the act is a governmental function?

Upon the basis of the decision of our own court, which will be directly considered, we are of the opinion that the maintenance and operation of a nursing home under said act is a proprietary and not a governmental function.

Gillies v. City of Minneapolis, 66 Fed. Sup. 467, involved the question of whether the city of Minneapolis in maintaining the Minneapolis General Hospital was performing a governmental function. The court, upon a stipulation of facts, held that the city in maintaining a city hospital under its charter provisions referred to in the decision, was engaged in a governmental function. The court in reaching this conclusion points out the objects and purposes contemplated to be conducted at the hospital, on page 468, as follows:

"According to the stipulation entered into herein, the Board of Public Welfare under the city charter is empowered to exercise general supervision and administrative control of all activities and agencies carried on and maintained by the City for (1) the promotion and preservation of health, and the prevention and suppression of disease in the City; (2) the care, conduct, management and operation of all hospitals, dispensaries, and clinics maintained by the City and the furnishing by the City of medical and dental service to the poor; (3) the relief of the poor, aged and indigent, and the maintenance, management, control and operation of all public institutions established by the City for the relief of the poor, aged and indigent. It is further stipulated: 'That during all of the said times, the said Board of Public Welfare, pursuant to the said powers, exercised general supervision and administrative control over the said Minneapolis General Hospital.' Moreover, it appears from the stipulation that the City of Minneapolis is under the statutory duty of providing for the general support and medical, hospital and nursing care of its poor persons, and it is recited in the stipulation that 'the principal function of the said Minneapolis General Hospital is to carry out the defendant City's said statutory duty in providing for the medical, hospital and nursing care of its poor, aged and indigent'."

We do not believe that the objects and purposes contemplated by and which may be carried on by a county under the act here considered are in any manner comparable to those considered by the court in the **Gillies** case. On page 469 the court refers to **Borwege v. City of Owatonna**, 190 Minn. 394, 251 N. W. 915. In that case the city hospital was a revenue-producing institution. In the course of the decision in the **Borwege** case the court on page 395 said:

> "The city charter (C. 4, Section 5, subd. 11) authorizes the city 'to establish and regulate boards of health, provide hospitals and nurses and keepers thereof.' * * * No nonpay patients were knowingly received. Occasionally, but not often, hospital bills could not be collected from a few of the patients. The money received was placed in a hospital fund and was not used for other city purposes. Charity patients of the county were paid for by the county board. Plaintiff was a pay patient.
>
> "In the operation of the hospital under the circumstances here, the city was exercising its corporate proprietary powers. The hospital was not such a one the operation of which would properly come within the governmental function for the protection of health and suppression of disease. It was a general hospital operated for the private advantage and convenience of the inhabitants of the city. That its operation may incidentally to some extent protect society from 'sickness and death' does not relieve the city from liability. Its main purpose was to care for and cure individual cases, which is the function of any hospital, whether it be a city hospital or a private hospital. When a city engages in activities which are of a nature ordinarily engaged in by private persons and which subject private persons to liability for negligence, the city is likewise liable for negligence."

In our opinion the **Borwege** case is in point and controlling upon the matter considered. Here, as in the **Borwege** case, the governing authority may prescribe rates for the care and treatment of patients so as to produce sufficient revenue to meet the cost of operation without the necessity of resorting to a tax levy.

In conclusion, we are of the opinion that the operation and maintenance of a county nursing home under the provisions of Chapter 610, supra, by a county as a unit or in conjunction with one or more counties, is a proprietary and not a governmental function. The conclusion reached by the court in the **Borwege** case answers your first question.

We answer the third question in the affirmative.

A categorical answer to the second question cannot be given. Each case must be determined in the light of the attendant facts. We cannot pass upon questions of fact. As bearing on this question see **Newman v. County of St. Louis**, 145 Minn. 129, 176 N. W. 191.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Becker County Attorney.
June 5, 1952. 904

SOCIAL WELFARE

AID

202

Food allowance—Blind—Dependent children—Old age assistance—County Welfare Boards must adopt food standards in conformity with the rules and regulations of the Director of Social Welfare; cannot determine food allowances on the basis of local costs unless such rules and regulations so provide—See M. S. 1949, Section 256.13, (2) and (4), M. S. 1949, Section 393.07, Subds. 2, 3 and 5.

Facts

The Director of the Division of Social Welfare of the State of Minnesota amended his rule and regulation No. 1 pertaining to food standards applying to old age assistance, aid to dependent children and aid to the blind. The revised standards, as prescribed in said rule and regulation do not permit any deviation from the standard prescribed, as was permitted prior to the promulgation of the amended rule.

Question

Is the amendment to rule and regulation No. 1 of the Division of Social Welfare of the State of Minnesota and pertaining to food standards mandatory for the Ramsey County Welfare Board to adopt or may the Ramsey County Welfare Board determine its food allowances on the basis of local costs?

Opinion

Rule and regulation No. 1 of the Division of Social Welfare on file in the office of the Secretary of State, as required by M. S. 1949, Section 15.042, relates to standards of need for recipients of old age assistance, aid to dependent children and aid to the blind. It has been amended from time to time, the last amendment to such rule and regulation No. 1 being filed in the office of the Secretary of State on June 6, 1951. That regulation, as amended, relates in part to standards for food, clothing, personal needs and household supplies and replacements and adopts food standards which do not permit any deviation either above or below the standards prescribed therein as did the rule and regulation prior to the last amendment.

M. S. 1949, Section 256.13, reads as follows:

"The state agency shall:

"(1) * * *

"(2) Make uniform rules and regulations, not inconsistent with the law, for carrying out and enforcing the provisions of Sections 256.11 to 256.43 in an efficient, economical, and impartial manner, and to the end

that the old age assistance system may be administered uniformly throughout the state, having regard for varying costs of living in different parts of the state, and in all things to carry out the spirit and purpose of these sections. Such rules and regulations shall be made by the director of the division of social welfare, with the approval of the attorney general as to form and legality, and shall be furnished immediately to all county agencies and shall be binding on such county agencies;

"(3) * * *

"(4) Cooperate with the federal social security board, created by Title 7 of the social security act, Public No. 271, enacted by the 74th congress of the United States and approved August 14, 1935, in any reasonable manner as may be necessary to qualify for federal aid for assistance including the making of such reports in such form and containing such information as the federal social security board may, from time to time, require, and comply with such provisions as such board may, from time to time, find necessary to assure the correctness and verifications of such reports;"

M. S. 1949, Section 303.07, as amended by L. 1951, C. 620, reads in part as follows:

"Subd. 2. * * * The duties of the county welfare board shall be performed in accordance with the standards, rules and regulations which may be promulgated by the director of social welfare in order to comply with the requirements of the federal social security act and to obtain grants-in-aid available under that act. * * *

"Subd. 3. The county welfare board provided for in section 393.01, subdivision 3, shall be charged with the duties of administration of all forms of public assistance and public welfare within the purview of the federal social security act and which now are, or hereafter may be, imposed on the director of social welfare by law, of both children and adults, including aid to dependent children, old age assistance, and aid to the blind. The duties of such county welfare board shall be performed in accordance with the standards, rules and regulations which may be promulgated by the director of social welfare in order to comply with the requirements of the federal social security act and to obtain grants-in-aid available under that act.

"Subd. 5. 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. * * * "

The director of social welfare has informed us that the federal social security administrator requires:

"The State plan must include the State-wide standard and the policies to be applied uniformly throughout the State in the determination of need and the amount of assistance. In order that the standard and the policies may be uniformly applied and thus provide a basis for ob-

jective and equitable determinations throughout the State, it is essential that the instructions be clear and definite."

In view of the statutory provisions above referred to and the requirements of the federal social security administrator, in our opinion, the Ramsey County Welfare Board is required to adopt food standards in accordance with the rules and regulations of the director of social welfare and may not determine its food allowances on the basis of local costs unless the rules and regulations of the director of social welfare so provide. They do not so provide in amended regulation No. 1 of the director of social welfare filed in the Secretary of State's office on June 16, 1951, as referred to herein.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Ramsey County Attorney.
July 30, 1951. 125-A-64

CHILDREN

203

Commitment—Dependent—Neglected—Delinquent—In making commitment of child, presence of infant child is not required in court at time of hearing—M. S. 1949, 260.08, 260.02—**Court expenses in guardianship proceedings in such cases**—Section 260.29—**County of commitment reimburses director of social welfare for his disbursements**—Section 260.38.

Facts

"'A' and 'B', husband and wife, moved into Renville County sometime about the first of December, 1951. Prior to that date, they had lived for short periods of time in several different counties, and the county of residence for poor relief purposes has, as yet, not been determined, and may not be determined without ultimate litigation.

"About the middle of December, the wife was confined in a hospital in Redwood County for delivery, and upon birth of the child, both she and her husband absolutely refused to have anything to do with the child, and completely abandoned the child.

"The Welfare office in Redwood County was notified of the situation, and being unable to prevail upon the parents to take the child, finally placed it with a child placement orphanage in St. Cloud. The orphanage will accept the child on an adoptive basis as soon as legal commitment of the child as an abandoned child can be had.

"After the child had been placed in the orphanage in St. Cloud, the parents signed a petition asking that the child be committed as a dependent child. The parents filed the petition with the Probate Court of

Redwood County for such commitment under Section 260.07 and 8. The Probate Court of Redwood County then determined that in as much as the child was no longer in Redwood County but in Stearns County, and the parents of the child, 'A' and 'B', were residing in Renville County, that venue and jurisdiction would lie in Renville County.

"The petition was thereupon refiled in Renville County, and the Probate Court there evidently is attempting to disclaim jurisdiction, and apparently largely for the reason that Renville County is fearful of the effects of Section 260.38, making Renville County responsible for the care and support of the child until such time as it may be taken off their hands. The matter now stands — hearing adjourned by Probate Court in Renville County to a future date."

Questions

"1. Under Section 260.08, the statute seems to imply that the child be present at the hearing by virtue of the wording wherein the statute says that the person having custody of the child shall 'appear with the child.' However, I am mindful of your opinion of August 31, 1939 (268-H), wherein you state that it is not necessary that the child be present. And in this case, the parents have abandoned the child and are themselves the petitioners. Am I therefore correct in assuming that the presence of the child is not essential?

"2. Section 260.07 of the statute provides that the petition shall be filed in the county where the child is, or in the county of its residence. Am I therefore not correct in assuming that the residence of this infant child follows the residence of the parents, which, for the time being appears to be Renville County, and that therefore jurisdiction of the matter would lie in Renville County? Your opinion dated July 10, 1930 (268-H), holds that the Juvenile Court, in this case Renville County, must assume jurisdiction regardless of the place of settlement or legal residence of the child, which legal residence or settlement in this case for poor relief purposes has not as yet been determined.

"3. Under Sections 260.29 and 260.38, is your interpretation of those sections to the effect that the committing county is bound for all care and expense of this child both for the lying-in expense and for the boarding care of the child clear up to the present time regardless of where the place of legal settlement for poor relief purposes may eventually be determined to lie? I cannot believe that this is the intent of the statute, and would appreciate clarification on this point."

Opinion

M. S. 1949, 260.08, does not require the presence of the child in court. It provides that the judge may issue a summons requiring the person having custody or control of the child to appear with the child at a place and time stated. There is nothing to indicate that the presence of the child is jurisdictional. What can the presence of an infant of tender years contribute to the hearing? His appearance may be observed but no information by

way of testimony may be obtained in case of an infant incapable thereof. I consider that the presence in court of the child is not jurisdictional. See opinion June 11, 1931, 268-H.

Section 260.02 deals with the subject of jurisdiction.

> " * * * In counties now or hereafter having a population of not more than 100,000 the probate court shall have jurisdiction over the appointment of guardians of dependent * * * children for the purpose of these sections. The jurisdiction of both the district and probate courts over cases of dependency, neglect and delinquency arising thereunder shall extend to all persons **resident or found within the territorial limits of the court,** although the evidentiary facts showing such dependency, neglect, or delinquency may have occurred outside such territorial limits."

See opinion April 12, 1937, 268-H. Since that opinion was written, the language of the section has been changed, but the meaning thereof in respect to territorial jurisdiction is the same.

The residence of a child is usually the residence of the parents. See opinion, March 5, 1947, 268-H. On the basis of that opinion, it appears that the proper county in which the petition should be filed is Stearns County. See opinion of July 10, 1930, 268-H.

Section 260.29 relates to the expenses in these matters in probate court. Such expenses include the care of children when in custody and not with their parents. The expenses include medical and hospital care when the child is in the court's custody. Such expenses include witnesses' fees and officers' fees, and travel expense, as specified, and clerical fees.

Section 260.38 is authority requiring the county of commitment to pay expense incurred by the director of social welfare in providing care for a child under his regulations. Neither of the last named sections contemplates payment of hospital expense for mother and child at the time of the birth of a child. When the dependent child is committed to the director of social welfare, the support comes from the public. The county committing the child has a burden specified.

The facts appear to warrant prosecution under M. S. 1949, 617.55. See **State v. Clark,** 148 Minn. 389, 182 N. W. 452.

CHARLES E. HOUSTON,
Assistant Attorney General.

Redwood County Attorney.
March 13, 1952. 268-H

OLD AGE ASSISTANCE

204

Liens—Indian lands held in trust by the United States under USCA Title 25, Section 348, are not subject to old age assistance lien under M. S. 1949, Section 256.26.

Facts

A recipient of old age assistance has a patent to certain lands, which patent in part reads as follows:

> "Now know ye, That the United States of America, in consideration of the premises, has allotted, and by these presents does allot, unto the said Indian the land above described, and hereby declares that it does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the said Indian and at the expiration of said period (of) the United States will convey the same by patent to said Indian in fee, discharged of said trust and free from all charge and incumbrance whatsoever."

Question

Are the lands covered by the trust patent containing the above quoted conditions subject to a lien for old age assistance under M. S. 1949, Section 256.26?

Opinion

It is assumed that the recipient of the old age assistance is a person of Indian blood, and the allottee in the patent above referred to.

M. S. 1949, Section 256.26, subd. 3, provides in substance that no person shall be paid old age assistance without first giving the state a lien on all of his property (real) situated within the state. The next subdivision provides that such lien shall be in favor of the state and upon all real estate belonging to the recipient. Subdivision 6 of the same section, so far as material to the question, provides that such lien shall attach to all real estate then owned by the recipient.

Under the trust patent above referred to the United States holds the lands patented for a period of 25 years in trust for the sole use and benefit of the Indian allottee, and at the expiration of the period of the trust the United States agrees to convey the same to said allottee by patent, in fee, discharged of said trust and **free from all charge and incumbrance whatsoever.** These conditions are in conformity with the provisions of USCA Title 25, Section 348.

It has been held by the courts that lands so held in trust by the United States are exempt from state taxation. **U. S. v. Rickert,** 188 U. S. 432, 436-438, **County of Mahnomen v. U. S.,** 319 U. S. 474, **U. S. v. Spaeth,** 24 Fed. Supp. 465.

The court in construing the nature of the interest and title of an Indian allottee during the trust period has held in effect that such title or interest was restricted to the use of the land and not to the fee, and that the title was in the United States. See **Morris v. Bean,** 146 Fed. 423, affirmed in 159 Fed. 651, and affirmed in 221 U. S. 485, and further that during such trust

period the allottee has no right to make contracts with reference to the trust lands, or do nothing more than occupy and cultivate them, until a regular patent has been issued. U. S. v. Rickert, supra.

From the foregoing authorities and the provisions of the old age assistance law above referred to, it is our opinion that lands for which a trust patent has issued, containing the above quoted provision, are held in trust by the United States, and during the continuance of such trust, such lands are not subject to an old age assistance lien under M. S. 1949, Section 256.26. We therefore answer the above question in the negative.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Pine County Attorney.
February 6, 1952. 521-P-4

RELIEF

205

Burial expense—Place of settlement—Liability for such expense and reimbursement of village which advanced and paid such expense on facts stated.

Facts

"A widow, with her seventeen-year-old son, who was dependent upon her, resided in the Village of Hewitt, Todd County. At the time in question their legal settlement was in A Township of W County. In the fall of 1948, while their status was as above stated, the son, while on a trip to or through North Dakota, was accidentally killed somewhere within the State of North Dakota. The remains were returned to the mother at Hewitt, Minnesota, where he was buried. The Village of Hewitt paid the burial expense of the son and now seeks to recover from Todd County. The widow's status as a pauper is not questioned. Direct relief was paid to the widow by the Village of Hewitt subsequent to the son's death without notice thereof being given to or demand being made upon A Township of W County."

Questions

"Was the Village of Hewitt liable for payment of the son's burial expense in view of the mother's residence therein?

"If there was not liability upon the Village of Hewitt for payment of the funeral expense, is the village now to be considered as a volunteer so as to bar it from recovery from the county?

" * * * I would appreciate your opinion if or not the township of legal settlement can, in view of the facts, be held ultimately liable for payment of the burial expense."

Opinion

The mother of the deceased had a settlement in the town of A in the county of W. She resided in the village of Hewitt in Todd County. The settlement of the mother was the settlement of the minor son. M. S. 1949, 261.07, subd 3.

When the son met his accidental death in a neighboring state and his body was returned to his mother in the village of Hewitt, there is no question that this was a most natural thing to do. When these facts came to the attention of the officers of the village, the village paid the burial expense, which we must, for the purpose of this opinion, assume to have been reasonable. No doubt the officers of the village in providing for this burial were prompted by the same sentiments as those of our Supreme Court, stated in **Thiede v. Town of Scandia Valley**, 217 Minn. 218, 229, 14 N. W. (2d) 400, where it is said:

> "More respect for the common rights of man and less regard for the condition of the public exchequer may result in a more humane administration of our poor laws."

We have given consideration to the language of our Supreme Court in **Robbins v. Town of Homer**, 95 Minn. 201, 103 N. W. 1023.

In view of the foregoing, it is my opinion that although the village of Hewitt may not have been liable for the son's burial expense, it was perfectly justified in paying it. It is my opinion that the village is not to be considered a volunteer for having advanced such payment.

Further, it is my opinion that the village should be reimbursed by the county and upon payment by the county it may recover from the town of the settlement of the deceased. M. S. 1949, 263.03 (2).

CHARLES E. HOUSTON,
Assistant Attorney General.

Todd County Attorney.
June 26, 1951. 339-C

206

Settlement—Determination of—Father living in household wherein his dependent children are granted ADC is a person receiving ADC, and time during which such assistance is received must be excluded in determining father's legal settlement—M. S. 256.12, subd. 14; 256.72—256.87; 261.07.

Facts

"A's family, wife and children are receiving ADC from the county. A, of course, is not included in the ADC budget. The family had a settlement, for relief purposes and ADC purposes, at City X. The whole

family, including A, have moved to township Y and have lived there over two years. In that time no member of the family has received direct relief but the ADC grant has been continual. A is now in need of relief and has made application to township Y."

Although you do not so specifically state, we are advised, and assume for the purposes of this opinion, that Jackson County operates under the so-called township system of poor relief.

Question

"Does the receipt of ADC by A's family prevent him [A] from acquiring settlement in township Y for relief purposes?"

Opinion

M. S. 261.07, in its portions material to your inquiry, provides as follows:

"Subdivision 1. Every person except those hereinafter mentioned, who has resided two years continuously in any county, shall be deemed to have a settlement therein, if it has the county system; if it has the town system, he shall have a settlement in the town, city, or village therein in which he has longest resided within two years. * * *

"Subd. 2. The time during which a person has received old age assistance or **aid to dependent children** * * * shall be excluded in determining the time of residence hereunder * * * .

"Subd. 3. Every minor not emancipated and settled in his own right and not under guardianship of the director of social welfare or the director of public institutions, or one of the state institutions as a feeble-minded, delinquent, or dependent person shall have the same settlement as the parent with whom he has resided. * * * "

The provision in M. S. 261.07 that the time during which a person has received old age assistance or aid to dependent children shall be excluded in determining the time of residence thereunder was incorporated into the statute by L. 1939, C. 398, Section 1.

The Aid to Dependent Children Act is coded as M. S. 256.72-256.87, although the statutory definition of "dependent child" is found in M. S. 256.12, subd. 14. Our present Aid to Dependent Children Act had its origin in L. 1937, C. 438, and that act was in force at the time of the enactment of the amendment of what is now 261.07 by L. 1939, C. 398, Section 1.

Accordingly, the question becomes: Where a father lives in a household with a family wherein the dependent children of the family are granted aid to dependent children, is the father a person who has received aid to dependent children within the meaning of M. S. 261.07? A consideration of the material provisions of the Aid to Dependent Children Act compels me to the conclusion that this question should be, and it is, answered in the affirmative.

So far as here material, 256.12, subd. 14, prescribes that a dependent child, as that phrase is used in Sections 256.72-256.87, means a child having the qualifications therein particularly described "who is living with his **father,** mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, or aunt **in a place of residence maintained by one or more of such relatives as his or their home.**"

M. S. 256.73 provides that assistance shall be given under M. S. 256.72-256.87 to any "dependent child" having the qualifications of eligibility therefor as such qualifications are prescribed in Section 256.73. Section 256.73, subd. 2, provides that the ownership by a **father** or mother of property therein stated shall be a bar to any allowance under Sections 256.72-256.87, and Section 256.73, subd. 3, provides that no aid to dependent children shall be given "to or on behalf of any one who is receiving," among other types of aid, **"old age assistance."**

M. S. 256.74, subd. 1, provides that the amount of assistance which shall be granted "to or on behalf of any dependent child and mother or other **needy eligible relative** caring for such dependent child shall be determined by the county agency with due regard to the resources and necessary expenditures **of the family** and the conditions existing in each case."

Accordingly, while the aid to dependent children is for assistance of the dependent children, yet the amount thereof is determined by reference to the resources and necessary expenditures of the **family** of which the children are members.

Any conclusion other than that herein expressed might well result in the anomalous situation where a husband and father living with his wife and children might have a different settlement for purposes of poor relief than would his wife and his children. I do not believe the legislature, in enacting L. 1939, C. 398, Section 1, ever intended such a result in such a situation. Yet, if the material provision of 261.07 excluding the time during which aid to dependent children is received from the computation of legal settlement thereunder were applied only to the dependent children or their mother and not to the husband and father living as a member of the family, that anomaly might well result. Subject to certain exceptions which are not material to the facts submitted by your inquiry, it is well settled in this state that the situs of the husband's settlement becomes that of his wife for poor relief purposes and that she takes from him that settlement by derivation. **City of Willmar v. Village of Spicer,** 129 Minn. 395, 152 N. W. 767; **In re Settlement of Rutland,** 215 Minn. 361, 10 N. W. 2d 365.

The legal settlement of the children involved in your inquiry for purposes of poor relief is, under that portion of 261.07, subd. 3, hereinabove quoted, "the same settlement as the parent with whom he has resided." The children here involved have resided with both the mother and the father, and the mother's legal settlement for purposes of poor relief is that of the husband; accordingly, the legal settlement for purposes of poor relief under 261.07 of the children in this case is that of the father. To hold that

the exclusionary provision here involved in 261.07 applied only to the mother and to the children, and not to the father, might result in a situation of separation of family disapproved in **In re Settlement of Rutland, supra.**

Another reason supporting the conclusion here expressed stems from this consideration: The father has the duty to support his minor children. If he were able to discharge in full that duty, his children would not be dependent or in need of aid to children assistance. To the extent that aid to his minor children is given under the Aid to Dependent Children Act, the father is receiving a benefit from the aid to dependent children assistance in the form of relief from the legal obligation to support his minor children. In these circumstances and in the light of the foregoing considerations involving the Aid to Dependent Children Act, I am of the view that the husband and the father in the case stated is a "person" receiving "aid to dependent children" within the meaning of M. S. 261.07, subd. 2.

This opinion is also supported by Attorney General's opinion dated November 1, 1941 (339o-2). The opinion cited is to the effect that, where a wife is the recipient of old age assistance, her husband, although not himself a recipient of old age assistance, is a person receiving old age assistance within the meaning of what is now M. S. 261.07, so that the husband is prevented thereby from obtaining legal settlement for purposes of poor relief in a county to which the husband and wife removed during the time that the wife received old age assistance and lived for the statutory time required by 261.07. I see no difference in principle between the inquiry in that opinion involved and the one submitted by you.

LOWELL J. GRADY,
Assistant Attorney General.

Lakefield Village Attorney.
June 9, 1952. 339-O-2

Editorial Note: Section 256.73 amended by L. 1953, C. 140 and C. 639; Section 261.07 amended by L. 1953, C. 256, S. 1.

207

Settlement—Two years of residence in county required whether county is under county or town system of relief—M. S. 1949, Section 261.07.

Opinion

The portion of M. S. 1949, Section 261.07, reads as follows:

"Subdivision 1. Every person except those hereinafter mentioned, who has resided two years continuously in any county, shall be deemed to have a settlement therein, if it has the county system; if it has the town system, he shall have a settlement in the town, city, or village therein in which he has longest resided within two years."

The courts have established the rule that, once acquired, a settlement for relief purposes cannot be terminated except by acquiring a new one or losing the settlement by removing from the state under the conditions by law provided. This rule is referred to in the following cases:

In re Settlement of Johnson — County of Kanabec v. County of Pine, 189 Minn. 161, 248 N. W. 710;

City of Willmar v. County of Kandiyohi, 167 Minn. 178, 208 N. W. 648;

In re Settlement of Schendel, 209 Minn. 466, 297 N. W. 27;

Town of Hagen v. Town of Felton, 197 Minn. 567, 267 N. W. 484; and

City of Minneapolis v. Village of Brooklyn Center, 223 Minn. 498, 27 N. W. 2d 563.

It is my understanding that the two counties to which you refer, namely, the Counties of McLeod and Sibley, are under the town system. Whether a county has the town system or the county system of relief, it appears that, under above referred to rule, a person who has acquired a settlement in one county and moves into another does not lose the settlement in the county which he leaves without the acquiring of a new settlement in the county to which he moves.

The statutory provisions of above quoted Section 261.07 must be read together and, in my opinion, should be construed to mean that no settlement is acquired in any county, whether the county is under the county system or the town system, without two years or more of residence therein. If a county has the county system, two years of residence anywhere in the county would appear to be sufficient to acquire a settlement for relief from the county. If, however, the county has the town system, two years of residence within the county would also appear to be required, but the place in the county from which poor relief may be received by the applicant is the town, city, or village therein in which during the two years of residence within the county required of applicant to be eligible for relief he has lived for the longest period of time.

The decision in the case of **Minneapolis v. Village of Brooklyn Center,** 223 Minn. 498, 27 N. W. 2d 563, recognizes that the applicant therein involved had not acquired settlement in any county other than Hennepin. Having lived in Hennepin County more than the required time for acquiring settlement in that county and having acquired no settlement in any other county, the applicant, the court held, was not required to reside for two years within any certain municipality within Hennepin County but was entitled to poor relief from the municipality in that county within which she had "longest resided within two years next prior to seeking and getting such relief."

From your statement of facts it is assumed that the applicant for relief had, prior to moving to McLeod County, acquired a settlement in Sibley County and no other, and had not resided in McLeod County during the two years required to establish a settlement in that county, his resi-

dence in the latter county being only 22 months. As the applicant moved back to Sibley County before losing his settlement therein, he would appear to be entitled to relief from the municipality in that county in which he has lived longest during the two years of residence required by Section 261.07. It is my opinion that, in determining the two years of residence prescribed therein, the 22 months during which the applicant lived in McLeod County should be excluded and that the last two years during which he lived in Sibley County, whether continuously or not or in one or more municipalities, are the years to be used for the purpose of determining in which municipality in Sibley County he has longest resided.

J. A. A. BURNQUIST,
Attorney General.

McLeod County Attorney.
February 21, 1951. 339-O-2

208

Town system—Reimbursement to city by county—Claims, if deemed correct by county board and if within liability of county under M. S. 1949, Section 263.10, must be paid in full; may not be compromised; nor may city withdraw claim or refrain from certifying it. Claim against county constituted by statute when certified to county auditor and deemed correct by county board.

Facts

"Section 263.10, Minnesota Statutes Annotated, as amended by Laws 1949, Chapter 26, Section 1, provides for the liability of counties for care of poor by towns, villages and cities. For many years there has been a loose understanding between the City of Winona and the County of Winona that the City would not file a claim under and pursuant to said section, the thinking being that the taxpayers of the City would not only have paid for the relief of those receiving public assistance by the City, but would, in turn, be paying a portion of the same bill through the taxes to be raised by said County for said reimbursement. No claims by any municipality within Winona County have heretofore been filed for the same reason.

"For a number of years, the Public Examiner's Office, in making its regular audit of the affairs of the City of Winona, has criticized the City Council for not filing a claim pursuant to said section. On May 2, 1950, after being more severely criticized by the Office of the Public Examiner for not having filed such a claim, the City Council authorized the filing of such a claim against the County of Winona. Said claim was filed as of May 2, 1950, for the years 1944, 1945, 1946, 1947 and 1948. The claim was referred by the County Board to the Welfare Board in and for Winona County, Minnesota, and which claim has been

placed on file with no action as of this date. On July 10, 1950, the claim for the year 1949 by the City of Winona against the County of Winona was so filed and it, too, was referred to the Welfare Board in and for Winona County, Minnesota. Said claim was filed and no action taken.

"Rural Winona County is opposed to the payment of these claims on the basis that they are paying, as taxpayers, a part of the relief load of the City of Winona. The attitude of the City of Winona is one of opposition and in the belief that the County of Winona, in raising taxes to pay said claim, permits the taxpayers of the City of Winona to, in effect, pay double, or a substantial portion of said claim."

Questions

1. "Must the claims be paid in full assuming that the claims are correct in so far as the sums claimed are concerned?

2. "May the Welfare Board in and for Winona County, Minnesota, or the County Board and the City Council agree on a compromise settlement in any amount that to each seems satisfactory?

3. "May the City withdraw the claims and be permitted to refrain from filing claims in the future, if such is their disposition?

4. "How many years back may a city, village or town go for reimbursement contemplated by said section?"

Opinion

Before attempting specific answers to the particular questions submitted, consideration should be given to the nature of the obligation imposed upon counties to which M. S. 1949, Sections 263.10-263.12 are applicable. That consideration justifies setting out in full the provisions of M. S. 1949, Section 263.10. It follows:

"Subdivision 1. In all counties of this state wherein the poor are cared for under the town system, if the expense incurred by any town, village, or city, however organized, for the care of the poor therein in any calendar year exceeds an amount in excess of one mill of the taxable value of real and personal property in such town, village, or city for that year, the county in which the town, village, or city is situated, **shall be liable** for 75 per cent of the amount in excess of such one mill on the taxable value of real and personal property in such town, city, or village.

"Subd. 2. The county board, at its first meeting in January each year, **shall estimate** the amount which it deems necessary for such purpose and include in the tax levy a sufficient amount of taxes to pay the expense of such poor relief and the same shall be extended against all property within the county."

The provisions of M. S. 1949, Section 263.11, should be considered with the provisions of 263.10. Section 263.11, in its provisions pertinent to your inquiry, prescribes:

> "In all towns, cities, and villages in counties wherein the poor are cared for under the town system, * * * the mayor and clerk of the city, in case of cities, * * * shall certify to the county auditor a statement showing when, for what purpose, the amount, and to whom, expense was incurred by such * * * city in the care of each named poor person. The county auditor shall lay such statement before the county board at its meeting next following the receipt thereof. If this statement is deemed by the county board to be correct, the amount so certified shall be a claim against the county to the extent of the liability of the county as stated in Section 263.10 and allowed and paid by the county to the treasurer of such * * * city, who shall credit the sum so paid to the poor fund of the * * * city * * * ."

The portion of the expenses for poor relief to be paid by a county under 263.10 is a **direct** county obligation and liability. See **City of Jackson v. County of Jackson** (1943), 214 Minn. 244, 7 N. W. 2d 753. That consideration is important. The liability imposed upon the county by 263.10 is **not** a secondary one of reimbursement for a portion of a primary and exclusive obligation and liability of its political subdivisions, as was prescribed by Mas. St. 1927, Section 3195, held unconstitutional in its entirety in **Village of Robbinsdale v. County of Hennepin** (1937), 199 Minn. 203, 271 N. W. 491. To be sure, the decision of the Supreme Court in the **Village of Robbinsdale** case inspired the enactment of L. 1937, C. 286, now coded as M. S. 1949, Sections 263.10-263.12. See **City of Jackson v. County of Jackson, supra.** Having in mind, then, that the portion of the expenses for poor relief to be paid by the county under 263.10 and 263.11 is a direct county obligation and liability and not a secondary one of reimbursement, we pass to a consideration of your specific inquiries, which we restate as we answer them.

> 1. "Must the claims be paid in full assuming that the claims are correct in so far as the sums claimed are concerned?"

M. S. 1949, Section 263.11, specifically provides that, if the statement of claim of the municipality "is deemed by the county board to be correct, the amount so certified **shall be a claim** against the county to the extent of the liability of the county as stated in Section 263.10 and **allowed and paid** by the county to the treasurer of such * * * city." Accordingly, if the claims presented are deemed by the county board to be correct and they do not exceed the extent of the liability of the county under 263.10, they must be paid in full.

> 2. "May the Welfare Board in and for Winona County, Minnesota, or the County Board and the City Council agree on a compromise settlement in any amount that to each seems satisfactory?"

In so far as this inquiry raises the question of the authority of the Welfare Board of Winona County, Minnesota, in the premises, it is sufficient to say that the Welfare Board of Winona County has no authority what-

ever in the matter. The powers of the county as a party politic and corporate are exercisable only by its county board. See M. S. 1949, Section 373.02.

In so far as this inquiry raises the question of the authority of the county board and the city council to agree on a compromise settlement in any amount that to each seems satisfactory, these observations may be made: The statute involved creates in favor of the municipality a claim against the county to the extent of the liability of the county in the statute specified. If there be no dispute as to the amount of the claim, the power of the municipality to compromise or settle is not an unrestricted or unlimited power.

In McQuillin, Municipal Corporations (2d), Rev. Vol. 6, Section 2643, at p. 649, we find:

> "The capacity to contract and be contracted with, and to sue and be sued gives the implied power to settle disputed claims, controversies and matters in litigation. But a municipality has no power to compromise a claim which is not doubtful and upon which the city could not be held liable. A settlement for less than the amount due is an unlawful diversion of public money to private use. In other words, a municipal corporation cannot, under the guise of a compromise surrender valuable rights or interests in claims over which there can be no substantial controversy. Accordingly, notwithstanding the right of settlement follows logically from the right to maintain and defend suits, a municipal corporation has no right to discharge a debt without payment which may be held against persons who are solvent and responsible where no controversy exists respecting the validity and binding effect of the indebtedness."

3. "May the City withdraw the claims and be permitted to refrain from filing claims in the future, if such is their disposition?"

M. S. 1949, Section 263.11, imposes upon the municipal officers therein named the mandatory duty to "certify to the county auditor a statement" showing the expense incurred by the municipality in the care of poor persons within the municipality during the period involved. That statement, if it be correct, constitutes a claim in favor of the municipality against the county to the extent of the county's liability specified in Section 263.10. If that duty be not performed by the municipal officers charged therewith, I assume that its performance in a proper case could be compelled by mandamus. I do not conceive it to be within the legal power of the municipality to refrain from certifying the statement required by the statute. Nor does the municipality have the right to withdraw a just claim any more than the municipality would have the right to settle for a nominal amount an undisputed claim against the county.

4. "How many years back may a city, village or town go for reimbursement contemplated by said section?"

The municipality may "go back" for a period of six years and cause to be filed the statement required by M. S. 1949, Section 263.11, for any one

or more years during that six year period for which no prior statement has been filed.

If there be public dissatisfaction with the operation of the statutes here considered, the remedy lies with the legislature.

LOWELL J. GRADY,
Assistant Attorney General.

Winona County Attorney.
March 7, 1951. 339-M

STATE

BOARDS

209

Chiropodists—Narcotics—May use as local anaesthetic—M. S. 1949, Section 153.01, Subd. 2; Section 618.01, Subd. 3—Attorney General 1922 Report Op. No. 25 (July 8, 1921) discussed.

Question

Under Minnesota law pertaining to the use of narcotics, may licensed chiropodists use the same in the surgical aspects of their profession?

Opinion

In an opinion of this office dated July 8, 1921, Attorney General 1922 Report, No. 25, the question you now submit was considered and it was held that chiropodists were not permitted to use narcotics under the provisions of the then applicable statute, Session Laws 1915, C. 260. Since that opinion was written Minnesota adopted, in substance, the so-called uniform narcotics drug act, same being adopted by Session Laws 1937, C. 74. This is now the present law and found in Minnesota Statutes 1949, C. 618. In view of the difference in the language of the said Session Laws 1915, C. 260, and the present statute, we now reconsider the question.

Under M. S. 1949, Section 153.01, Subd. 2, it provides:

"The word 'chiropody' is held to be the diagnosis or medical, mechanical, **or surgical treatment** of the ailments of the human hand or foot. It shall include the fitting or recommending of appliances, devices, or shoes for the correction or relief of minor foot ailments, except the amputation of the foot, hand, toes, or fingers, or the use of anaesthetics **other than local.**" (Emphasis added.)

As indicated previously, Minnesota has adopted the uniform narcotics drug act with certain qualifications. The qualifications do not, however, go to those provisions of the act which we here deem controlling.

Under M. S. 1949, Section 618.01, Subd. 3, it provides:

> " 'Physician' means a person authorized by law to practice medicine in this state and, **for the purposes of this chapter only**, any other person authorized by law to treat sick and injured human beings in this state and to use narcotic drugs in connection with such treatment." (Emphasis added.)

The controlling question is whether or not a chiropodist is construed to be a "physician" within the meaning of the quoted language.

This precise question was considered in the case of **Fowler et al. v. Michigan Board of Pharmacy**, 312 Mich. 505, 20 N. W. (2d) 680 (1945). The Michigan act was the uniform narcotics drug act which had been adopted with qualifications. That act defined a physician as "a licensed practitioner of medicine or osteopathy as defined by law in this state **and any other person authorized by law to treat sick and injured human beings in this State and to use narcotic drugs in connection with such treatment.**" (Emphasis added.) It will be noted that the emphasized provision of the Michigan law is precisely the same as that contained in Section 618.01, Subd. 3. The Michigan law relating to the licensing of chiropodists contained the provision that a certificate of qualifications or license " 'shall not authorize chiropodist to amputate the human foot or toes, **or to use or administer anaesthetics other than local'.**" Again it will be noted that the emphasized part is identical with the provisions of Section 153.01, Subd. 2, heretofore quoted.

In the **Fowler** case, supra, the court adopted a definition of local anaesthetics, which was defined at page 681 of the N. W. report:

> " 'Local anaesthetics are anaesthetics that when locally applied produce an absence of sensation in the organ or tissue treated. Narcotics, including cocaine, other derivatives of cocoa leaves, and similar compounds when properly applied produce such an effect, and are used as local anaesthetics'."

The definition of the word physician as contained in Section 618.01, Subd. 3, significantly places the term physician in quotes. It defines him as one authorized by law to practice medicine, and then goes on and states that, for purposes of Chapter 618 only, the definition includes any person authorized to treat sick and injured human beings and to use narcotic drugs in connection with such treatment. As stated in the **Fowler** case, "The chiropodists are called upon to perform many operations such as removal of ingrowing nails, growths and callosities on the foot, manipulation of the bones of the foot, et cetera, all of which would cause tremendous pain to the patient were anaesthetics not used." It is significant that Section 153.01, Subd. 2, authorizes the surgical treatment of the ailments of the human hand or foot. It seems natural that in many surgical treatments, which the chiropodist is permitted to make, an anaesthetic would be used. It appears

that the legislature realized this fact by excepting from the rights of a chiropodist the use of anaesthetics other than "local," and thus did, by said exception, grant the right to use local anaesthetics.

We believe that Chapters 153 and 618 must be construed together. In the **Fowler** case the court significantly stated:

> " * * * If 'local anaesthetics' do not include the use of narcotics, why did the legislature in Section 2 of the chiropody act state that the certificate of qualification or license of the chiropodist does not authorize him to use anaesthetics other than local. No limitations as to local anaesthetics would have been necessary for, if the State is correct, local non-narcotic anaesthetics may be used by anyone and there would have been no occasion for the law to mention it. We believe local anaesthetic means as defined in Dorland's American Medical Dictionary (Rev. 1941):
>
> " 'That which is confined to one limited part of the body'."

Accordingly, we conclude that a person licensed under Chapter 153 of the statutes may lawfully use narcotics in the practice of his profession, provided, however, that he must limit the use of narcotics to their use as a local anaesthetic.

DONALD C. ROGERS,
Assistant Attorney General.

Minnesota State Board of Chiropody Examiners.
April 25, 1951. 546-d

210

Health — Licenses — Resorts — Cottage located on lake or stream which is casually rented for private occupancy is not a resort within meaning of M. S. A. Section 157.01, and not subject to licensing provisions of Section 157.03—"Enclosure" defined.

Questions

"Assuming that a person owns a cottage upon a lake or stream and said cottage contains at least five rooms and that this cottage is rented by the owner to a private family from June 1st to September 1st, is such owner required to obtain a Department of Health license?"

"Frequently it is found that an owner will insulate and winterize a cottage which has five or more rooms and which abuts upon a lake or stream and then will rent this cottage for year around occupancy. In such an instance would it be construed that the renting of said cottage for a householder's year round use would require a Health Department license for such cottage?"

Opinion

Both questions are answered in the negative. A cottage rented in the circumstances above stated is not a resort as defined in M. S. A. Section 157.01, and therefore is not subject to the licensing provisions of Section 157.03.

The word "enclosure" as used in said Section 157.01 was considered in A.G.O. dated June 13, 1949, File 238-J.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Minnesota Department of Health.
May 9, 1952. 238-H

COMMISSIONS

211

Railroad and Warehouse Commission—Coal—Weighing—Fees for weighing coal not charge for service within scope of the Defense Production Act of 1950—M. S. 1949, Section 216.42-216.45, L. 1949, C. 740, Section 49, Ex. Sess. L. 1951, C. 1, Section 51.

Facts

"On May 21, 1951, the Commission approved a schedule of fees for the weighing of all coal 'in carload lots from any coal dock or coal distributive point in the State—' (Sec. 216.43 M. S. 1949) pursuant to authority vested in the Commission by Section 216.44 M. S. 1949. Thereafter said schedule of fees was submitted to the Commissioner of Administration for approval as is required by Section 49, Chapter 740, Session Laws for 1949. The fees for the weighing of coal in carload lots were increased in sufficient amount so as to approximate the amount appropriated for the operation of that division of the Commission.

"The Commission's authority to establish, collect and charge certain weighing fees for the weighing of coal in carload lots has been challenged, and the basis of the challenge is that the weighing of coal by the State of Minnesota is the rendering of a service and therefore subject to price control.

"We are attaching hereto Ceiling Price Regulation No. 34 dated May 11, 1951, and refer you particularly to Section 27, Subdivision 9, which sets forth the definition of a 'person,' and Section 27, Paragraph 17, defining 'service or services,' and Section 27, Paragraph 18, defining 'you'."

Question

Whether the Defense Production Act of 1950 (Public Laws 774, 81st Congress) and Ceiling Price Regulation 34 adopted pursuant thereto require this Commission to petition the Office of Price Stabilization for approval of any adjustment or increase in the weighing fees established, charged and collected by the Commission for the weighing of coal in carload lots.

Opinion

Your question is answered in the negative.

We have examined the applicable state statutes, Minnesota Statutes 1949, Sections 216.42 to 216.45, L. 1949, C. 740, Sec. 49, Ex. Sess. L. 1951, C. 1, Sec. 51, inclusive, and the Minnesota decisions with reference thereto. We have also examined the Defense Production Act of 1950 (Public Law 774, 81st Congress), the regulations promulgated thereunder and the federal cases which are germane to your question. From such examination, it is our conclusion that fees charged under the state laws for weighing coal in carload lots are not fees charged for "service." It follows that the fees so charged are not within the scope of the Defense Production Act of 1950 or the regulations promulgated thereunder.

See **State v. Inland Coal Company**, 208 Minn. 216, 293 N. W. 611; **Case v. Bowles**, 327 U. S. 92; 59 Corpus Juris 34, note 46.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Railroad and Warehouse Commission.
July 31, 1951. 495-C

212

Railroad and warehouse—Public local grain warehouse—License—The license of an individual operating a public local grain warehouse expires upon his death and cannot be assigned or transferred to the representative of his estate—M. S. 1949, C. 232.

Facts

X, a duly licensed and bonded public local grain warehouseman, died. A special administrator has been appointed. The special administrator has been operating the public local grain warehouse and buying and storing grain in the decedent's warehouse.

Question

May the special administrator operate a public local grain warehouse under the license issued to X and the bond filed by X as required by statute?

Opinion

Your inquiry is answered in the negative. The general rule of law applicable to a situation described in your letter is stated in the case of **People v. Sykes** (Mich.), 56 N. W. 12, in which the court said:

> "The right to carry on the business is in the nature of a license to the party who complies with the statute, and it cannot be said to pass over to the administrator at the death of the party holding it. In other words, the license expires at the death of the licensee."

In view of the foregoing, a representative of the estate of X would be without authority to operate the public local grain warehouse without first obtaining a license so to do and filing the required bond in conformity with M. S. 1949, C. 232.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Minnesota Railroad & Warehouse Commission.
February 5, 1952. 645-B-16

213

Railroad and warehouse — Railroad line — Abandonment — Commission is without authority to permit abandonment of a railroad line or any portion thereof in the absence of statutory authority; whether railroad company may effect an abandonment of its lines or portions thereof involves consideration of many factors—the absence or presence thereof determining the applicable rule of law.

Question

"Can an electric suburban railroad company, such as the Minneapolis and St. Paul Suburban Railroad Company, which operates a line of electric railroad between St. Paul and Mahtomedi, abandon its operations without an order of the Commission?"

Opinion

The railroad company referred to in your inquiry is a corporation organized under the laws of Minnesota for the purpose of conducting railroad operations as a common carrier. It has a system of electric lines. See **M. & St. P. S. R. Co. v. Village of Birchwood**, 186 Minn. 563, 244 N. W. 57. It therefore is not a street railway subject to the provisions of the Brooks-Coleman Act (M. S. 1949, C. 220). Operating between St. Paul and Mahtomedi as an electric suburban railroad company, and in the absence of further information, we assume that this railroad company is not within the jurisdiction of the Interstate Commerce Commission under the Interstate

Commerce Act, as amended by the Transportation Act of 1920. See 49 U. S. C. A. 1, (22); **Texas v. Eastern Texas R. R. Company**, 258 U. S. 204; **City of Yonkers v. U. S.**, 322 U. S. 685, 64 S. Ct. 327, 633.

As so limited, your inquiry requires our consideration of two matters:

1. The authority of the Railroad and Warehouse Commission to permit an electric suburban railroad company to abandon its line of railroad or a portion thereof.

2. The right of an electric suburban railroad company to abandon its line of railroad or a portion thereof.

Whether the Railroad and Warehouse Commission may permit such a railroad company to abandon its line of railroad or a portion thereof depends upon its statutory authority. Such authority is not contained in M. S. 1949, Section 218.62, relating to the discontinuance of the operation of regularly scheduled intrastate passenger trains. The discontinuance of train service and the abandonment of a railroad line or a portion thereof are not the same. See **Illinois Cent. R. Company v. Illinois Commerce Commission,** 75 N. E. (2d) 23 and the cases cited therein.

We next consider whether there is any statutory authority authorizing the Railroad and Warehouse Commission to permit the abandonment of a railroad line or any portion thereof. Prior to the enactment of L. 1945, C. 21, the authority of the Commission to permit such an abandonment was expressed in M. S. 1941, Sections 219.68 and 219.74, which sections read in part as follows:

> "No company operating any line of railroad in the state shall abandon the same or any portion thereof nor shall it abandon any siding, sidetrack, spur, or other railway track of any kind which has once been opened and used for business, nor shall it close for traffic thereon except as provided in Section 219.74. * * *
>
> "Any railroad company desiring to abandon or close for traffic any portion of its line, siding, sidetrack, spur or other railway track, shall first make application to the commission in writing. Before passing upon such application the commission shall fix a time and place for hearing and require such notice thereof to be given as it deems reasonable. **Upon the hearing, the commission shall ascertain the facts and make findings thereon and, if such facts satisfy the commission that the proposed abandonment or closing for traffic will not result in substantial injury to the public, the commission may allow the same, otherwise, it shall be denied,** or, if the facts warrant it, the application may be granted in a modified form." (Emphasis supplied.)

These statutory provisions were interpreted by the Minnesota Supreme Court in the case of **State v. Duluth & N. M. Ry. Co.**, 150 Minn. 30, 184 N. W. 186. There the court held that the Railroad and Warehouse Commission possessed only the authority given to it by the legislature and could permit abandonment of a railroad line where it determined that such aban-

donment "will not result in substantial injury to the public" but that it could not permit abandonment of a railroad line in any other case. The court said:

> "While it might seem desirable that the question whether a railway company has the right to abandon its road because it cannot be operated at a loss, should be determined in some orderly and authoritative manner before the road is closed to traffic, and while the Railroad and Warehouse Commission is probably the only agency of the state which possesses the facilities and machinery for ascertaining and determining the questions of fact involved, yet that commission possesses only the authority given to it by the legislature and cannot exceed the bounds to its power fixed by the legislature."

See also **M. & St. P. S. R. Co. v. Village of Birchwood**, 186 Minn. 563, 244 N. W. 57; 5 Dunnell's Minn. Dig., Sec. 8088c, and **Hill City Ry. Co. v. Youngquist**, 32 Fed. (2d) 819.

Thus, under the statutory provisions as they existed prior to the enactment of L. 1945, C. 21, the jurisdiction of the Commission to permit the abandonment of a railroad line or a portion thereof was limited to the one instance falling within the emphasized portion of the statutory provisions; viz.: when the Commission found that the abandonment or closing for traffic would not result in substantial injury to the public.

This limited jurisdiction of the Commission to permit abandonment of a railroad line or a portion thereof, was withdrawn by the enactment of L. 1945, C. 21, which repealed M. S. 1941, Sections 219.68 and 219.74, and reenacted in their place other statutory provisions, including Minnesota Statutes 1949, Sections 219.681, 219.691, 219.741 and 219.742. See **State v. Chicago Great Western Railway Co.**, 222 Minn. 504, 25 N. W. 2d 294. The reenacted statutes, however, relate only to a spur, industrial, team, switching or side track which has been used directly by the shipping public or any member thereof for the loading or unloading of freight and have no application to the matters now being considered.

Existing statutory provisions do not confer upon the Railroad and Warehouse Commission authority to permit an electric suburban railroad company to abandon its lines or a portion thereof for any reason whatsoever.

Although the Railroad and Warehouse Commission no longer has authority to permit such a railroad company to abandon its lines or a portion thereof, such lack of jurisdiction of the Commission does not dispose of the second matter raised in this opinion, viz.: the right of the electric suburban railroad company to abandon its lines or a portion thereof.

Where such a regulatory body is without authority to permit abandonment of a railroad line or a portion thereof, the question of whether the railroad company itself may effect such an abandonment involves a consideration of many factors. These factors include, for example, the terms of the carrier's charter and franchises, the carrier's financial condition and earnings as they relate to the entire railroad system and to the portion or portions thereof sought to be abandoned, the effect upon the railroad and

upon the public of an involuntary operation of the line or lines sought to be abandoned. See 44 Am. Jur., Sections 211 through 213 and the cases and annotations referred to therein; 10 A. L. R. (2d) 1121. In the absence of a statement of facts which would enable us to determine the presence or absence of the above factors, it is impossible to categorically determine whether the electric suburban railroad company in question has a right to abandon its lines or a portion thereof.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Minnesota Railroad and Warehouse Commission.
October 25, 1951. 365-B-12

OFFICERS

214

Governor—Proclamation—Holidays—When holiday falls on Sunday, following Monday not legal holiday, but Governor may issue proclamation requesting observance on Monday.

Question

You request a ruling as to the authority of the Governor in the matter of issuing a proclamation requesting observance of Armistice Day on Monday, as this year November 11th falls on Sunday.

Opinion

M. S. 1949, Section 645.44, Subd. 5, designates "Armistice Day, November 11" as a "Holiday."

When November 11th falls on Sunday, the following day does not become a legal holiday, and there is no statutory provision authorizing the Governor to designate such following day as a legal holiday.

However, there is no law prohibiting the Governor from issuing a proclamation requesting an observance of Armistice Day, which this year falls on Sunday, on the following Monday in such manner as he deems advisable, though such proclamation will not have the effect of law, and compliance therewith cannot be legally enforced.

J. A. A. BURNQUIST,
Attorney General.

Governor of Minnesota.
October 16, 1951. 276-C

TAXATION

AD VALOREM

215

Exemption—Churches—Bowling alleys in parochial schools.

Facts

The Church of St. Thomas at St. Louis Park has a bowling alley in its parochial school building for which it charges bowling fees for the use thereof by the public.

Question

Are such bowling alleys exempt or are they subject to exemption as personal property?

Opinion

Minnesota Statutes 1949, Section 272.03, Subdivision 1, provides that for the purposes of taxation "real property" includes the land itself and all buildings, structures and improvements or other fixtures on it. Whether the bowling alleys to which you refer are fixtures within this definition of real property, is a question of fact which will have to be determined by the assessing officials. In making that determination those officials should apply the tests which are ordinarily applied in determining whether a chattel has become a fixture.

See 3 Dunnell's Minnesota Digest, Fixtures, Section 3766.

See also 1950 Assessors Manual, Section 206, p. 46.

If it is determined that the bowling alleys constitute real property within the definition of that term in Section 272.03, Subdivision 1, the question next arises as to whether the parochial school building, or any part of it, loses its otherwise exempt status by reason of the operation of the bowling alleys. The Minnesota Supreme Court, in the case of **Christian Business Men's Committee v. State**, 228 Minn. 549, 38 N. W. (2d) 803, has laid down the rule that when a building is owned by a charitable or other tax-exempt institution and one **substantial** part thereof is directly, actually, and exclusively occupied by the institution for the purposes for which it was organized, and another **substantial** portion thereof is permanently used for revenue by rental to the general public, the building with the grounds thereof is pro rata exempt from taxation and pro rata taxable according to its separate uses, and it should be assessed and taxed on that portion of its proper assessable value allocated to the taxable use, after deducting from its over-all assessable value the portion thereof properly allocated to the proportionate tax-exempt use. The court in its per curiam decision denying

the petition for reargument states that what is a **substantial** portion of the building is a question of fact to be determined in the light of a reasonable, natural and practical interpretation of that term.

If it is determined that the bowling alleys constitute personal property rather than real property, and that that personal property is not being devoted exclusively to a proper church use,

Compare Opinion No. 331, 1942, Published Opinions of Attorney General it necessarily follows that they are subject to ad valorem personal property assessment.

CHARLES P. STONE,
Assistant Attorney General.

Washington County Attorney.
February 9, 1951. 414-D-6

216

Exemption — Grain bins — Immunity from taxation of grain bins owned by Commodity Credit Corporation—M. S. 1949, Section 272.03, Subd. 1.

Facts

A question has arisen as to the taxation by the State of Minnesota of grain bins belonging to the Commodity Credit Corporation of the United States. You state that there are 559 of these bins located on 108 sites in 36 counties of Minnesota. The bins are quonset-type structures varying in size from 40 by 100 feet to 30 by 100 feet, with capacities varying from approximately 25,000 bushels to approximately 38,000 bushels. The bins are tunnel-like in shape and rest on a so-called floating slab of concrete some four inches in thickness. There is no foundation. The concrete slab is poured directly on to waterproof paper laid on the surface of the ground. Anchor bolts are placed in the concrete at the time it is poured, and the bin is bolted to these anchor bolts. The bin can easily be moved by unbolting them from the slabs.

You state further that the sites for the grain bins are leased by Commodity Credit Corporation from the landowners. The leases recite that the bins shall not be considered as affixed to the real estate, and that the corporation shall have the right to remove all or any of them at any time. The leases all end October 1, 1954.

Question

In assessing the real property upon which the grain bins are located for ad valorem tax purposes, should the value of the bins be included in the value of the real property?

Opinion

The Commodity Credit Corporation is an instrumentality of the United States created by an act of Congress (15 U.S.C. 714 et seq.). Possessions, institutions, and activities of the Federal Government are immune from any form of state taxation unless that immunity has been waived. The immunity from state taxation of real property only of the Commodity Credit Corporation has been waived by Congress by the terms of 15 U.S.C. 713a-5, as follows:

> "Bonds, notes, debentures, and other similar obligations issued by the Commodity Credit Corporation under the provisions of Sections 713a-1 to 713a-5 of this title shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation (except surtaxes, estate, inheritance, and gift taxes). The Commodity Credit Corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the Commodity Credit Corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed."

Whether or not the grain bins in question are real property of the Commodity Credit Corporation within the terms of 15 U.S.C. 713a-5 quoted above as distinguished from personal property is a question of fact to be determined by the assessing officials. On the basis of the facts presented in your letter, these bins should be found to be personal property in light of the general rule that structures placed on the land of another, and with an agreement or understanding that they are to be removed or considered as personal property, are legally personal property. See **Smith v. Park**, 31 Minn. 70, 16 N. W. 490.

The bins in question, not being real property within the meaning of 15 U.S.C. 713a-5 quoted above, are immune from taxation, and their value should not be included in the value of the real property in assessing for ad valorem tax purposes.

In writing this opinion, I have in mind Minnesota Statutes 1949, Section 272.03, Subdivision 1, providing that:

> "For the purposes of taxation, 'real property' includes the land itself and all buildings, structures, and improvements or other fixtures on it, * * * "

Having determined, however, that the grain bins in question are not real property within the meaning of 15 U.S.C. 713a-5, such bins are immune from taxation in the State of Minnesota, and that immunity cannot be destroyed by the Minnesota law defining what is to be considered as "real property" for Minnesota ad valorem tax purposes.

In the case of **United States v. Allegheny County** (1944) 322 U. S. 174, 64 S. Ct. 908 (the now famous Mesta Machine Company case), the assessing authority of Allegheny County, Pennsylvania, added to the assessment of real estate of the Mesta Machine Company certain machinery owned by the Federal Government located thereon on the theory that only the land was being taxed which the United States did not own, and the Government's machines were considered only as an enhancement of the value of the land to Mesta, its owner. (The Pennsylvania statute, like our statute, provided for an in rem assessment of the land, including the value of all structures and improvements thereon.) The Court saw little theoretical difference, and no practical difference at all, between what was done and what would be done if the machinery were taxed in form, and held that the substance of the procedure was to lay an ad valorem property tax on property held by the United States, in violation of the Federal Constitution.

Since the bins in question were owned by the Commodity Credit Corporation, a declared instrumentality of the Government of the United States, it follows that in view of the United States Supreme Court's decision in the Mesta Machine Company case, the value of such bins cannot be included in the assessment of real estate on which they are located.

JOSEPH S. ABDNOR,
Assistant Attorney General.

Commissioner of Taxation.
November 2, 1951. 414-A-2

217

Exemption—Homestead—Dwelling left by decedent to brothers and occupied by brothers constituted homestead of brothers even though probate proceedings not completed— Minnesota Statutes 1949, Section 273.13, Subdivision 7.

Facts

"During her lifetime, from 1946 to the date of her death in February of 1950, Miss A lived in her homestead, together with her two brothers, B and C.

"By her will, Miss A left the residence property, her homestead, to her brothers, B and C, where they were residing at the time of A's death.

"Probate proceedings in the estate of Miss A were initiated in March of 1950 and the Final Decree of Distribution was issued on September 15, 1952. B and C continued to occupy the premises in question down to the present time."

Question

"When did the property in question become B and C's homestead so as to entitle them to receive the benefits of the homestead valuation of 25 per cent of the first $4,000.00 for taxation purposes?"

Opinion

It is the opinion of this office that the property in question became B and C's homestead within the meaning of Minnesota Statutes 1949, Section 273.13, Subdivision 7, at the instant of the death of Miss A. Under the facts you stated B and C occupied the property. B and C were also the owners of the property under the following rule as set out in Dunnell's Minnesota Digest, Vol. 2, Section 2722:

"The title to the real property of a decedent passes immediately upon his death to the heirs or devisees, subject to the claims of administration. The heirs or devisees have the right to the immediate possession, subject to the right of the representative to take possession under the statute for purposes of administration. No act or decree of court is necessary to vest them with title. It vests by operation of law. * * * "

JOSEPH S. ABDNOR,
Assistant Attorney General.

Watonwan County Attorney.
November 17, 1952. 232-d

218

Exemption — Playground — 15-acre tract owned by American Legion Post used by public as a playground — Not entitled to exemption as public property—Minn. Const., Art. IX, Sec. 1.

Facts

"Bloomington Post No. 550 of the American Legion, Department of Minnesota, has been incorporated under Section 312.01 of M. S. 1949. This corporation owns a 15-acre tract of land situated in our town which is devoted exclusively to the use of the public as a playground, that is, it is used exclusively for a public purpose."

Question

Is the tract entitled to exemption from ad valorem taxation?

Opinion

Minnesota Constitution, Article IX, Section 1, and Minnesota Statutes 1949, Section 272.02, Paragraph (7), provide that "public property used exclusively for any public purpose" shall be exempt from taxation. Although

the tract in question may be used for a public purpose, it is not owned by the public and, therefore, is not entitled to exemption under these constitutional and statutory provisions.

Opinions dated May 26, 1950, File No. 414-d-6, No. 203, 1948 report, December 30, 1930, File No. 414-a-11 and No. 353, 1944 Report.

CHARLES P. STONE,
Assistant Attorney General.

Town Attorney, Town of Bloomington.
April 4, 1951. 414-d-11

219

Exemption—Teacherage—Minnesota Constitution, Article IX, Section 1.

Questions

"1. If a school district (consolidated) owns a teacherage and rents it to a coach as part of his (the coach's) salary, does the teacherage remain tax free?

"2. Does it remain tax free if the coach in case (1) above rents a room out to another teacher?

"3. Would it affect the status (tax free or not) if the district rented these rooms to other teachers?"

Question No. 1

Opinion

Minnesota Constitution, Article IX, Section 1, provides:

" * * * Public property used exclusively for any public purpose shall be exempt from taxation. * * * "

Since property owned by a school district is public property, if it is being used for public purpose it is exempt from taxation. In **State v. Carleton College**, 154 Minn. 280, 191 N. W. 400, the Supreme Court of this state held that providing homes for the professors of an institution like Carleton College is regarded as reasonably necessary; that courts will not readily interfere with the judgment of the governing body of an institution as to what is for its best interests, financially or otherwise; nor is it important that the professors' salaries are diminished by what is termed rent for the houses they occupy. It is the opinion of this office that if the Board of Education considers it to be reasonably necessary for the operation of a public school that the school district own a teacherage and rent it to the coach as part of his salary then the property is being used for a public purpose and it is exempt from taxation.

Question No. 2

Opinion

If under the circumstances referred to in Question No. 1 the coach rents out a room to another teacher, that portion of the building being rented out is not subject to tax exemption. The room being rented out is used for a private purpose; that is, rental purposes with benefits received by the coach. If a substantial portion of the building is being used for rental purposes, the building "should be assessed and taxed on that portion of its proper assessable value allocated to the taxable use, after deducting from its over-all assessable value the portion thereof properly allocated to the proportionate tax exempt use." See **Christian Business Men's Committee v. State,** 228 Minn. 549, 38 N. W. (2d) 803.

Question No. 3

Opinion

In an opinion of this office dated December 18, 1946 (File No. 414-b-5) there was presented the question of the taxable status of a home for teachers owned and equipped by an independent consolidated school district wherein the teachers paid the district what the Board considered an upkeep and replacement fee of $50.00 per month. We said in that opinion:

> "If it was not necessary to build and equip this property for the housing of the teachers, then the school district was without right to furnish it. The question of the necessity was for the board. In view of the law, I would consider this a public use. The fact that the property is owned by the school district and devoted to a public use makes it exempt from taxation. If it were not to be devoted to a public use, then the school district had no right to acquire it in the first place. My conclusion, therefore, is that it is exempt from taxation."

In an opinion of this office dated August 27, 1942 (Attorney General's Report 1942, No. 347), this office ruled:

> "The school district here involved can only own the property in question to enable it to perform a governmental function, that of education. It has no legal right to engage, in a proprietary capacity, in the business of leasing real estate. * * * "

This question then presents a fact question to be resolved by the assessing officials. If the school district by such rental is in the business of leasing or renting this property to teachers, the property is not tax exempt. If, on the other hand, the furnishing of living quarters to the teachers is reasonably necessary to the proper function of the schools, the fact that the teachers are paying to the district an upkeep or replacement fee on the property does not affect the status of the property for taxation purposes and it is exempt.

JOSEPH S. ABDNOR,
Assistant Attorney General.

Commissioner of Education.
August 13, 1952. 414-B-5

220

Refundment—Interest—No interest is payable on such refunds—M. S. 1949, Section 270.07.

Question

Where the real estate tax is erroneously assessed at too high a figure and it is discovered that the taxpayer has a refund coming, is the taxpayer entitled to interest on the refund?

Opinion

An applicant for a refund of ad valorem tax must proceed under the provisions of Minnesota Statutes 1949, Section 270.07, which reads as follows:

> "The commissioner of taxation * * * shall have power * * * to order the refundment, in whole or in part, of any taxes, costs, penalties or interest thereon which have been erroneously or unjustly paid * * * "

The interest referred to in the above quoted portion of Section 270.07 is interest on the tax which may have accumulated because it was not paid on time and became delinquent. There is no provision in the statutes for adding interest to an amount refunded to a taxpayer. It is, therefore, the opinion of this office that the taxpayer is not entitled to any interest on a refund of ad valorem tax.

JOSEPH S. ABDNOR,
Assistant Attorney General.

Brown County Attorney.
January 25, 1952. 424-A-11

221

Refundment — Taxes voluntarily paid — Refund of illegal taxes voluntarily paid within discretion of Commissioner of Taxation—M. S. 1949, Section 270.07.

Facts

An individual has made application for the refund of certain taxes paid by her from 1924 to 1950, inclusive, totaling an amount of $1,301.62.

> "Her claim is that the Auditor's Office included this parcel with her two lots for tax purposes, being a tract lying between Lots 5 and 6, Block 2, Curtis Survey, and the Mississippi River, and this tax was paid on said parcel of land adjoining the above lots which she owned and said parcel of land is alleged as belonging to the State of Minnesota and has been occupied as a tennis court by the State Teachers College. Apparently she is making claim under Section 270.07 M. S. A."

You state you are informed that it is the custom of the Department of Taxation as a matter of practice to limit refunds of tax to the current year and in some cases to three years prior, but in this case the applicant is making a claim for refund of taxes paid over a period of twenty-five years.

Question 1

Does the law require that taxes paid prior to three years from date of application be refunded to the applicant?

Opinion

Your question is answered in the negative. The settled law of this state is that one who pays illegal taxes voluntarily is not entitled to recover them. Whether the whole or part of ad valorem taxes paid should be refunded is a matter within the discretion of the commissioner of taxation and not one of law for the courts. The courts will interfere with an exercise of the discretion vested in the commissioner of taxation only to correct a manifest abuse thereof or plain error in law or fact or mixed law and fact. See **Application of P. I. Telephone Company for Refund of Taxes,** 156 Minn. 87, 194 N. W. 317. Neither Minnesota law nor Federal law requires that a county refund taxes which have been voluntarily paid. **Mahnomen County, Minnesota v. United States,** 319 U. S. 474, 63 S. Ct. 1254.

Question 2

Would not the Statute of Limitation bar the collection of any part of said taxes paid more than six years prior to application?

Opinion

The opinion of this office in answer to Question No. 1 being that the law does not require that taxes voluntarily paid be refunded, the statute of limitation has no application to the instant question.

JOSEPH S. ABDNOR,
Assistant Attorney General.

Stearns County Attorney.
January 30, 1952. 424-A-11

222

Undervalued—Auditor to include on tax books property undervalued in current year—M. S. 1949, Sections 273.02 and 274.09. (Opinions dated May 1, 1952, and November 21, 1949, reversed.)

Facts

"The County Auditor turned the tax books over to the County Treasurer on or before the first Monday in January, 1952, assessments having been made May 1st, 1951. Any taxes due on said assessments are payable in 1952."

Questions

"If there is an undervaluation by reason of failure to take into consideration the existence of buildings or improvements, the land has heretofore been assessed but the buildings on said land were omitted, or a reclassification made, can the County Auditor make changes in the current tax books within one year after December 1st of the year in which the property was assessed or should have been assessed?

"If the above question is answered in the negative, then in what situations does Minnesota Statutes 273.02, Subd. 2, apply?"

Opinion

Minnesota Statutes 1949, Section 273.02, provides as follows:

"Subdivision 1. Discovery. If any real or personal property be omitted in the assessment of any year or years, and the property thereby escape taxation, or if any real property be undervalued by reason of failure to take into consideration the existence of buildings or improvements thereon, or be erroneously classified as a homestead, when such omission, undervaluation or erroneous classification is discovered the county auditor shall in the case of omitted property enter such property on the assessment and tax books for the year or years omitted, and in the case of property undervalued by reason of failure to take into consideration the existence of buildings or improvements thereon, or property erroneously classified as a homestead, shall correct the valuation or classification thereof on the assessment and tax books; and he shall assess the property, and extend against the same on the tax list for the current year all arrearage of taxes properly accruing against it, including therein, in the case of personal property taxes, interest thereon at the rate of seven per cent per annum from the time such taxes would have become delinquent, when the omission was caused by the failure of the owner to list the same. If any tax on any property liable to taxation is prevented from being collected for any year or years by reason of any erroneous proceedings, undervaluation by reason of failure to take into consideration the existence of buildings or improvements, erroneous classification as a homestead, or other cause, the amount of such tax which such property should have paid shall be added to the tax on such property for the current year.

"Subd. 2. Limitation. Nothing in Laws 1943, Chapter 632, as amended, shall authorize the county auditor to enter omitted property on the assessment and tax books more than six years after May first of

the year in which the property was originally assessed or should have been assessed and nothing in Laws 1943, Chapter 632, as amended, shall authorize the county auditor to correct the valuation or classification of real property as herein provided more than one year after December first of the year in which the property was assessed or should have been assessed. * * * "

Our prior opinion referred to in your letter related to the assessment of omitted real property under the provisions of Section 273.02. Analyzing Subdivision 1 of the statute cited above with regard to omitted property we find:

"If any real or personal property be omitted in the assessment of any year or years, and the property thereby escape taxation, * * * when such omission, * * * is discovered the county auditor shall in the case of omitted property enter such property on the assessment and tax books for the year or years omitted, * * * ."

We held with regard to omitted property under Section 273.02 that where the county auditor had already delivered the tax list to the county treasurer prior to April 1, he had no authority to add the omitted property assessment to such tax list.

The question presented in the instant request for opinion relates not to omitted property but to property undervalued by reason of failure to take into consideration the existence of buildings or improvements thereon. Analyzing Section 273.02 with regard to this type of property we find:

" * * * if any real property be undervalued by reason of failure to take into consideration the existence of buildings or improvements thereon, or be erroneously classified as homestead, * * * when such * * * undervaluation or erroneous classification is discovered the county auditor shall * * * in the case of property undervalued by reason of failure to take into consideration the existence of buildings or improvements thereon, or property erroneously classified as a homestead, shall correct the valuation or classification thereof on the assessment and tax books; * * * ."

It is the opinion of this office that when there is an undervaluation by reason of failure to take into consideration the existence of buildings or improvements, the county auditor may within one year after December 1 of the year in which the land was assessed correct the valuation or classification of such real property on the tax books even though such tax books may be in the hands of the county treasurer.

Attention is also called to Minnesota Statutes 1949, Section 274.09, which provides that:

"If the county auditor has reason to believe or is informed * * * that the assessor has not returned the full amount of all property required to be listed in his town or district, or has omitted, or made an erroneous return of, any property subject to taxation, he shall proceed,

at any time before the final settlement with the county treasurer, to correct the return of the assessor, and to charge the owners of such property on the tax lists with the proper amount of taxes. For such purpose the county auditor may issue compulsory process, require the attendance of any person whom he may suppose to have a knowledge of the property, or its value, and may examine such person, on oath, in relation to such statement or return. In all such cases, before making the entry on the tax list, the county auditor shall notify the person required to list that he may have an opportunity to show that his statement or the return of the assessor is correct; and the county auditor shall file in his office a statement of the facts or evidence upon which he made such corrections. In no case shall the county auditor reduce the amount returned by the assessor without the written consent of the state auditor, on a statement of the case submitted by the county auditor or the party aggrieved."

It is the opinion of this office that under the provisions of Section 274.09 quoted above the county auditor may correct the tax books at any time prior to final settlement with the county treasurer even though the tax books may be in the hands of the county treasurer in cases where the assessor has not returned the full amount of all property required to be listed or has omitted or made an erroneous return of any property subject to taxation. In proceeding under this section the county official should be cautioned to observe those provisions of that section requiring that notice be given to the person required to make the list.

Inasmuch as the provisions of Minnesota Statutes 1949, Section 274.09, were not considered in writing our opinion of May 1, 1952, addressed to you and the opinion of this office dated November 21, 1949, No. 244, 1950 report, addressed to George D. Erickson, county attorney of Brown County, insofar as this opinion may conflict with such prior opinions, the prior opinions are herewith overruled.

JOSEPH S. ABDNOR,
Assistant Attorney General.

Brown County Attorney.
July 3, 1952. 554-i

ASSESSED VALUATION

223

County Agricultural Societies—L. 1951, Ch. 471—Assessed valuation as used therein means the latest valuation for purposes of taxation as finally equalized of all taxable property within the county, excluding money and credits—M. S. A. Section 475.51, Subd. 5—Purchasing building and site.

Question

What is the meaning of the term "assessed valuation" as used in Laws 1951, Ch. 471, Section 1?

Opinion

So far as pertinent to this question, Laws 1951, Ch. 471, Section 1, in part provides:

> "Any county in this state having more than 10,000 and less than 12,000 inhabitants, and an **assessed valuation** of more than $2,500,000 and less than $4,200,000 and having less than 19 full or fractional congressional townships may issue bonds or certificates of indebtedness and sell the same, without a vote of the people of the county, as herein provided, for any one or more of the following purposes * * * ." (Emphasis supplied.)

In our opinion the term "assessed valuation" as used in said act means the legislative definition of the words "assessed value" as defined in M. S. A. Section 475.51, Subd. 5, which excludes money and credits for the reason that the same are not taxable.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Sherburne County Attorney.
January 28, 1952. 772-C-5

224

Library purposes — Two-mill levy authorized by L. 1949, C. 217, applied to 33⅓% and 40% of the full and true value of class 3b and class 3c homestead property, respectively—M. S. 1949, Section 273.13, Subds. 6, 7 and 7a. (L. 1933, C. 359.)

Facts

"Laws 1951, Chapter 217, authorizes counties, cities, villages, and towns to levy two mills for the support of a library in a neighboring municipality. Chapter 217 is an amendment to M. S. A. Section 134.12 (originally enacted as Laws 1903, Chapter 173, and last amended by Laws 1913, Chapter 509, at which time a one-mill levy was authorized for the purpose stated above).

"Laws 1933, Chapter 359, changed the amount that homestead property could be assessed for taxation. This change in valuation would have affected the salaries of officials, tax levy limitations, and net debt limitations that were based upon assessed valuation. Presumably, in order

to maintain the status quo with respect to said matters, after changing the valuation of homestead property, said Laws 1933, Chapter 359, contained the following paragraph:

> 'For the purpose of determining salaries of all officials based on assessed valuations and of determining tax limitations and net bonded debt limitations now established by statute or by charter, class 3b and class 3c property shall be figured at 33⅓% and 40% of the true and full value thereof respectively'."

Questions

Should the two-mill levy authorized by Laws 1951, Chapter 217, be computed by using one of the following formulas:

"I. Two mills applied to an amount that would require class 3b and class 3c homestead property to be figured at 33⅓% and 40% of the full and true value thereof, respectively.

"II. Two mills applied to the lower assessed value of homestead property (20% and 25% of the full and true value thereof, respectively).

"III. One mill (Laws 1913, Chapter 509) applied to an amount that would require class 3b and class 3c homestead property to be figured at 33⅓% and 40% of the full and true value thereof, respectively, and an additional one mill (Laws 1951, Chapter 217) to be applied to the lower assessed value of homestead property."

Opinion

We have this day rendered an opinion to you holding that the provisions of M. S. 1949, Section 273.13, Subd. 7a, originally enacted as a part of L. 1933, C. 359, have been, since the effective date of the last cited act, in continuing effect in the determination of tax limitations.

Before answering your questions, we must first determine if the provisions of L. 1951, C. 217, are tax limitation provisions. We think it clear that these provisions are tax limitations within the meaning of subdivision 7a, supra. **510 Groveland Avenue, Inc. v. Erickson,** 201 Minn. 381, 276 N. W 287.

For the reasons stated in our opinion to you referred to above, it is our opinion that the two-mill levy authorized by Laws 1951, Chapter 217, should be applied to a valuation based upon 33⅓ per cent and 40 per cent of the full and true value of class 3b and class 3c homestead property, respectively.

This conclusion makes it unnecessary to answer your other questions.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Public Examiner.
July 6, 1951. 519-C

225

Whether change in valuation affected the salaries of officials—Limitations—33⅓% and 40% of full and true value base therefor for homesteads in classes 3b and 3c respectively—M. S. 1949, Section 273.13, Subds. 6, 7 and 7a. (L. 1933, C. 359.)

Facts

"Laws 1933, Chapter 359, changed the amount that homestead property could be assessed for taxation. This change in valuation would have affected the salaries of officials, tax levy limitations, and net debt limitations that were based upon assessed valuation. Presumably, in order to maintain the status quo with respect to said matters, after changing the valuation of homestead property, said Laws 1933, Chapter 359, contained the following paragraph:

> 'For the purpose of determining salaries of all officials based on assessed valuations and of determining tax limitations and net bonded debt limitations now established by statute or by charter, class 3b and class 3c property shall be figured at 33⅓% and 40% of the true and full value thereof respectively.'

"Numerous tax levy limitations, that were fixed at the time of the passage of Laws 1933, Chapter 359, have been modified since the passage of said law by amendment. In other instances, tax levy limitations have been created by a complete new general law or by a law of special application."

Question

"Where tax levy limitations are fixed by laws passed subsequent to Laws 1933, Chapter 359, will you kindly inform me whether the assessed valuation against which said tax levies are to be computed should be an amount that would require class 3b and class 3c property to be figured at 33⅓% and 40% of the true and full value thereof, respectively; or whether the lower assessed value of homestead property should be employed."

Opinion

Prior to the enactment of L. 1933, C. 359, all unplatted real estate, with certain exceptions not material here, including homesteads, was assessed at 33⅓ per cent of its value, and all platted real estate, including homesteads, was assessed at 40 per cent of its value. Mason's Minn. Stat. 1927, Sec. 1993. By the enactment of Chapter 359, the legislature placed all homesteads, unplatted or platted, in separate classifications. The unexempt value of a homestead upon unplatted land was to be assessed at 20 per cent of its value. The unexempt value of a homestead upon platted land was to be assessed at 25 per cent of its value. Chapter 359 also contained the following provision:

"For the purpose of **determining salaries** of all officials based on assessed valuations and of **determining tax limitations** and **net bonded debt limitations now** established by statute or by charter, class 3b and class 3c property shall be figured at 33⅓% and 40% of the true and full value thereof respectively." (Emphasis ours.)

We are here concerned with only one of the three affected limitations, namely, "tax limitations." By L. 1949, C. 723, the legislature amended the above language by deleting therefrom the words "and net bonded debt limitations."

We come now to consideration of the effect to be given to the word "now" as used in the language quoted above. The question resolves itself into this: Does the word "now" have a limiting effect restricted to tax limitations established by statute or charter on the effective date of C. 359, or does the word "now" have a continuing effect applicable to all such tax limitations in effect on the effective date of C. 359 or subsequently effective? We have had the benefit of thorough research by interested counsel as well as members of the staff of this office. The decisions in point are numerous and of little value to us for the reason that they are to be found to sustain either view. We are compelled, then, to resort to fundamental rules of construction and other material which has some bearing upon the question before us.

There are no decisions in Minnesota upon the word "now," but the effect of the word "now" is stated in M. S. 1949, Sec. 645.45 to be:

"The following words and phrases, when used in any law **hereafter enacted**, unless the context clearly indicates otherwise, shall have the meanings ascribed to them in this section:

" * * *

"(19) 'Now,' in any provision of a law referring to other laws in force, * * * or to any facts or circumstances as existing, relates to the laws in force, * * * or to the facts or circumstances existing, respectively, on the effective date of such provision;

" * * * *."

This canon of construction was enacted by L. 1941, C. 492. By its terms, it has no application to L. 1933, C. 359. We shall endeavor to apply the canon of construction laid down in M. S. 1949, Sec. 645.16, which is a restatement of applicable Minnesota **case law:**

"The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions.

" * * *

"When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:

"(1) The occasion and necessity for the law;

"(2) The circumstances under which it was enacted;

" * * * * *

"(4) The object to be attained;

" * * * * *

"(6) The consequences of a particular interpretation;

" * * * * *

"(8) Legislative and administrative interpretations of the statute."

We are fortunate in having in **510 Groveland Avenue, Inc. v. Erickson**, 201 Minn. 381, 385, 276 N. W. 287, the following expression by our supreme court with reference to Chapter 359:

" * * * All that was done by the law of 1933 was to declare new and reduced proportions of value whereon to tax homesteads but to **preserve** former and higher rates for the figuring, that is the application, of tax limitations. * * * " (Emphasis ours.)

It appears clear from the history of tax legislation in this state, the above expression of the supreme court and the contemporary economic times, that the purpose sought to be attained by the legislature was to give relief from taxation to the owners of real estate used for homestead purposes without changing the basis upon which tax limitations were to be determined thenceforth. Applying the reasoning in the above cited case, Chapter 359 did not change any tax limitations imposed by statute or charter, but only preserved the basis upon which such tax limitations were determined. It must be recognized also that the state and county auditors have very little time for spreading the annual real estate taxes. Uniformity of treatment expedites their work. To hold that they would have to make an additional classification of tax limitations based upon tax limitations enacted subsequent to 1933 would increase their work tremendously. We are not justified in placing that burden upon them unless it clearly appears that the legislature so intended. It does not so appear.

The supreme court of Minnesota has considered the effect of the word "already" as used in Laws 1905, C. 175. The word "already" would appear to be more strongly indicative of the present than the word "now." However, in **Evenson v. Demann**, 109 Minn. 328, 331, 123 N. W. 930, the court said:

" * * * We are of opinion that this was the intention of the legislature, and construe the word 'already' to have reference to the future, as well as the present."

Webster's New International Dictionary, Second Edition, in defining "already" states it "refers to the time that is past with respect to the verb which it modifies." In defining "now" it states it means "at the time imme-

diately before the present." Upon the basis of these definitions, "already" and "now" are so nearly synonymous that we have no hesitancy in applying the construction made by the court in the case last cited above.

We also have a legislative interpretation of the word "now" as used in Chapter 359. We have referred above to the amendment of Chapter 359 by L. 1949, C. 723, wherein the words "and net bonded debt limitations" were deleted. If the word "now" in Chapter 359 did not have a continuing effect, there would appear little reason after the lapse of years to eliminate "and net bonded debt limitations." The reenactment by the 1949 act of the words "now" in conjunction with the reenactment of "determining tax limitations now established by statute or by charter" was in itself, at the very least, a recognition of the continuing effect of the provision here under discussion.

Another factor suggesting a progressive interpretation of the word "now" **in regard to tax limitations** is the other language contained in the following sentence:

> "For the purpose of determining salaries of all officials based on assessed valuations and of determining tax limitations now established * * * ."

The words "assessed valuations" clearly refer to a progressive, and not a static, standard. Minnesota Statutes 1949, Section 475.51, subd. 5, reads:

> " 'Assessed value' means the latest valuation for purposes of taxation, as finally equalized, of all property taxable within the municipality."

The foregoing definition of "assessed value," as a matter of statutory history, has always been regarded as interwoven with Section 273.13.

In determining the effect to be given to these matters which we have discussed above, we shall apply from **Bull v. King**, 205 Minn. 427, 435, 286 N. W. 311, the following:

> "Rules of construction are mere aids in ascertaining the legislative intent. Being founded on reason and experience, they are neither ironclad nor inflexible. They have force only as suggestions to the judicial mind. The rules yield when an intention contrary to the inference ordinarily suggested by them is ascertained, Gerdts v. Gerdts, 196 Minn. 599, 265 N. W. 811, and are to be resorted to only so long as they furnish aid. State ex rel. Maryland Cas. Co. v. District Court, 134 Minn. 131, 148 N. W. 798."

and from **Governmental Research Bureau, Inc. v. Borgen**, 224 Minn. 313, 320, 28 N. W. 2d 760, the following:

> " * * * The needs of a growing population are current and not always one year in arrears. Where the law is susceptible of more than one meaning, the court will not adopt an interpretation defeating its purpose and the consequence of which is to establish a tax limitation not in accord with recognized current needs. * * * "

This office has held many times that in determining salaries of public officials, the provisions here under discussion have a continuing effect. See 1942 Attorney General Report, No. 199. This construction is entitled to weight.

For the reasons above stated, it is our opinion that provisions in L. 1933, C. 359, relating to the use of 33⅓ per cent and 40 per cent of the true and full value of class 3b and class 3c property in determining tax limitations are and have been in continuing effect since the enactment of said Chapter 359, now found as M. S. 1949, Section 273.13, Subdivisions 6, 7 and 7a, applying to all tax limitation provisions, statutory or charter, in effect on the effective date of Chapter 359 or subsequently effective.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Public Examiner.
July 6, 1951. 519-C

Editorial Note: Section 273.13 amended by L. 1953, C. 358, SS. 1 and 2, C. 400, S. 1, and C. 745, SS. 1 and 2.

DELINQUENT

226

List—Description—$1.00 for each description to be included in judgment for delinquent taxes only fee charged—No separate charge for reimbursement of cost of publication — 55c of the $1.00 reimbursement to the county for such publication—L. 1951, C. 505 (Sections 279.07 and 279.08); L. 1951, C. 509 (Section 279.24). Minn. St. 1949, Section 281.02.

Statement and Facts

"Our county auditor calls our attention to Laws 1951, Chapter 505 (Secs. 279.07 and 279.08) relating to the publication of the delinquent real estate, which changed the statutes to allow a charge by the newspaper of $1.20 per folio for the first insertion and 60c per folio for each subsequent insertion, which charge had been a maximum of 45c per description.

"He calls attention to Laws 1951, Chapter 509 (Section 279.24), which deletes the words 'with the amount per description paid for reimbursement of the county for publication of the notice and list' and which increases the costs to be taxed to $1.00, which includes 45c clerk's costs.

"He states that heretofore in cases of redemption after publication of the delinquent real estate tax list and prior to entry of judgment he charged each description with the cost of publication per description."

Minnesota Statutes 1949, Section 279.07, provides:

"Prior to the day on which the county board designates a newspaper for the publication of the notice and list, any publisher or proprietor of a legal newspaper, as defined by law, may file with the county

auditor an offer to publish such notice and list in such paper, stating the rate at which he will make such publication, **which shall not exceed 45 cents for each description.** The board may in its discretion receive offers presented to it at any time prior to the time when designation is made." (Emphasis ours.)

Section 279.07 was amended by Laws 1951, Chapter 505. The amendment deleted the emphasized language "which shall not exceed 45 cents for each description" and inserted in lieu thereof the following language: "which shall not exceed $1.20 per folio for the first insertion and sixty cents per folio for each subsequent insertion."

Minn. St. 1949, Sec. 279.24, so far as material here provides:

"For all services in tax proceedings, except oaths to witnesses on trial, the clerk **shall receive 45 cents for each description,** including the entry to be made by him on the right-hand page of the real estate tax judgment book, which sum, **with the amount per description paid for reimbursement of the county for publication of the notice and list,** shall be included in the amount charged to each description in the judgment."

Section 279.24 was amended by L. 1951, C. 509, and so far as material here provides:

"For all services in tax proceedings, except oaths to witnesses on trial, the clerk **shall make a charge of one dollar for each description,** including the entry to be made by him on the right-hand page of the real estate tax judgment book, which sum shall be included in the amount charged to each description in the judgment. **Of said charge 45 cents shall be allowed the clerk for his services."**

From the above amendments, it was, in our opinion, the intention of the legislature to accomplish two things.

First, by amendment of Section 279.07 by L. 1951, C. 505, it intended to change the basis of bidding for publication of the delinquent list from a charge for each description to a charge for each folio of the published delinquent list.

Second, by amendment of Section 279.24, by L. 1951, C. 509, by (1) the change from the provision "the clerk shall **receive** 45 cents for each description" to one providing "the clerk shall **make a charge** of one dollar for each description" (emphasis ours) and (2) the deletion of the following language: "with the amount per description paid for reimbursement of the county for publication of the notice and list," it was the intention of the legislature to substitute a flat charge of 55 cents as reimbursement of the cost of publication of the delinquent list which is attributable to each parcel of land. The amount to be received by the clerk is preserved at 45 cents. With this understanding of the intention of the legislature in enacting these amendments, we shall proceed to answer your questions.

Question

"1. Is the county to pay for publication of the delinquent list, as provided in Sections 279.07 and 279.08, as amended, and collect, in cases of redemption, only $1.00 per description in accordance with the provisions of Minnesota Statutes 1949, Section 279.24, as amended?"

Opinion

Your first question is answered in the affirmative.

Question

"2. Is the total cost of publication to be assessed against all the real estate included in the delinquent list in addition to the $1.00 court costs?"

Opinion

Your second question is answered in the negative.

Question

"3. Is any part of the $1.00 charge to be used to defray the cost of publication assessed against each description of property contained in the delinquent list?"

Opinion

When redemption is made, 55 cents of the amount collected will be paid to the county and will be a reimbursement of the cost of publication of the delinquent list which is attributable to the parcel of land which has been so redeemed. Presumably, the cost of publication of the delinquent list will have been paid, and the amount received upon redemption will not defray such cost but will be, as we have said, a reimbursement.

Question

"4. Is the total cost of publication to be divided by the total number of descriptions contained in the delinquent list and the resultant quotient assessed against each description therein as publication costs?"

Opinion

Your fourth question is answered in the negative.

Question

"5. In the event the $1.00 charge is the only sum added to the amount per description in the published delinquent list at the time of securing judgment, may the auditor charge 55c per description, or any other sum, in cases of redemption after publication of list and prior to entry of judgment?"

Opinion

Your fifth question is answered in the negative.

When redemption is made, the county auditor in determining the amount payable under Minn. St. 1949, Sec. 281.02, will include therein the sum of one dollar as costs.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Ramsey County Attorney.
August 15, 1951. 412-A-13

227

Real estate—Judgment—Interest and penalty—M. S. 1949, Sections 279.01, 279.02, 279.03, 279.06, 281.37.

Facts

"During the past years, through error, the County has failed to publish delinquent taxes on certain parcels of property. Proper assessment was made on these parcels of property, the taxpayer failed to pay his tax, the taxes are listed as being delinquent, and there has been no certification from the County Auditor to the Clerk of Court and therefore the delinquent taxes as they appear on these parcels of property never received the proper publication and therefore still stand on the records as being delinquent. This failure on the part of the County Auditor occurred on certain parcels of property for many years past and therefore the County Auditor has now certified all of these taxes as being delinquent on these parcels of property. The Clerk of District Court has made the proper return, a proper publication has now been made,

* * * .

"You will understand from the facts as given, that these delinquent taxes are from the year 1926 through the year 1950."

Question

"Should the Clerk of District Court, in entering his judgment against these parcels of property, compute the interest from the date of delinquency and include this interest in his judgment, or should the Clerk enter judgment only for the delinquent tax plus the penalty, plus costs, and have the County Auditor compute the interest at the time of redemption of the property or purchase at the tax sale?"

Opinion

Taxes for the years 1926 to 1929, inclusive, bear interest at the rate of 12 per cent per annum from the second Monday of May in the year in which the taxes became delinquent. M. S. 1949, Section 281.37.

Taxes for the year 1930 and subsequent years bear interest at varying rates which are prescribed in M. S. 1949, Section 279.03, as follows:

> "279.03. The rate of interest on delinquent real estate taxes levied in the year 1930 and 1931 is hereby fixed at ten per cent per annum, and the rate of interest on delinquent real estate taxes levied in the year 1932 and subsequent years is hereby fixed at eight per cent per annum. The rate of interest on delinquent taxes levied in the year 1942 and subsequent years is hereby fixed at six per cent per annum. All provisions of law providing for the calculation of interest at any different rate on delinquent taxes in any notice or proceeding in connection with the payment, collection, sale, or assignment of delinquent taxes, or redemption from such sale or assignment are hereby amended to correspond herewith. In calculating such interest for any fractional part of a year on taxes levied in 1930 and 1931 it shall be calculated on the basis of five-sixths of one per cent for any month or major fraction thereof; and in calculating such interest for any fractional part of a year on taxes levied in 1932 and subsequent years, it shall be calculated on the basis of two-thirds of one per cent for any month or major fraction thereof. In calculating such interest for any fractional part of a year on taxes levied in 1942 and subsequent years, it shall be calculated on the basis of one-half of one per cent for any month or major fraction thereof.
>
> "Such interest shall be calculated **from the second Monday of May following the year in which the taxes became due,** on the full amount of the **taxes, penalties** and **costs** accrued.
>
> "The provisions of this section shall not apply to any taxes which have heretofore been bid in by an actual purchaser at a May tax sale or which have heretofore been assigned." (Emphasis ours.)

As the judgment for the taxes for the year 1950, which were payable in 1951 and became delinquent on the first Monday of January, 1952, will be entered before the second Monday of May, 1952, there will not be included in the judgment any interest upon the taxes for the year 1950.

The judgment which will be entered in 1952 will include interest computed to the date of entry of judgment upon the taxes for all years prior to 1950 which are delinquent. M. S. 1949, Section 279.06. See Attorney General's opinion dated May 7, 1928 (file 412a-9). The interest will be computed at the rate specified above as applicable to the year involved.

While your inquiry relates only to interest, we wish to point out to you that the penalties which have attached to the taxes for the several years

are not always the same and in some years there were no penalties attached on the first Monday of January. The correct penalty for a given year must be the one included in the judgment or its validity may be impaired.

M. S. 1949, Section 279.01;

Mason's Minn. Stat. 1927, Section 2105, as amended by L. 1931, C. 316, Section 2;

Mason's Minn. Stat. 1927, Section 2105, as amended by L. 1933, C. 121, Section 2;

M. S. 1941, Section 279.02, as amended by L. 1943, C. 281, Section 1;

M. S. 1945, Section 279.02;

M. S. 1949, Section 279.02.

Your attention is also directed to the change in the clerk of court's fees by L. 1951, C. 509, amending M. S. 1949, Section 279.24.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Anoka County Attorney. 412-A-10
March 6, 1952. 412-A-9

LEVIES

228

Mill rate—Villages—Taxable property located in two different counties—Uniformity clause, Minn. Const. Art. IX, Section 1, controlling.

Facts

Within the past two years a village has been incorporated from the original area of Mounds View Township, and at the present time there appears a possibility that another village will be incorporated which will include a part of the town of Mounds View in Ramsey County, and also some territory in the adjoining county.

Question

"Whether or not a village which includes within its area parts of two different counties can levy a village tax with different mill rates for each county."

Opinion

This question is premised upon the assumption that a village may be incorporated which will include within its corporate limits part of two dif-

ferent counties. Until such incorporation has actually occurred it would seem that the question submitted is moot. No legal problem exists at the present time.

As controlling upon the question submitted, attention is directed to Minn. Const. Art. IX, Section 1, which in part provides that "taxes shall be uniform upon the same class of subjects."

The fact that a village may be incorporated so as to embrace lands and premises situated within two different counties would not justify a different village tax rate so as to discriminate between areas within the village which have different county geographical boundaries.

M. S. A. Section 412.251 provides for an annual tax levy by villages. No reason has been suggested which would justify a different annual tax levy by the village which might be incorporated so as to differentiate between taxable property therein premised upon the boundary line between two counties. The uniformity clause in the constitution above referred to is controlling and should be observed by the council when levying taxes for village purposes.

See **Little Falls Electric and Water Company v. City of Little Falls,** 74 Minn. 197, 77 N. W. 40; **Village of Robbinsdale v. County of Hennepin,** 199 Minn. 203, 271 N. W. 491; **City of Jackson v. County of Jackson,** 214 Minn. 244, 7 N. W. 2d 753.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Attorney for Township of Mounds View.
March 21, 1952. 519-q

229

Road and bridge fund—Amendments of M. S. 1949, Section 162.01, Subd. 5, by Laws 1951, Chapters 523 and 548, are to be read together and both given effect.

Facts

Attention is called to M. S. 1945, Section 162.01, subd. 5, and to the fact that this subdivision was amended by L. 1951, Chapters 523 and 548. You further refer to the amendment in Chapter 523 relating to the tax levy for road and bridge purposes in counties having a population of not more than 100,000 inhabitants, which amendment is not to be found in Chapter 548, which was the law last enacted.

Question

"Under the present state of the law, how many mills can the county board of a county, having a population of less than 100,000, and a taxable valuation of over $8,000,000.00, levy for the road and bridge fund?"

Opinion

The amendment of subdivision 5 contained in L. 1951, C. 523, affects only those counties which have a population of not more than 100,000 inhabitants. Chapter 523 contains no amendment of the provisions of subdivision 5 affecting counties which have a population of more than 100,000 inhabitants. On the other hand, the amendment of subdivision 5 contained in L. 1951, C. 548, affects only those counties having a population of more than 100,000, and not more than 300,000 inhabitants. Chapter 548 contains no amendment of the provisions of subdivision 5 affecting counties which have a population of not more than 100,000 inhabitants.

The supreme court in the case of **State v. Archibald**, 43 Minn. 328, 45 N. W. 606, considered the effect of the passage of two laws in the same session dealing with the same subject-matter. On page 330 the court said:

> "To justify a court in holding that an act is repealed by one subsequently passed, it must appear that the later provision is certainly and clearly in hostility to the former. If by any reasonable construction the two statutes can stand together, they must so stand. If harmony is impossible, and it is only in that event, the earlier enactment is repealed."

Let us apply, therefore, the rule laid down above and attempt to construe the two chapters as one act.

It is readily apparent from the enactment of Chapters 523 and 548 that the legislature had considered two separate problems and determined upon the proper solution of each problem. In passing upon H. F. No. 1703 and enacting it as Chapter 523, it considered and disposed of the fiscal problems relating to roads and bridges in counties which have a population of not more than 100,000 inhabitants. In passing upon H. F. No. 1700 and enacting it as Chapter 548, it considered and disposed of fiscal problems relating to roads, streets and highways in counties which have a population of more than 100,000 and not more than 300,000 inhabitants and within which there is a city of the first class.

If we were to construe the action of the legislature in enacting Chapter 548 as constituting a repeal of the amendment in Chapter 523, we would have as a result the legislature giving thorough consideration to a problem and working out a solution of it and then immediately casting aside the results of its efforts by the omission of the language accomplishing this from that found in Chapter 548. This result would follow not because of any language in Chapter 548 directly indicating that the legislature has changed its mind as to the provision which it had written into Chapter 523, but because of its omission from Chapter 548.

In the case of **State v. Archibald**, supra, on page 330 the court said:

> "Of course, repeal by implication can be effected by inconsistent enactments at the same session of the legislature; but it has been said that statutes enacted at the same session are to be construed to a certain extent as one act, and therefore in such a case there is a much

stronger presumption against an intention to repeal which is not expressed than in case of statutes passed at different sessions; and in such cases there should be such an exposition as will give effect to what appears to be the main intent of the lawmaker."

Applying the rules laid down by the court to the matter before us, giving careful consideration to the results which would follow from construction holding that Chapter 548 had repealed the provisions quoted above relating to public improvements, the conclusion appears to us inescapable that such repeal was not the intention of the legislature and that a reasonable construction permits the provisions of Chapter 523, referred to above, and the provisions of Chapter 548, referred to above, to be read together, giving full effect to both. We so hold.

The answer to your question is that under the provisions of subdivision 5, referred to above, as amended by L. 1951, C. 523 and 548, the county board of any county having a population of not more than 100,000 inhabitants and a taxable valuation of over $8,000,000 has the power, subject to the other conditions of subdivision 5, to levy a road and bridge tax of 20 mills. In other words, the classification found in said subdivision 5, based upon valuation, in counties having a population of not more than 100,000 inhabitants is no longer a part of subdivision 5.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Public Examiner.
July 6, 1951. 519-k

230

Sanatorium maintenance — Classification of counties by assessed valuation and population—County may grow into or out of class specified by gain or loss of population, or assessed valuation.

Facts

Attention is called to L. 1943, C. 65, which authorizes an additional annual tax of $45,000 for general revenue purposes "In any county in this state now or hereafter having a population of not less than 20,000, nor more than 26,000, inhabitants, according to the last federal census, and having an assessed valuation of not less than $5,500,000 nor more than $9,000,000, exclusive of moneys and credits, and containing a total acreage of not less than 550,000, nor more than 552,000, acres, * * * ."

The description used in the above law, at the time of enactment, applied only to X County. Subsequently, the assessed valuation of X County increased to $10,411,153.

Question

"In view of this increase, does X County continue to have authority to levy an additional tax of $45,000 for general revenue purposes?"

Opinion

The act considered relates to counties of a certain assessed valuation. It relates to "any county in this state now or hereafter having * * * an assessed valuation of not * * * more than $9,000,000."

" 'Now,' in any provision of a law referring to other laws in force, or to persons in office, or to any facts or circumstances as existing, relates to the laws in force, or to the persons in office, or to the facts or circumstances existing, respectively, on the effective date of such provision;". M. S. 1949, Section 645.45 (19).

" 'Hereafter,' a reference to the time after the time when the law containing such word takes effect;". M. S. 1949, Section 645.45 (11).

So, the language refers to the alternative. County X is not now in the assessed valuation class described, although it was when the law was enacted.

A statute would have been bad if it did not, by its terms, operate uniformly upon all counties of the specified class, if it were not applicable to counties which might come within the class subsequent to its enactment. **State v. Ritt,** 76 Minn. 531, 75 N. W. 535. The converse of the proposition is true. When the county grew out of the class, the act no longer applied.

Facts

"Laws 1943, Chapter 78, authorizes the county board to levy a tax, not to exceed ten mills, for sanatorium maintenance 'In any county in this state now or hereafter having a population of less than 18,000 and more than 16,000, and having not less than 56 and not more than 58 full or fractional congressional townships, * * * '."

"The description used in this law, at the time of enactment, applied only to Y County. Subsequently, the population of Y County decreased to 14,327."

Question

"In view of this decrease in population, does Y County continue to have authority to levy ten mills for sanatorium maintenance?"

Opinion

The same reasons as given in the first problem apply. The law no longer applies to Y County.

CHARLES E. HOUSTON,
Assistant Attorney General.

Public Examiner.
October 16, 1951. 519-L

231

Welfare purposes—Counties—Statutory time for tax levy is directory, not mandatory—Tax levy may be made before and after July meeting, but not after tax has been spread on rolls — M. S. 1949, Sections 275.03, 393.08.

Facts

At its regular semi-annual meeting on July 9, 1951, the Mahnomen County Board, by appropriate resolution, approved the budget proposed by the Mahnomen County Welfare Board in the amount of $68,405.50. The Board now believes that because of increased welfare costs the levy for welfare purposes should be increased in the amount of $10,000.

Question

"Can the County Board now increase the levy for welfare purposes for collection in 1952?"

Opinion

M. S. 1949, Section 275.03, provides, among other things:

" * * * the county taxes shall be levied by the county board at its meeting in July of each year * * * ."

For your assistance see opinion of Attorney General 1918-1922 Report, No. 207, dated September 16, 1919, which we believe answers your inquiry. Section 2518, General Statutes of Minnesota 1913, is now M. S. 1949, Section 162.01; Section 2048 is now M. S. 1949, Section 275.01. The statute referred to in paragraph 3 of the said opinion is M. S. 1949, Section 275.03. Subsequent opinions of this office have consistently held that the provisions of M. S. 1949, Section 275.03, are directory and not mandatory (Report of Attorney General 1936, No. 113, Sept. 6, 1935, Jan. 30, 1934, Nov. 28, 1938, Apr. 20, 1948, file 519-D) and that the county board may, if the conditions in the said opinion exist, amend the tax levy made in July at any time **prior to the spreading of the taxes on the tax rolls by the county auditor.** We do not know whether the taxes have been spread by the county auditor in your county.

In accordance with M. S. 1949, Section 393.08, the budget for welfare purposes originates with the county welfare board, and is then considered and approved or adjusted by the county board of commissioners in accordance with the facts. You state that the **Board,** which we assume is the county board, now believes that the levy for welfare purposes should be increased. In order to remove a possible ground for challenge of the validity of the increased levy, we suggest that the county welfare board adopt a resolution approving the revision of its estimate stating the new amount.

G. L. WARE,
Special Assistant Attorney General.

Mahnomen County Attorney.
November 1, 1951. 519-D

PERSONAL PROPERTY

232

Lien—Distress proceedings—Attaches on May 1 of the year when assessed —M. S. A. Section 272.50—When personal property which has been assessed and which is subject to payment of the tax is sold or about to be removed from the county, distress proceedings may be initiated to compel payment of tax as determined by county auditor—Section 272.51.

Facts

B was a retail merchant engaged in business in your county. W and B, attorneys representing several of B's creditors, obtained several judgments against him. Executions were issued upon these judgments and personal property belonging to B was sold upon execution sale. W and B were purchasers at the execution sale. Subsequently thereto W and B sold the property purchased by them at such execution sale to D, a resident of Minneapolis, who upon purchasing the same made arrangements to remove the property from your county to Minneapolis. Thereupon the assessor informed the county auditor and a distress warrant was issued under the provisions of M. S. A. 272.51. The assessment for 1952 for the personal property was made against B who was the owner thereof on May 1, 1952. After the distress warrant was issued the personal property tax upon this property was determined upon the basis of the 1951 levy. Subsequent to the issuance of the distress warrant W and B, as attorneys for D, stated in a telephone conversation that if the sheriff would release the property involved which was subject to levy under the distress warrant they would pay the tax or cause the tax to be paid. Relying upon the promise thus made by W and B as attorneys for D the property was released and has now been removed from your county.

Questions

"Does the lien of the state for payment of the tax continue after a sale and until removal from the county in which it is assessed?

"Does the failure to issue a distress warrant and make levy thereunder until after the sale is consummated, either at private sale or execution, submerge the lien of the state and make the title of the purchaser paramount thereto?"

Opinion

Both of these questions will be considered together, and likewise answered.

So far as material to these questions M. S. A. 272.50 provides:

"The taxes assessed upon personal property, with lawful penalties, interest, and costs, shall be a first and perpetual lien, superior and paramount to all other liens or encumbrances thereon, except the vendor's

interest in conditional sales contracts, whether prior or subsequent in point of time, upon all of the personal property then owned by the person assessed from and including May first in the year in which they are levied, until they are paid; provided, such lien shall not continue on items of personal property sold at wholesale or retail in the ordinary course of business."

Under this section we have held that the lien as therein given for personal property taxes attaches to all the personal property of the person assessed from and after May first in the year in which they are levied.

Upon the facts presented it is evident that B was, on May 1, 1952, the owner of the personal property sold upon execution sale to W and B. The property purchased by W and B was not at wholesale or retail in the ordinary course of the business of B, the owner, and therefore W and B acquired such property subject to the statutory lien for the personal property tax as assessed for and including May 1, 1952, against all of B's property.

Section 272.51 in part provides:

"If the personal property assessed in any year is being, or about to be, sold in bulk, or at auction sale, or is being, or is about to be, removed from the county in which it is assessed before the taxes are paid, such taxes shall immediately become due and collectible. It shall be the duty of the assessor, when he has knowledge of such intended sale or removal, to notify the county auditor of such intention, and thereupon the county auditor shall proceed by distress to restrain such sale or removal of the property and to secure the payment or lien of the taxes due or to become due. If at the time of such distress the levy for the year is unknown the county auditor shall determine the amount of the taxes by applying the rate of levy of the preceding year to the assessment of the current year, and upon payment to the county treasurer of the amount so ascertained the county auditor shall make a certificate releasing the property from the lien of such taxes."

Pursuant to this statute the distress warrant was issued when it became apparent to the assessor that the property purchased by D was about to be removed from the county. It was the duty of the assessor under this statute to notify the auditor of the fact that D intended to remove the property subject to the tax lien from the county. It was proper under this statute for the county auditor to cause a distress warrant to be issued so as to prevent the removal of the property from the county until the personal property tax, as determined, was paid. After the property was seized by virtue of such distress warrant the same could be released only by the county auditor upon the payment to the county treasurer of the amount of the tax as determined by the auditor. After such payment the statute prescribes that "the county auditor shall make a certificate releasing the property from the lien of such taxes."

The second paragraph of Section 272.50 provides the procedure and the manner of giving notice by the sheriff after distraining personal property for taxes under the provisions of Section 272.51, supra.

From the foregoing statutory provisions we reach the conclusion that there has not been any valid release of the seizure of the property made by virtue of the distress warrant. The lien provided for in Section 272.50, supra, still remains unaffected by the purchase of the property by W and B upon execution sale, and the subsequent sale thereof by them to D. The removal of the property from the county in the circumstances disclosed by the facts should not defeat the plain intent of the law which provides for a lien upon personal property of B and for a seizure thereof so as to prevent the removal of such property from the county until the taxes as determined have been paid.

Whether the promises made by W and B, as stated in the facts, to pay the tax or to cause the same to be paid so as to escape distress proceedings constitutes conduct which would operate to nullify the release given is a matter for further consideration. We hold that the statutory provisions for seizure under the distress warrant issued are still available and may be pursued and the property may be seized thereunder. After seizure the requirements for giving notice to all persons entitled thereto as provided for in Section 272.50 should be complied with.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Todd County Attorney.
July 29, 1952. 421-A-9

233

Motor vehicles — Trailer house assessed as personal property on May 1 — Motor vehicle registration tax for same calendar year paid thereafter — Owner's remedy—M. S. 1949, Sec. 168.013, Subd. 5.

Facts

X purchased a new trailer house in the summer of 1949. It was brought to F, Minnesota, and placed on a lot adjoining the home of X's parents. The trailer house stayed there until July, 1950, at which time it was sold and a trailer house license for the second half of 1950 was purchased so that the trailer house could be moved to Wyoming. Later on the Minnesota Motor Vehicle Division of the Secretary of State's Office collected from X a trailer house license for the year 1949 and for the first half of the year 1950.

In the meantime, on May 1, 1950, the village assessor assessed the trailer house to X as personal property.

Question

Should X pay the 1950 personal property tax assessed, and if so, is he entitled to a refundment of the motor vehicle registration tax which he has paid for the first half of 1950?

Opinion

Minnesota Statutes 1949, Section 168.013, Subdivision 5, provides that if any person (other than a dealer in new and unused motor vehicles) against whom a tax has been levied on the ad valorem basis because of any motor vehicle shall, during the calendar year for which such tax is levied, be also taxed under the provisions of the motor vehicle registration tax law, then and in that event, upon proper showing, the Commissioner of Taxation shall grant to the person against whom the ad valorem tax was levied, an abatement of the entire ad valorem personal property tax upon the motor vehicle for that year.

It seems to us that this statutory provision furnishes a complete answer to X's problem.

CHARLES P. STONE,
Assistant Attorney General.

Becker County Attorney.
February 13, 1951. 421-C-25

234

Ownership—To be taxed against person acquiring at auction sale on May 1 —M. S. 1949, Sec. 273.01.

Facts and Question

You state that a farmer in your county is having an auction on May 1. The local assessor was in to see you and wanted to know if this personal property would be assessed against the farmer or if the assessment should be against those persons who purchase the property that day. You state further if you correctly interpret the above quoted law, the assessment would be against the purchasers and not the farmer.

Opinion

Minnesota Statutes 1949, Section 273.01, provides in part:

> " * * * Personal property shall be listed and assessed annually with reference to its value on May first; and, if acquired on that day, shall be listed by or for the person acquiring it."

It is the opinion of this office that the portion of the statute cited above answers the question presented, and if the sale is made and title to the property passes on May 1 by auction sale, such property is "acquired on that day" and is to be listed by or for the person acquiring it.

JOSEPH S. ABDNOR,
Assistant Attorney General.

Morrison County Attorney.
April 29, 1952. 421-A-14

235

Situs—Merchant or manufacturer—M. S. 273.29.

Facts

"A New Jersey corporation, having its home office in New York City, has its principal place of business in Minnesota, as well as its registered agent, in St. Paul in Ramsey County.

"All sales and inventory control is from its St. Paul office.

"It has packaged, bulk dry and bulk liquid merchandise stored in Ramsey County and in other counties throughout the state. Such merchandise is only warehoused elsewhere. It has no employees at any of the various warehouses. It exercises no control over the employees or operations at the warehouses. The bulk liquid comes into Minnesota in tank cars, and, at least in part, is delivered by tank trucks of the warehouse. It and the other merchandise is shipped out at the phoned or written instructions of the St. Paul office.

"One of the other counties assessed and taxed the merchandise in it. This tax was paid. Ramsey county also assessed and taxed this particular merchandise. This tax was not paid. The owner has filed an application for an abatement of the Ramsey County tax."

Question

"Assuming a foreign corporation has its principal place of business in Ramsey County, warehouses merchandise in other counties, has no employees at such warehouses, and the Ramsey County office has complete control of the sale and distribution of the merchandise, is it taxable in Ramsey County or where warehoused?"

Opinion

From your statement of facts we assume that the corporation is a "merchant" or "manufacturer" as those terms are defined in M. S. 1949, Section 272.03, Subdivisions 10 and 11. On that assumption the situs of the property for taxation purposes is governed by M. S. 1949, Section 273.29, which provides:

"The personal property pertaining to the business of a merchant or of a manufacturer shall be listed in the town or district where his business is carried on * * * "

It follows that if the corporation in question carries on business in those counties in which its personal properties are located on May 1, then the properties are taxed in such counties. On the other hand, if the corporation does not carry on business within those counties, then the property is taxed in Ramsey County, its principal place of business in Minnesota.

In **State ex rel Board of Commissioners of Carlton County v. Iverson**, 108 Minn. 316, 122 N. W. 165, the taxpayer had its principal place of business in Carlton County but had sent crews of men into St. Louis County to cut down trees and manufacture therefrom its products, ties, posts and poles which were stored in St. Louis County ready for shipment direct to purchasers. In that case the Supreme Court said:

> " * * * It cannot be said that it (the taxpayer) carried on business in St. Louis County merely because its employees were sent into that county to manufacture posts and poles from the standing timber * * * " (Parenthesis supplied.)

In **Minneapolis & Northern Elevator Company v. Board of County Commissioners of Clay County**, 60 Minn. 522, 63 N. W. 101, the Supreme Court said:

> "The business of merchandising includes both buying and selling, and a merchant may buy his goods in one place and sell them in another. But the provisions of the statute seem to have reference to the place of selling, and it seems to us that the place where the goods are kept for sale by a merchant is the place where they should be listed and assessed; * * * "

Since there is no mention in your request for opinion of selling activities or activities of any other kind carried on by this corporation outside of Ramsey County in the State of Minnesota, it is the opinion of this office that the properties referred to in your letter are all taxable in Ramsey County. We do not believe that the mere storage of merchandise in counties other than Ramsey County constitutes the carrying on of business in such other counties within the meaning of M. S. 1949, Section 273.29.

JOSEPH S. ABDNOR,
Assistant Attorney General.

Ramsey County Attorney.
April 22, 1952. 421-A-17

236

Vessel tonnage—Lieu provision determined as to personal property taxes— M. S. 1949, Sections 272.03, Subd. 2 (2), 276.01, and 289.01.

Facts

"Minnesota Statutes 1949, Chapter 289, the so-called vessel tonnage tax law, reads as follows:

> " 'The owner of any steam vessel, barge, boat, or other water craft owned within, or hailing from, any port of this state and employed in the navigation of international waters, annually, on or before July first,

may file with the state auditor a verified statement containing the name, name of owner, port of hail, and registered tonnage of such craft, and thereupon may pay into the state treasury a sum equal to five cents per net ton of such registered tonnage, and the treasurer shall issue his receipt therefor. Such payment shall be received in lieu of other taxes on such craft, state or municipal, for the year in which such payment is made. On or before December first, following, such treasurer shall pay one-half of such sum to the treasurer of the county wherein the port of hail of such craft is located'."

Question

1. Is the application of this law limited to steam vessels, steam barges, steam boats, or other steam water craft only?

Opinion

It is our opinion that the word "steam" as used in the foregoing section modifies only the word "vessel." Your first question is answered in the negative.

Question

2. "Being 'in lieu of other taxes on such craft, state or municipal, for the year in which such payment is made,' to which year's 'other taxes' is the statute applicable?"

Opinion

Unless otherwise taxed as provided by law, the water craft referred to in Section 289.01 will be taxed as personal property. Section 272.03, Subd. 2 (2). Such tax is levied annually and is due and payable on the first Monday in January of the year next following the year in which it is levied. Section 276.01.

Section 289.01 provides an alternative method of taxation of the water craft therein referred to. If he elects so to do, "the owner of any * * * water craft * * * annually, on or before July first, may file with the state auditor a verified statement * * * , and thereupon may pay into the state treasury a sum * * * ." This provision clearly provides that to pay the tonnage tax upon water craft for a given year, for example, 1952, such tax must be paid on or before July first, and in our example on or before July 1, 1952.

Section 289.01 also provides, "Such payment shall be received in lieu of other taxes on such craft, state or municipal, for the year in which such payment is made." This language is clear. It refers to the taxes "for the year in which such payment is made."

While this language may refer to any given year, we shall again use the year 1952 as an example.

As we have set forth above, the personal property taxes upon such water craft for the year 1952 are levied in the year 1952. As we have set forth above, the tonnage tax upon water craft described in Section 289.01

for the year 1952 is paid in 1952, but on or before July first thereof. It is clear then that the tonnage tax on such water craft which is paid in 1952 is in lieu of the personal property tax on such water craft which is levied in 1952 for the year 1952 and which is payable on and after the first Monday in January of 1953.

This answers your second question.

GEO. B. SJOSELIUS,
Deputy Attorney General.

State Auditor.
May 7, 1952. 421-C-4

REAL PROPERTY

237

Date taxable—Building removed between May 1 and first Monday in January—M. S. 1949, Sections 272.38 and 272.39 not applicable.

Facts

A tract of land, with a dwelling house thereon, situated in the village of Evan, Brown County, was assessed as of May 1, 1948. During the month of June, 1948, the tract was sold, the vendor reserving the right to remove the dwelling house. Some time during the month of June or July, 1948, the vendor removed the dwelling house and took it to the village of Sleepy Eye, Brown County.

When the tax assessed against the tract as of May 1, 1948, became due and payable on the first Monday in January, 1949, the purchaser of the tract objected to paying that portion of the tax attributable to the valuation of the dwelling house and offered to pay only that part of the tax based upon the valuation of the tract without the building, insisting that it was the duty of the county and state to collect the balance of the tax from the vendor. The vendor refused to pay any part of the tax.

The tax became delinquent and the tract was included in the May, 1950, tax judgment sale.

In the meantime, the purchaser placed another dwelling house on the tract (in July, 1948).

Question

Upon the above state of facts, what is the duty of the county or state with reference to the tax in question?

Opinion

All tax laws have to fix upon some particular date in the year at which to determine the taxability and value of property, for purposes of assessment and taxation. For purposes of ad valorem real property taxation, Minnesota Statutes 1949, Section 273.01 has fixed that date as May 1 of the even numbered year. All real property, if in being as taxable property on that date, is liable to taxation for that year at its then value.

County of Martin v. Drake, 40 Minn. 137, 41 N. W. 942.

Section 272.03, Subdivision 1, provides that for the purposes of taxation "real property" includes the land itself and all buildings, structures, and improvements or other fixtures on it. Section 273.08 requires the assessor to determine the true and full value of each tract of real property and enter the value thereof, "including the value of all improvements and structures thereon" opposite each description.

See Opinion No. 387, 1944 Published Opinions of Attorney General.

On May 1, 1948, the dwelling house which was later removed to Sleepy Eye was situated on the tract. The inclusion of the value of the dwelling house in the assessment of the tract was therefore proper.

Under our law taxes on real estate are a charge against the land and can be enforced only against the land. They create no personal liability or obligation on the part of the landowner and cannot be enforced against him personally.

Nortmann-Duffke Co. v. Federal Crushed Stone Co., 172 Minn. 567, 216 N. W. 250.

Since the tax became delinquent on the first Monday in January, 1950, the county officials took the only course which they could take when they sold the tract for taxes.

There was no duty on the part of county or state officials to proceed under the provisions of Minnesota Statutes 1949, Sections 272.38 and 272.39 to enjoin the removal of the house or to seize it after its removal from the tract because at the time the dwelling house was removed from the tract in June or July, 1948, the tax assessed as of May 1, 1948, was not due and payable, and the provisions of those sections of the statute therefore were not applicable.

CHARLES P. STONE,
Assistant Attorney General.

Brown County Attorney.
January 11, 1951. 412-A-24

238

Date taxable—Property acquired by gross earnings taxpayer after assessment date taxable for current year — M. S. 1949, Sections 272.31 and 273.01.

Facts

"A is the owner of real estate in Winona County, Minnesota. The property is assessed on May 1st in the name of A. In September of the same year A sells and conveys said real estate to X Telephone Company, a public utility, organized under the laws of the State of Minnesota. Said real estate is used by X Telephone Company in connection with its primary business."

Question

"Will X Telephone Company be required to pay the real estate taxes due and payable in the calendar year 1953 which were assessed in the calendar year 1952 in the name of X?"

Opinion

All real property subject to taxation is listed and assessed with reference to its value on May 1. M. S. 1949, Section 273.01. The taxes assessed become a lien on the property from May 1 in the year in which they are levied. M. S. 1949, Section 272.31. Under the facts you state, taxes are assessed as of May 1, become a lien on the property as of May 1, and are not relieved from taxation for that year by reason of the fact that such property was acquired by a gross earnings taxpayer subsequent to the assessment date. It was so held in **State v. Northwestern Telephone Exchange Company**, 80 Minn. 17, 82 N. W. 1090. See also **Foster v. City of Duluth**, 120 Minn. 484, 140 N. W. 129, and published opinion of the Attorney General for 1942, No. 332, Page 476.

It is, therefore, the opinion of this office that the law of the State of Minnesota requires the taxes so assessed to be paid.

JOSEPH S. ABDNOR,
Assistant Attorney General.

Winona County Attorney.
October 28, 1952. 474-D-1

239

Tax list—Undivided interest acquired by the State of Minnesota—How handled in assessment book and on tax list.

Facts

According to the records in the office of the register of deeds of Lincoln County "A" owned an undivided two-thirds interest in a certain tract of real property in one of the villages of the county and "B" owned the other undivided one-third interest. The tract was listed and assessed for

the years 1949 and 1950 in the name of "A." "B" paid one-third of the 1949 tax and received from the county treasurer of Lincoln County tax receipts covering the first and second half of the 1949 tax on "B's" undivided one-third interest. The 1949 tax on the undivided two-thirds interest was not paid. "A," the owner of the undivided two-thirds interest, died intestate on May 7, 1950, and left no surviving spouse or heirs. According to the final decree in "A's" estate, dated February 13, 1951, all interest of "A" in the property was decreed to the State of Minnesota in fee simple. Because the 1949 tax on the undivided two-thirds interest was not paid, the tract was included in the delinquent tax list for the year 1949. No part of the 1950 tax assessed against the tract has been paid as yet.

Questions

"1. Would the county auditor be authorized to drop the tax against the undivided two-thirds interest now owned by the State from the 1951 extended tax list and to carry only the tax on the undivided one-third owned by 'B' on his tax and assessment rolls for the year 1951 in view of the fact that there was no assessment made in 1951 and that the State's undivided two-thirds interest is exempt from taxation for the year 1951?

"2. Should the county auditor in making up the 1952 assessment book for assessment purposes describe 'B's' interest as follows: 'an undivided one-third interest in and to' and then describe the real property?"

Opinion

We answer your first question in the affirmative.

Minnesota Statutes 1949, Section 273.03, provides that the county auditor shall annually provide the necessary assessment books and blanks, and shall make out, in the real property assessment book, complete lists of all lands or lots subject to taxation, showing the names of the owners, if to him known. Since only the undivided one-third interest owned by "B" is subject to taxation for the year 1951, it is our opinion that the description in the real estate assessment book for the year 1951 should be carried as "an undivided one-third interest in and to" the tract (describing it), showing the name of "B" as the owner.

See **Wray v. Litchfield** (1896), 64 Minn. 309, 67 N. W. 72.

Since the undivided two-thirds interest in and to the tract was owned by the State of Minnesota during all of 1951, and therefore is exempt from taxation for that year, the description of that interest should not be included in the 1951 real property assessment book as property subject to taxation.

You are, of course, aware of the fact that under the holding of the Minnesota Supreme Court in the case of **Foster v. City of Duluth** (1913), 120 Minn. 484, 140 N. W. 129, no further proceedings should be taken to enforce and collect the unpaid portion of the 1949 tax against the undivided two-thirds interest of the State of Minnesota in and to the tract, since all such

proceedings would be void. However, since this tax was validly assessed and spread at a time when this undivided interest was still in private ownership, the 1949 tax will have to remain on the tax books, and will again become enforceable if and when the State of Minnesota conveys its undivided interest to a private individual. Under the holding of the **Foster** case, no part of the 1950 tax should have been spread against the undivided two-thirds interest (which passed to the State of Minnesota on May 7, 1950) and an application addressed to the Commissioner of Taxation for the abatement of the proportional part of said tax attributable to said interest is in order.

"B" may proceed to pay the proportional part of the 1950 tax attributable to his undivided one-third interest, under authority of Minnesota Statutes 1949, Section 276.07, and his undivided interest will then be protected from any subsequent proceedings to enforce collection of the tax against the other undivided interest.

Opinion No. 434, 1938 Published Opinions of the Attorney General, file No. 474-G-2.

We answer your second question in the affirmative, for the same reasons which we gave in answering your first question.

CHARLES P. STONE,
Assistant Attorney General.

Lincoln County Attorney.
May 23, 1951. 474-G-2

REDEMPTION

240

Expiration—Notice of expiration of time for redemption—Cost thereof included in cost of redemption—Amount of such costs—Assignee of certificate after notice of expiration given by county officials must also serve notice of expiration of time for redemption—M. S. 1949, Sections 281.02 and 281.24.

Facts

"The County Auditor has prepared and posted a Notice of Expiration of Redemption on lands about to forfeit to the State for non-payment of taxes for the year 1945. The Sheriff has completed service and returned his affidavit for same to the County Auditor. Publication of Notice has been completed and an affidavit thereof filed with the County Auditor. The 60-day redemption period has not expired. The County has incurred the expense of serving and publishing the foregoing notices."

Question No. 1

"Should the County Auditor include in the amount to redeem any of the lands in the said list, any amount for reimbursement to the County for such service costs? If so, how much should he charge?"

Opinion

The County Auditor should include in the amount to redeem any of such land the amount expended by the county for sheriff's fees in duly serving the notice of redemption on such land.

This conclusion is required by Minnesota Statutes 1949, Section 281.02, which provides in part:

"Any person redeeming any parcel of land shall pay into the county treasury, for the use of the funds or person thereto entitled:

"(1) If such parcel was bid in for the state and its right has not been assigned, the amount for which the same was bid in, with interest at 12 per cent per annum from the date of sale, and the amount of all delinquent taxes, penalties, costs, and interest thereon at such rate from and after the time when such taxes become delinquent;

"(2) If the right of the state has been assigned pursuant to Section 280.11, the amount paid by the assignee, with interest at 12 per cent per annum from the date when so paid, and all unpaid delinquent taxes, interest, costs, and penalties accruing subsequently to such assignment; and if the assignee has paid any delinquent taxes, penalties, costs, or interest accruing subsequently to the assignment, the amount so paid by him, with interest at 12 per cent per annum from the day of such payment; * * * "

Your first question is answered by Paragraph (1) of the statute cited above which requires the inclusion of such costs. In reading this statute it should be remembered that the interest rate on delinquent taxes has not been maintained by the legislature at the 12 per cent figure. See:

Laws of Minnesota 1931, Chapter 315, Section 1.

Laws of Minnesota 1933, Chapter 121, Section 3.

Laws of Minnesota 1943, Chapter 281, Section 2.

M. S. 1949, Section 279.03.

The cost of publishing the notice of expiration of redemption in the manner provided by Minnesota Laws 1935, Chapter 278, Section 8 (c) (M. S. 1949, Section 281.22, Subd. 3) is not to be included in the cost of redemption. In a previous opinion, this office has ruled that it would be impossible to break down the cost of publishing such notice and attach such cost to the individual tract of land. Opinion May 8, 1939, File No. 419-F-1.

Question No. 2

"Would the same apply in a case where a state assignment certificate is purchased on any of these parcels?"

Opinion

Section 281.02 (2) cited above requires the inclusion of "the amount paid by the assignee" and "all unpaid * * * costs * * * arising subsequently to such assignment." If notice of expiration of time to redeem has been served by the county before a state assignment certificate is issued, Minnesota Statutes 1949, Section 280.11, requires the inclusion of costs in "the amount paid by the assignee." It follows that the sheriff's fees paid by the county in serving the notice of time to redeem, having been included in the amount paid by the assignee, are includible in the amount required to redeem.

The costs of serving and publishing the notice of expiration of redemption incurred pursuant to the provisions of M. S. Section 281.13, by the assignee of a state assignment certificate are also included in the cost of redemption. In this case such costs include not only the sheriff's fees but the cost of publishing. I call your attention to an opinion of this office dated May 27, 1947 (1948 Published Opinions of the Attorney General No. 197, File 419-f-1) wherein this office held that when the cost for publishing a notice of expiration of time for redemption is paid by the holder of a tax assignment certificate, such cost must be repaid by the party offering to redeem such land before a certificate of redemption may be issued.

Question No. 3

"In the event we have such a purchaser of a state assignment certificate under the above stated facts, does he acquire all of the rights of the state, or must he still proceed to publish his own Notice of Expiration of Redemption?"

Opinion

This question is answered by Minnesota Statutes 1949, Section 281.24, which provides:

"Every parcel of land heretofore bid in for the state at any tax judgment sale and not heretofore sold or assigned to an actual purchaser, and every parcel of land hereafter bid in for the state at any such sale, unless redeemed, shall remain subject to assignment to an actual purchaser in the manner provided by law until the date of forfeiture of such parcel, but no longer. **In case any such parcel shall be so assigned after notice of expiration of redemption has been given by the county auditor, such notice shall be ineffectual as to such parcel, and the time for redemption of such parcel shall continue until termi-**

nated after notice given as in other cases of parcels assigned to actual purchasers." (Emphasis supplied.)

JOSEPH S. ABDNOR,
Assistant Attorney General.

Itasca County Attorney.
April 21, 1952. 419-f-1

TAX-FORFEITED LANDS

241

Conveyance — Conveyed to a governmental subdivision for a public use — Reconveyance for non-use or abandonment discussed—M. S. 1949, Section 282.01, Subd. 1.

Statement and Facts

"It has been brought to our attention that for several years past it has been the practice in this county for the county board to accept on behalf of the State of Minnesota reconveyances of tax forfeited lands on failure of governmental subdivisions to use such lands for the purpose for which they had been conveyed by the Commissioner of Taxation under the following provisions of M. S. 1949, Sec. 282.01:

'The commissioner of taxation shall have power to convey by deed in the name of the state any tract of tax-forfeited land held in trust in favor of the taxing districts, to any governmental subdivision for any authorized public use, provided that an application therefor shall be submitted to the commissioner with a statement of facts as to the use to be made of such tract and the need therefor and the recommendation of the county board. The deed of conveyance shall be upon a form approved by the attorney general and shall be conditioned upon continued use for the purpose stated in the application.'

"A form of the resolution used by the county board is enclosed. After the adoption of the resolution by the county board the county auditor causes the deed to be recorded and notifies the Commissioner of Taxation by forwarding to him a certified copy of the resolution and advising him that the deed has been recorded, also giving him information as to the original conveyance from the State.

* * * *

"It seems that the county board in times past has accepted reconveyances of a portion of lands theretofore conveyed, * * * ."

Questions

"(1) Whether the practice of acceptance of deeds of reconveyance by the county board is correct; and

"(2) If so, what are its duties in respect to the matters hereinbefore set forth?"

Opinion

Your first question is answered in the negative.

M. S. 1949, Section 282.01, Subd. 1, which you have quoted in part in your letter, contains the authorities relating to the conveyance of tax-forfeited lands to a governmental subdivision for a public use. The entire power and duty to act with reference to such conveyance is conferred upon the state commissioner of taxation conditioned only upon an application for such land bearing the recommendation of the county board. The power and duty to make such recommendation is the only power or duty conferred upon the county board with reference to tax-forfeited lands conveyed or to be conveyed to a governmental subdivision for a public use. We are unable to find any statute conferring any authority upon the county board with reference to lands which have been conveyed through action of the commissioner of taxation to a governmental subdivision for a public use. Certainly, there is no statute authorizing or requiring an acceptance by the county board on behalf of the state of such land.

The statute imposes upon the governing body of a governmental subdivision to which tax-forfeited land has been conveyed for a public use the duty of authorizing a reconveyance of such land to the State of Minnesota if it fails to put the land to the proper use or it shall abandon such use. The duty so imposed is mandatory. The statute does not require acceptance of the reconveyance on behalf of the state. If the governing body fails to provide for reconveyance when it should, the statute vests in the commissioner of taxation the power and duty to act. If and when the tax-forfeited land is reconveyed to the state, it is the duty of the county board to classify and appraise the land so that it can again be offered for sale by the county auditor as provided by law. This answers your second question.

With reference to our opinion of April 12, 1950, 425c-11, to Faribault City Attorney, we adhere to that opinion. However, we wish to point out that in some instances one conveyance of tax-forfeited land to a governmental subdivision has included a large number of parcels of land which were conveyed for different public uses. This is a different situation than the one before us in the April 12, 1950, opinion. In the situation which we are now considering, for the reasons given in the April 12, 1950, opinion, it would be the duty of the governmental subdivision to reconvey all the parcels of land conveyed for a common public use. At the same time, the governmental subdivision could make application for a conveyance of the portions of land

which it desired to use. Such application would require the recommendation of the county board. The commissioner of taxation could then make such conveyance if he deemed it proper so to do.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Hennepin County Attorney.
April 4, 1952. 425-C-11

Editorial Note: Section 282.01 amended by L. 1953, C. 144, S. 1.

242

Easements — Auditor authorized to grant easement or permit for electric power lines, but not for drainage ditch—L. 1951, C. 203, Sec. 2, which amends M. S. 1949, Sec. 282.04.

Question

"1. Does the County Auditor have authority to grant an easement for an REA electrical transmission line over and across tax forfeited lands not within a so-called 'conservation area' without the approval of the Commission of Conservation?"

Opinion

M. S. 1949, Section 282.04, as amended by L. 1951, C. 203, Section 2, grants authority to a county auditor, upon conditions therein contained, to grant easements or permits over unsold tax-forfeited lands for electric power lines. The tax-forfeited lands therein referred to are tax-forfeited lands held in trust by the state for the taxing districts. There is no provision therein requiring approval by the commissioner of conservation of such easement or permit.

Question

"2. Does the County Auditor have authority to grant an easement to a farmer, or group of farmers, to construct and maintain an open drainage ditch to drain his or their farm lands over and across tax forfeited lands not within a so-called 'conservation area' without the approval of the Commissioner of Conservation?"

Opinion

M. S. 1949, Section 282.04, as amended by L. 1951, C. 203, Section 2, states the specific uses for which easements or permits may be granted. Such enumeration is exclusive. It does not include an easement or permit for an open drainage ditch. The county auditor, therefore, has no authority to grant an easement or permit over tax-forfeited lands for an open drain-

age ditch. There are specific statutes relating to the construction and maintenance of drainage ditches. Perhaps they offer a method which can be used to accomplish the wishes of those interested.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Mahnomen County Attorney.
July 17, 1952. 700-A-3

243

Repurchase — Formerly owned by municipality may be repurchased or an application for conveyance made — M. S. 1949, Section 282.241, as amended by L. 1951, C. 514; M. S. 1949, Section 282.01, Subd. 1. M. S. 1949, Section 279.33.

Facts

"The Village of Danvers in Swift County, Minnesota, was the owner of five lots located in said village. There was a ditch lien on these five lots and in 1943 the proper authority of the village went to the County Auditor's office, received a statement of the unpaid balance due on said ditch lien and paid that unpaid balance. However, the Village neglected to pay the current installment due on said lien for that year 1943. That installment was never paid and on November 23, 1948, the land was forfeited. The lots have not been offered for sale at a tax-forfeited land sale since their forfeiture. The Village's failure to pay the 1943 installment was just an oversight and the Village is now anxious to get a state deed to these lots."

Question

"Does the County Auditor now have to have the lots appraised and offer them for sale at a regular tax-forfeited land sale? Is there any shorter procedure that could be used to get the Village a deed to these lots?"

Opinion

Your attention is called to Minnesota Statutes 1949, Section 282.241, as amended by Laws 1951, Chapter 514. It appears to us that the Village of Danvers may, under this statute, repurchase the tax-forfeited lands referred to upon compliance with the conditions set forth.

If these lands are to be used by the village for a public purpose, the village may apply to the Commissioner of Taxation for a conveyance of the lands to the village on condition that they be used for such purpose. This procedure is authorized by Minnesota Statutes 1949, Section 282.01, Subdivision 1. If this procedure is used, the village would not be required to pay anything for the title to the land as the Commissioner of Taxation

should approve the application and make the conveyance. Of course, if the land is not to be used for a public purpose, the only procedure is that which I have referred to in the preceding paragraph.

In the preceding discussion we have assumed that the real property in question was properly forfeited. You do not state sufficient facts so that we can determine this question.

We would suggest that you read **Foster v. City of Duluth,** 120 Minn. 484, 140 N. W. 129, and **Christian Business Men's Committee of Minneapolis, Inc. v. State,** 228 Minn. 549, 38 N. W. (2d) 803. If the real property was exempt from taxation and not properly forfeited, an application to have the forfeiture set aside may be made to the Commissioner of Taxation under Minnesota Statutes 1949, Section 279.33.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Swift County Attorney.
August 23, 1951. 425-C-13

Editorial Note: Section 282.241 amended by L. 1953, C. 471, S. 1.

244

Repurchase—Purchase agreement—Defaulted—Reinstatement thereof governed by Minn. St. 1949, Sec. 282.341 — L. 1947, C. 366, as amended by L. 1951, C. 124, not applicable to such contract.

Facts

"Certain tax-forfeited land was sold upon installments and the contract thereafter cancelled by the County Auditor for failure of the purchaser to continue with the installment payments. Less than 50% of the purchase price was paid by the purchaser. The purchaser now contends that Laws 1951, Chapter 124, should be construed to permit an ordinary purchaser of tax-forfeited lands on installments to 'repurchase' under said Chapter notwithstanding the express provision covering that situation made by Laws 1945, Chapter 98, Sections 1 and 2 (282.341)."

Question

"May Laws 1951, Chapter 124, be so construed?"

Opinion

Your question is answered in the negative.

The agreements referred to in Laws 1951, Chapter 124, as agreements for repurchase of tax-forfeited land are agreements which were made under Minnesota Statutes 1949, Section 282.241, as amended by Laws 1951, Chap-

ter 514, and the predecessor laws thereof. Under these repurchase laws, the repurchase could only be made by the owner at the time of forfeiture, or his successor. The purchaser to whom you refer did not make a repurchase, according to your statement of facts. He purchased tax-forfeited lands when they were sold at public sale. The purchase agreement which he has is not within the purview of Section 282.241, as amended. The reinstatement of such a contract of purchase is governed by Minn. St. 1949, Section 282.341.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Hubbard County Attorney.
September 13, 1951. 425-C-6

245

Sale—Specific land described may be sold under M. S. 1945, Sections 282.221 to 282.226, inclusive—Veterans' privileges—M. S. 1945, Sections 282.031 to 282.037—**Conservation—Agricultural lands.**

Facts

"Laws 1951, Chapter 7, relates to a tract of tax-forfeited land in Beltrami County therein described, which is situated in the Red Lake game preserve created under Minnesota statutes, Sections 84A.01 et seq., and is therefore the absolute property of the state. It borders on a meandered lake, and so has been deemed to be reserved from sale under Minnesota statutes, Section 92.45.

"However, the 1951 act above cited lifts this reservation from the tract in question by expressly authorizing the commissioner of conservation, under certain conditions, on application of the county board, to 'authorize and approve the classification and sale of said land as non-conservation land.' The act provides that the sale is to be made under the provisions of Minnesota statutes 1945, Sections 282.221 to 282.226, inclusive, and acts amendatory thereof. The act contains further provisions for making allowance for the value of improvements made upon the land under certain conditions.

"It appears that a war veteran, who has had no previous interest in the land or improvements thereon, has made application to purchase this land under the provisions of Minnesota statutes, Sections 282.031 to 282.037."

Questions

1. " * * * whether this land is subject to purchase by a war veteran under the statutes last above cited.

2. "If so, what action should be taken, if any, respecting allowance for improvements on the land in case a sale to the war veteran should be consummated?"

Opinion

The sale of the land in question can only be had upon compliance with the conditions imposed by L. 1951, C. 7. These conditions, as far as here material, are hereinafter set forth.

The **first** condition is that "the commissioner of conservation shall determine, after investigation, that the land heretofore forfeited in the state for nonpayment of taxes in Beltrami County * * * is suitable for any lawful private use and is not suitable or necessary for public use."

The **second** condition is that the county board must classify the land as non-conservation land and order it sold.

The **third** condition is that the county board, after it has so classified the land and ordered its sale, must apply to the commissioner of conservation asking that he authorize and approve the classification and sale.

The **fourth** condition is that the commissioner of conservation approve such classification and sale as non-conservation land.

The **fifth** condition is that, after meeting the foregoing conditions, the land must "be sold in the manner provided for the sale of agricultural lands under the provisions of Minnesota Statutes 1945, Sections 282.221 to 282.226, inclusive, and acts amendatory thereof."

The **sixth** condition is the following:

> " * * * If there are any improvements upon the land made by any person who shall be determined by the county board, with the approval of the commissioner of conservation, to have made the same in good faith, believing that such improvements were upon land belonging to him, the value of such improvements shall be appraised separately, * * * ."

The **seventh** condition is the following:

> " * * * if at the sale of such land such person or his successor in interest shall be the purchaser, he shall not be required to pay for such improvements."

The **eighth** condition is the following:

> " * * * If anyone other than such person or his successor shall purchase the land, the provisions of Minnesota Statutes 1945, Section 92.06, subdivision 4, shall apply as far as applicable."

As stated above as the fifth condition, C. 7 provides that the land, if sold, shall "be sold in the manner provided for the sale of agricultural lands under the provisions of Minnesota Statutes 1945, Sections 282.221 to 282.226, inclusive, and acts amendatory thereof." It is significant that it does not provide generally that the land shall be sold as agricultural lands in the manner provided by law. There is a maxim in the law that "the expression of one thing is the exclusion of another." Applying this maxim to the situation before us, it is our opinion that the specification by the legislature

of sale under the provisions of M. S. 1945, Sections 282.221 to 282.226, inclusive, excludes authority to sell under M. S. 1945, Sections 282.031 to 282.037, inclusive.

Your first question is answered in the negative.

The answer to your first question makes it unnecessary to answer your second question.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Commissioner of Conservation.
April 1, 1952. 310

Editorial Note: Section 282.031 amended by L. 1953, C. 81, S. 1, and C. 699, S. 11. Section 282.032 amended by L. 1953, C. 699, S. 12.

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