# REPORT

OF THE

# ATTORNEY GENERAL

TO THE

# GOVERNOR
# STATE OF MINNESOTA

1953 - 1954

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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 1953-1954.

Respectfully yours,

J. A. A. BURNQUIST,
Attorney General.

December 31, 1954.

## ATTORNEYS GENERAL OF MINNESOTA

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### 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 Dec. 31, 1954 |

## STAFF

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### ATTORNEY GENERAL

J. A. A. Burnquist

### DEPUTY ATTORNEYS GENERAL

Louis B. Brechet
Geo. B. Sjoselius

### ASSISTANT ATTORNEYS GENERAL

Joseph S. Abdnor
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
G. L. Ware

### DEPARTMENT CLERK

Genevieve K. Spangenberg

## TABLE OF CONTENTS


| | Page |
|---|---|
| Attorneys General of Minnesota | 4 |
| Compilation of Cases and Court Proceedings | 8–15 |
| Criminal Cases and Prosecutions Reported by County Attorneys for Year 1953 | 16–19 |
| Index to Opinions | 347–386 |
| Index to Statutes | 389–393 |
| Letter of Transmittal | 3 |
| Selected Opinions | 22–344 |
| Staff | 5 |

## UNITED STATES SUPREME COURT

| DOCKET | TITLE | ACTION | DECISION OR STATUS |
|---|---|---|---|
| 6445 | Leo Arens, et al. v. Village of Rogers | Declaratory judgment — municipal liquor store | 347 U. S. 949<br>74 S. Ct. 680 |
| 6448 }<br>6517 } | Northern Natural Gas Co. | Certiorari — rate increase | 346 U. S. 922<br>74 S. Ct. 307, 312 |
| 6487 | Robert Lee Breeding v. Warden, State Prison | Certiorari—habeas corpus | 347 U. S. 941<br>74 S. Ct. 645 |
| 6493 | Robert J. Koalska v. Warden, State Prison | Certiorari | 346 U. S. 837<br>74 S. Ct. 55<br>347 U. S. 963<br>74 S. Ct. 713 |
| 6532 | Robert Kubus v. Warden, State Prison | Certiorari | Denied |
| 6543 | Lester Lavern Richter v. Warden, State Prison | Certiorari | 347 U. S. 979<br>74 S. Ct. 792 |
| 6547 | Phillips Petroleum Co. v. State of Wisconsin and related cases (Amicus curiae) | Certiorari — natural gas rates | 347 U. S. 672<br>74 S. Ct. 794 |

## UNITED STATES CIRCUIT COURT OF APPEALS

| | | | |
|---|---|---|---|
| 6433 | United States v. Liquor Control Commissioner, et al. | Price control | Dismissed upon stipulation |
| 6448 }<br>6517 } | Northern Natural Gas Co. | Rate increase | 206 F. 2d 690 |

## UNITED STATES DISTRICT COURT

| | | | |
|---|---|---|---|
| 6404 | United States v. Commissioner of Taxation; Polk County, et al. | Quiet title — tax lien | Judgment for United States |
| 6405 | United States v. Commissioner of Taxation, Wadena County, et al. | Quiet title — tax lien | Judgment for United States |
| 6463 | Roscoe MacKean v. Warden, State Prison | Habeas corpus | Denied |
| 6493 | Robert J. Koalska v. Warden, State Prison | Habeas corpus | Denied |
| 6501A | Elkon, Inc., et al. v. Angus H. Taylor, et al. (Pharmacy Board)<br>Walgreen Co. v. Idem<br>Snyder's Drug Stores, Inc. et al. v. Idem | Declaratory judgment — validity of regulations | At issue |
| 6526 | Ray D. Butler v. Warden, State Prison | Habeas corpus | Denied |
| 6532 | Robert Kubus v. Warden, State Prison | Habeas corpus | Denied |

## MINNESOTA SUPREME COURT, CIVIL

| DOCKET | TITLE | ACTION | DECISION OR STATUS |
|---|---|---|---|
| 6067 | Lake Mining Company | Royalties — iron ore in Syracuse Lake bed | Affirmed |
| 6186 | State v. John Anderson, et al.—Lac qui Parle Project | | |
| 6253 | Minnesota Power & Light Co. | Registration — mineral rights | Briefs filed |
| 6370 | Village of Pierz | Public Examiner's audit fee | 62 N. W. 2d 498 |
| 6414 | Henry C. Domeier v. Public Examiner | Injunction — Sleepy Eye audit | Reversed |
| 6445 | Leo Arens, et al. v. Village of Rogers | Declaratory judgment — municipal liquor store | 61 N. W. 2d 508 |
| 6458 | Addison Miller Estate | Taxation of costs | 64 N. W. 2d 1 |
| 6464 | Andrew C. Dunn v. Director of Vocational Education, et al. | Equipment contract | 60 N. W. 2d 14 |
| 6471 | C. B. Thomas v. Industrial Commission | Prohibition against mandamus — minimum pay rate | 62 N. W. 2d 809 |
| 6476 | Morrison County Ind. School District No. 6 v. Board of Education | State aid | 65 N. W. 2d 668 |
| 6487 | Robert Lee Breeding v. Warden, State Prison | Habeas corpus | 59 N. W. 2d 314<br>60 N. W. 2d 4<br>62 N. W. 2d 498 |
| 6493 | Robert J. Koalska v. Warden, State Prison | Habeas corpus | 62 N. W. 2d 842<br>66 N. W. 2d 337 |
| 6496 | Hannah Skjefstad v. Red Wing Potteries Inc. and State Treasurer | Workmen's compensation —special fund | 60 N. W. 2d 1 |
| 6497 | Eunice Johnston v. State | Certiorari—benefits under L. 1947, c. 616 | 62 N. W. 2d 347 |
| 6503 | Margit Kaljuste v. Hennepin County Sanatorium Commission, et al. | Certiorari—benefits under L. 1947, c. 616 | 61 N. W. 2d 757 |
| 6508 | State ex rel. Clifford W. Gardner v. Secretary of State, et al. | Mandamus — Judicial salary bill | 62 N. W. 2d 52 |
| 6510 | Independent Consolidated School District No. 46, of Jackson County, Minnesota | Quo warranto — consolidation election | 65 N. W. 2d 117 |
| 6515 | Clarence Malakowsky v. Superintendent, St. Cloud Reformatory | Habeas corpus | Denied |
| 6521 | P.K.M. Electric Cooperative, Inc. | Commutation of personal property tax | 65 N. W. 2d 871 |
| 6522 | William M. Bollenbach, et al. | Condemnation of right-of-way to Five Lake — navigability | 63 N. W. 2d 278 |
| 6523 | Hilda Carroll v. State | Certiorari—benefits under L. 1947, c. 616 | 64 N. W. 2d 166 |
| 6524 | Amalgamated Food Handlers Local 653A, et al. | Certification of bargaining agent | Briefs filed |
| 6526 | Ray D. Butler v. Warden, State Prison | Habeas corpus | 66 N. W. 2d 1 |
| 6532 | Robert Kubus v. Warden, State Prison | Habeas corpus | 65 N. W. 2d 177 |
| 6533 | In re Bradley's Estate | Redetermination of inheritance tax | 63 N. W. 2d 374 |
| 6534 | Village of Tonka Bay v. Commissioner of Taxation | Equalization | 64 N. W. 2d 3 |
| 6535 | Harry A. Johnson v. Morris G. Levy, Sr., et al. | Unemployment benefits | 61 N. W. 2d 846 |

## MINNESOTA SUPREME COURT, CIVIL—Continued

| DOCKET | TITLE | ACTION | DECISION OR STATUS |
|---|---|---|---|
| 6536 | Pearl B. Swanson v. Minneapolis-Honeywell Regulator Company | Unemployment benefits | 61 N. W. 2d 526 |
| 6537 | Estate of Mayer Weisberg v. State | Attorney's fees — escheated estate | 64 N. W. 2d 370 |
| 6540 | Goldie Dixon v. Warden, State Prison | Habeas corpus | 62 N. W. 2d 926 |
| 6543 | Lester Lavern Richter v. Warden, State Prison | Habeas corpus | 63 N. W. 2d 265<br>66 N. W. 2d 17 |
| 6546 | Wallace Peifer v. Monte C. Loomis and State Treasurer, et al., Garnishees | Appeal from garnishment dismissal | Dismissed |
| 6548 | Harold J. Reynolds | Certified question—constitutionality of M. S. 1953, § 615.17 | Affirmed |
| 6550 | Western Auto Supply Co. v. Commissioner of Taxation | Certiorari—franchise tax liability | Briefs filed |
| 6551 | Kenneth Melvin Veblen v. Warden, State Prison | Habeas corpus | 65 N. W. 2d 619 |
| 6554 | Douglas Bruno May v. Warden, State Prison | Habeas corpus | 65 N.W. 2d 657 |
| 6562 | Leonard R. Dickinson v. Secretary of State | Order to show cause — election filing | 65 N. W. 2d 654 |
| 6564 | Hjalmar Petersen v. Secretary of State | Order to show cause — descriptive words on ballot | 66 N. W. 2d 15 |
| 6565 | Traverse County School District No. 56, et al. v. Commissioner of Education, et al. | Certiorari—consolidation | 66 N. W. 2d 20 |
| 6567 | Byron Allen, et al. v. Secretary of State (In re Frank P. Ryan) | Election—Filing by petition—last day | 66 N. W. 2d |
| 6572 | E. R. Starkweather v. Frank Blair, Director of State Game and Fish Division | Bill of attainder | Briefs filed |
| 6573 | Clarence Fisher, Axel and Anna Swanson, et al. | Flowage easement — Hoff and Harder Lakes | Record filed |
| | National Bank of Bemidji v. Northern Minnesota National Bank of Duluth, State, Intervening | Tax claim | Argued |
| | Viola E. Nyberg v. R. N. Cardozo, Inc., and State Department of Employment Security | Employment discontinued | Argued |
| | Poultry Processing Plants, et al. v. Land O'Lakes Creameries | | |
| | Orders State Department Employment Security | Seasonal employment | Argued |

## MINNESOTA SUPREME COURT, CRIMINAL

| DOCKET | TITLE | ACTION | DECISION OR STATUS |
|---|---|---|---|
| 896A | Eugene Cole | Rape | 59 N. W. 2d 919 |
| 898A | William L. Thompson | Misappropriation of funds —double jeopardy | 62 N. W. 2d 512 |
| 899A | Robert Billington | Murder | 63 N. W. 2d 387 |
| 900A | Eugene Rasmussen | Burglary | 63 N. W. 2d 1 |
| 903A | Oscar T. Johnson | Failure to candle eggs and failure to give dockage | 64 N. W. 2d 145 |
| 904A | International Harvester Company | Violation "pay-while-voting" statute | 63 N. W. 2d 547 |
| 905A | Anthony Schifsky | Assault — certified questions | Argued |
| 910A | Elmer Edward Brady | Criminal negligence in operation of motor vehicle | Argued |
| 911A | Glen Johnson | Assault | Argued |
| 912A | Leo DePauw | Indecent assault | Briefs filed |
| 913A | Jack Hayes | Manslaughter — certified questions | Argued |

## MINNESOTA DISTRICT COURTS, CIVIL

| | | | |
|---|---|---|---|
| 6078 | Youngstown Mines Corp., et al. | Iron ore—Rabbit Lake bed | Findings for defendant |
| 6253 | Minnesota Power & Light Co. | Registration — mineral rights | Judgment for state — for defendants |
| 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 | Findings for defendants |
| 6288 | Robert M. Adams, et al. | Title to iron ore under Fortage Lake | Awaiting trial |
| 6289 | Cherrill 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 | Findings for defendants |
| 6291 | Adams Corporation, et al. | Title to iron ore under Spruce Lake | Awaiting trial |
| 6293 | Arthur Iron Mining Co. v. State, et al. | Registration (Snowball Lake) | Judgment for applicant |
| 6296 | Charitable Trust under Will of Gilbert M. Walker | Petition by T. B. Walker Foundation for instructions | Response filed |
| 6297 | Adams Holding Co., et al. | Title to iron ore under Clinker Lake | Findings for defendants |
| 6298 | Byron H. Coolidge, et al. | Title to iron ore under Curley Lake | Findings for defendants |
| 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 | Findings for defendants |
| 6302 | The Adams Corporation, et al. | Title to iron ore under Little Rabbit Lake | Findings for state |
| 6331 | Clifford H. Thomas, et al. v. State Auditor, et al. | School land certificate—tax forfeiture | Judgment for defendants |

## MINNESOTA DISTRICT COURTS, CIVIL—Continued

| DOCKET | TITLE | ACTION | DECISION OR STATUS |
|---|---|---|---|
| 6425 | Minneapolis Street Ry. Co. | Depreciation reserve | Dismissed |
| 6426 | St. Paul City Ry. Co. | Depreciation reserve | Dismissed |
| 6435 | Christine Bothum, et al. v. Hyme Silver, Dec'd, et al. | Surety on livestock dealer's bond | Dismissed |
| 6436 | Longyear Holding Company v. State | Expungement of deeds from record | Judgment for plaintiff |
| 6463 | R. G. N. MacKean v. Warden, State Prison | Habeas corpus | Denied |
| 6471B | C. B. Thomas v. Industrial Commission | Mandamus — minimum pay to women and minors | At issue |
| 6480 | Bodel Corporation v. State | Quiet title to mineral rights—tax lien | Judgment for plaintiff |
| 6483 | Thos. A. Gall, et al. | Quiet title (Prairie River) | Judgment for state |
| 6484 | Michael Halek v. State, et al. | Title registration (Palmer Lake) | State's claim settled |
| 6487 | Robert Lee Breeding | Habeas corpus | Denied |
| 6490 | Ward Bright, et al. | Livestock dealer's license | Dismissed |
| 6491 | James Innes | Telephone service — Watkins and Kimball | Settlement pending |
| 6495 | William R. Hedberg, Inc. v. H. Brooks & Company, Inc. | Certiorari—order of Commissioner of Agriculture on potato sale | Affirmed |
| 6498 | Ed Linehan v. Industrial Commission | Certiorari—wage order | Argued |
| 6500 | State v. Charles Romkey, et al. | Condemnation for Moorhead State Teachers College | Certificate filed |
| 6501 | Snyder's Drug Stores, Inc., et al. v. State Pharmacy Board | Declaratory judgment — validity of regulations | Dismissed |
| 6502 | Harold Duane Berge v. Director of Public Institutions and Superintendent, Rochester State Hospital | Habeas corpus | Released — commitment invalid |
| 6504 | Zontelli Bros. Inc. v. State, et al. | Quiet title—mineral rights | Judgment for plaintiff — mineral rights to state |
| 6505 | In re Birth Record of Thatcher | Inspection of birth records | Granted |
| 6506 | Duluth, Missabe & Iron Range Ry. Co. | Railroad & Warehouse Commission order for re-establishment passenger service | Submitted on briefs |
| 6507 | Chicago and North Western Ry. Co. | Railroad & Warehouse Commission order — agency service at St. Peter | Affirmed |
| 6509 | Board of Regents v. James T. Hillhouse, et al. | Condemnation for University Campus | Certificate filed |
| 6511 | Harry Fuhrman v. Village of Crosby | Declaratory judgment — village ordinance and M.S.A. 329.11 | Dismissed |
| 6512 | City of Little Falls | Claim for public examiner's audit | Briefs filed |
| 6513 | Roy E. Hilton v. Commissioner of Iron Range Resources and Rehabilitation and Deerwood Industries, Inc. | Injunction — wood processing pilot plant | Dismissed upon stipulation |

| DOCKET | TITLE | ACTION | DECISION OR STATUS |
|---|---|---|---|
| 6514 | Ibar M. Spellacy v. Railroad & Warehouse Commission | Mandamus — tariff of rates | Dismissed upon stipulation |
| 6519 | Ernest Dodge v. Industrial Commission | Certiorari — wages of women in retail stores | Dismissed |
| 6520 | Commissioner of Agriculture v. Paul Johnson, et al. | Wholesale dealer's bond | Judgment entered |
| 6524 | Amalgamated Food Handlers Local 653-A, et al. | Certiorari — Labor Conciliator's decision on bargaining agent | Affirmed |
| 6525 | United Van Bus Delivery Co. | Cancellation of contract carrier permit | Dismissed |
| 6527 | Estate of Charles G. Callas v. State Employees Retirement Assn. | Death benefits | Judgment for Estate |
| 6528 | Village of Coon Rapids v. Liquor Control Commissioner | Mandamus — municipal liquor store license | Quashed |
| 6529 | Farmers Mutual Automobile Insurance Co. v. Commissioner of Insurance | Certiorari — revocation of rating filing | Writ quashed |
| 6530 | Application of W. G. Harrington for Approval of Contracts of Carriage | Railroad & Warehouse Commission denial | Awaiting trial |
| 6531 | Northern Minnesota National Bank v. Junior Mining Co. and Cleveland Cliffs Iron Co. (State additional defendant) | Royalty lien under ore mining lease | Settled |
| 6537 | Estate of Mayer Weisberg | Probate Court's disallowance of supplemental account and denial of amended decree | Affirmed |
| 6538 | John P. Sullivan v. State, et al. | Quiet title—tax lien | Dismissed as to state |
| 6542 | U. S. Steel Corporation v. State, et al. | Quiet title (Little Mesaba Lake) | Awaiting trial |
| 6544 | Application of John C. McClintock, et al. | Registration — tax-forfeited land | Application joined in by state |
| 6545 | Cleveland Cliffs Iron Company | Quiet title—O'Brien Lake | Dismissed |
| 6546 | Wallace Peifer v. Monte C. Loomis and State Treasurer, et al., Garnishees | Garnishment | Dismissed |
| 6549 | Paul S. Mann v. State Board of Optometry W. J. Reyburn v. Idem | Injunction—revocation of license | Awaiting trial |
| 6556 | Irving Reiter, et al. v. Secretary of State et al. | Declaratory judgment — motor vehicle dealer's license | Findings for defendants |
| 6557 | William E. Anderson v. Superintendent, Fergus Falls State Hospital | Habeas corpus | Writ discharged |
| 6558 | David Hastay v. Secretary of State | Mandamus — registration of motor vehicle | Judgment for petitioner |
| 6559 | Grant Iron Mining Co., et al. | Quiet title (Bruce Mine) | Pending |
| 6560 | Bodel Corporation v. State | Quiet title to mineral rights—tax lien | At issue |
| 6561 | University of Minnesota v. Theta Tau Association Inc., Alpha Chapter | Condemnation | Certificate filed |
| 6563 | City of Springfield v. Public Examiner | Injunction against audit | Denied |

MINNESOTA DISTRICT COURTS, CIVIL—Continued

| DOCKET | TITLE | ACTION | DECISION OR STATUS |
|---|---|---|---|
| 6566 | B. J. Proulx v. Ramsey County Civil Service Commission | Mandamus — Veterans preference | Answer filed |
| 6568 | St. Louis Park v. State Auditor | Cigarette and Liquor Tax Apportionment | Answer filed |
| 6569 | Adriatic Mining Co. | Mining lease | Papers served |
| 6572 | L. C. Trudeau v. Secretary of State | Chauffeur's license | Dismissed |

## MINNESOTA DISTRICT COURTS; CRIMINAL

| DOCKET | TITLE | ACTION | DECISION OR STATUS |
|---|---|---|---|
| 897A | Harland M. DeBoer | False certificate by notary | Pleaded guilty |
| 901A | Delbert Murphy | Reconsideration of plea and sentence | Abandoned for lack of jurisdiction |
| 902A | Lillian R. Carlson | Grand larceny | Acquitted |
| 907A | Arthur William Kamp | Murder | Convicted |
| 908A | Miller C. Robertson | Failure to make return, with intent to evade income tax | Dismissed |
| 909A | Gunnar Engbloom | Manslaughter | Convicted |

## GRAND JURY

| | | | |
|---|---|---|---|
| 906A | Death of Simon Rock | | Indictment for manslaughter |

## PROBATE COURTS

| DOCKET | TITLE | PROCEEDING | DECISION OR STATUS |
|---|---|---|---|
| 6537 | Estate of Mayer Weisberg | Supplemental account and amended final decree | Disallowed 64 N. W. 2d 370 |

## SUPERIOR COURT OF CALIFORNIA

| | | | |
|---|---|---|---|
| 6488 | Estate of James Van Martin | Probate — capacity of State to take trust under will | $125,000 decreed to Gillette State Hospital |

## MUNICIPAL COURTS

| DOCKET | TITLE | ACTION | DECISION OR STATUS |
|---|---|---|---|
| 6555 | Abe Ward v. James B. Wood and Minn. State Agricultural Society, Garnishee | Garnishment | Dismissed |

## JUSTICE COURTS

| | | | |
|---|---|---|---|
| 6518 | W. E. Pierce | Unlawful detainer | Judgment for defendant |

## FEDERAL BOARDS AND COMMISSIONS

### Civil Aeronautics Board

| DOCKET | TITLE | PROCEEDING | DECISION OR STATUS |
|---|---|---|---|
| 6541 | North Central Airlines, Inc., Services over Segment 5 of Route 86 | Airline certificate | Service denied |
| 6553 | Service to Fairmont and Fort Dodge | Air service | Hearing had |
| 6570 | Service to International Falls | Air service | Hearing had |

### Federal Power Commission

| | | | |
|---|---|---|---|
| 6485 | New York State Power Authority Project 2000 | St. Lawrence Seaway | License issued enabling start of project |

## STATE BOARDS AND COMMISSIONS

### Civil Service Board

| | | | |
|---|---|---|---|
| 6492 | Erwin F. Struck | Dismissal | Sustained |
| 6552 | Norman Erickson | Dismissal | Sustained |

### Pharmacy Board

| | | | |
|---|---|---|---|
| 6329-F | Anthony J. Klenert | Revocation of License | Dismissed |
| 6329-G | Leonard Royce | Revocation of License | Deferred |
| 6329-H | Carl T. Appel | Revocation of License | Deferred |
| 6329-I | Alex H. Altshuler | Revocation of License | Deferred |
| 6329-J | Byron A. Farley | Revocation of License | Dismissed |

### Water Pollution Control Board

| | | | |
|---|---|---|---|
| 6441 | Pollution of Albert Lea Lake and Shell Rock River | Investigation into pollution by sewage and waste discharge | Revised findings and order adopted |
| 6494 | International Refineries, Inc. | Application for permit to discharge effluent—Jay Cooke Park | Granted |

## TABLE NO. I

PROSECUTIONS REPORTED BY COUNTY ATTORNEYS FOR 1953*

| COUNTY AND COUNTY ATTORNEY | IN DISTRICT COURT | | | | IN MUNICIPAL COURT | | | |
|---|---|---|---|---|---|---|---|---|
| | Pleaded Guilty | Found Guilty | Acquitted | Dismissed | Pleaded Guilty | Found Guilty | Acquitted | Dismissed |
| Aitkin—John T. Galarneault | 16 | 3 | 3 | 6 | 397 | 2 | ..... | ..... |
| Anoka—Robert W. Johnson | 8 | ..... | ..... | ..... | 493 | ..... | 3 | 30 |
| Becker—Robert W. Irvine | 16 | 1 | 1 | 6 | 479 | 7 | 1 | 21 |
| Beltrami—*Herbert Olson* | 25 | 1 | ..... | ..... | 313 | 8 | 8 | 4 |
| Benton—J. Arthur Bensen | 6 | ..... | ..... | ..... | 43 | ..... | 1 | 9 |
| Big Stone—C. J. Benson | 3 | ..... | ..... | 2 | 77 | ..... | ..... | ..... |
| Blue Earth—Carl Peterson | 10 | 1 | ..... | 1 | 1,358 | 52 | 10 | 20 |
| Brown—Robert J. Berens | 7 | ..... | 1 | 6 | 238 | 1 | ..... | 1 |
| Carlton—Thos. Bambery | 30 | 2 | 1 | 9 | 742 | 5 | ..... | 28 |
| Carver—Martin L. Stahlke | 0 | ..... | ..... | ..... | 140 | 1 | ..... | 9 |
| Cass—Edward L. Rogers | 22 | 2 | 5 | 7 | 126 | 3 | ..... | 1 |
| Chippewa—Sigvald B. Oyen | 9 | ..... | ..... | ..... | 136 | ..... | ..... | 10 |
| Chisago—Howard F. Johnson | 3 | ..... | ..... | ..... | 140 | 11 | ..... | 19 |
| Clay—Vance N. Thysell | 25 | 2 | ..... | 1 | 341 | 6 | ..... | 6 |
| Clearwater—O. E. Lewis | 15 | ..... | ..... | 1 | 146 | 1 | ..... | ..... |
| Cook—J. Henry Eliasen** | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| Cottonwood—Walter H. Mann | 6 | ..... | ..... | ..... | 152 | 1 | ..... | ..... |
| Crow Wing—Arthur J. Sullivan** | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| Dakota—R. C. Nelsen | 28 | 1 | 2 | 4 | 869 | 8 | 3 | 5 |
| Dodge—G. W. Freeman | 5 | ..... | ..... | ..... | 136 | 3 | ..... | 5 |
| Douglas—John J. McCarten | 12 | ..... | ..... | 2 | 373 | 34 | 5 | 11 |
| Faribault—H. C. Lindgren | 13 | ..... | ..... | 10 | 188 | ..... | ..... | 18 |
| Fillmore—Geo. E. Frogner | 11 | ..... | ..... | ..... | 245 | 2 | 1 | 1 |
| Freeborn—Rudolph Hanson | 19 | 1 | 3 | 3 | 511 | 6 | 4 | 2 |
| Goodhue—Milton I. Holst | 27 | 2 | 1 | 1 | 530 | 67 | 1 | 21 |
| Grant—I. L. Swanson | 5 | ..... | ..... | ..... | 29 | ..... | ..... | ..... |
| Hennepin—Michael J. Dillon | 480 | 20 | 15 | 24 | 2,282 | 52 | 8 | 84 |
| Houston—L. L. Roerkohl | 10 | 1 | ..... | ..... | 234 | 9 | ..... | 2 |
| Hubbard—James A. Wilson | 5 | 1 | 3 | 3 | 142 | 10 | 4 | 7 |
| Isanti—Robert B. Gillespie | 2 | ..... | ..... | 1 | 99 | 7 | ..... | 1 |
| Itasca—Ben Grussendorf | 24 | ..... | ..... | 1 | 500 | 12 | ..... | 6 |
| Jackson—Harvey A. Holtan | 5 | ..... | ..... | ..... | 175 | 9 | ..... | 6 |
| Kanabec—Robert W. Nyquist | 11 | ..... | ..... | ..... | 161 | 1 | ..... | 1 |
| Kandiyohi—V. W. Lundquist | 6 | ..... | ..... | ..... | 214 | 2 | 3 | 5 |
| Kittson—Lyman Brink | 2 | ..... | ..... | ..... | 127 | 1 | ..... | 5 |
| Koochiching—L. P. Blomholm | 17 | ..... | 1 | ..... | 396 | 21 | 1 | 7 |
| Lac qui Parle—Wallace Jackson** | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| Lake—Emmett Jones | 0 | 7 | ..... | ..... | 337 | ..... | ..... | ..... |
| Lake of the Woods—W. B. Sherwood | 0 | ..... | 1 | ..... | 42 | ..... | 1 | ..... |
| Le Sueur—Geo. T. Havel | 6 | ..... | ..... | ..... | 157 | ..... | ..... | ..... |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Lincoln—Durward L. Pederson | 9 | 1 | ..... | ..... | 79 | ..... | ..... | ..... |
| Lyon—C. J. Donnelly | 27 | 2 | ..... | ..... | 314 | ..... | ..... | 7 |
| McLeod—Arnold W. Beneke | 0 | 12 | ..... | ..... | 481 | ..... | ..... | ..... |
| Mahnomen—A. J. Powers | 5 | ..... | ..... | 1 | 56 | 3 | ..... | ..... |
| Marshall—Duane W. Turnwall—Arnold A. Trost | 8 | ..... | ..... | ..... | 289 | ..... | ..... | ..... |
| Martin—Arthur T. Edman | 11 | ..... | 1 | ..... | 427 | ..... | ..... | 2 |
| Meeker—Edw. F. Jacobsen | 1 | ..... | ..... | ..... | 130 | 2 | ..... | ..... |
| Mille Lacs—John S. Nyquist, Jr. | 13 | ..... | ..... | ..... | 502 | 16 | 5 | 10 |
| Morrison—Attell P. Felix | 10 | ..... | ..... | 3 | 690 | 5 | 3 | 12 |
| Mower—Wallace C. Sieh | 22 | ..... | 1 | 10 | 367 | 9 | 7 | 19 |
| Murray—J. T. Schueller | 4 | ..... | ..... | ..... | 139 | 1 | ..... | ..... |
| Nicollet—A. L. McConville | 2 | ..... | ..... | ..... | 362 | ..... | ..... | ..... |
| Nobles—Raymond E. Mork | 15 | ..... | ..... | ..... | 253 | ..... | ..... | 1 |
| Norman—O. E. Austinson | 7 | ..... | ..... | ..... | 140 | ..... | ..... | ..... |
| Olmsted—Frank G. Newhouse | 30 | 2 | 3 | 2 | 1,089 | 28 | 7 | 61 |
| Otter Tail—Owen V. Thompson | 31 | 2 | ..... | 10 | 275 | 3 | ..... | 30 |
| Pennington—L. W. Rulien** | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| Pine—Geo. E. Sausen | 20 | ..... | ..... | ..... | 236 | ..... | ..... | ..... |
| Pipestone—J. H. Manion | 4 | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| Polk—F. H. Stadsvold | 12 | ..... | 1 | 3 | 78 | 2 | 2 | 3 |
| Pope—Wm. Merrill | 1 | ..... | ..... | ..... | 124 | ..... | ..... | 1 |
| Ramsey—James F. Lynch | 268 | 8 | 2 | 9 | 2,274 | 36 | 10 | 7 |
| Red Lake—Chas. E. Boughton, Jr. | 3 | ..... | ..... | ..... | 151 | 10 | ..... | 1 |
| Redwood—Thos. Reed | 2 | ..... | ..... | ..... | 206 | ..... | 1 | 14 |
| Renville—Russell L. Frazee | 16 | ..... | ..... | ..... | 149 | ..... | 1 | 4 |
| Rice—Urban J. Steimann | 15 | ..... | 1 | ..... | 646 | 15 | 1 | 12 |
| Rock—Mort B. Skewes | 8 | ..... | ..... | ..... | 177 | 2 | ..... | 1 |
| Roseau—Bert Hanson | 3 | 2 | 1 | 4 | 153 | ..... | ..... | ..... |
| St. Louis—Thos. J. Naylor | 147 | 14 | 11 | 30 | 836 | 41 | 3 | 45 |
| Scott—M. J. Daly | 15 | ..... | ..... | ..... | 194 | 3 | ..... | 2 |
| Sherburne—Howard S. Wakefield | 12 | ..... | ..... | 2 | 294 | 5 | 1 | 2 |
| Sibley—R. G. Williamson | 1 | ..... | ..... | ..... | 236 | 8 | ..... | 20 |
| Stearns—David T. Shay** | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| Steele—Byron J. Casey | 8 | ..... | 1 | ..... | 468 | 2 | 3 | 10 |
| Stevens—Thos. J. Stahler | 8 | ..... | ..... | ..... | 174 | 11 | 3 | 8 |
| Swift—Roy W. Holmquist | 7 | 1 | ..... | 1 | 293 | 1 | 3 | 2 |
| Todd—Frank L. King | 19 | 4 | ..... | 2 | 156 | 7 | ..... | 17 |
| Traverse—Earl E. Huber | 5 | 2 | ..... | ..... | 41 | 75 | ..... | 4 |
| Wabasha—Martin J. Healy** | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| Wadena—Chas. W. Kennedy | 14 | ..... | ..... | ..... | 243 | ..... | ..... | ..... |
| Waseca—Einer C. Iversen | 8 | 1 | ..... | 1 | 284 | 4 | 3 | 4 |
| Washington—Wm. T. Johnson | 20 | ..... | ..... | 2 | 707 | 15 | 2 | 31 |
| Watonwan—Paul V. Fling | 8 | ..... | 1 | 1 | 275 | ..... | ..... | ..... |
| Wilkin—R. N. Nelson | 5 | ..... | 1 | ..... | 122 | 2 | ..... | ..... |
| Winona—W. Kenneth Nissen | 24 | 1 | 2 | 5 | 5,343 | 7 | 4 | 20 |
| Wright—Walter S. Johnson | 15 | 1 | ..... | 2 | 296 | 10 | 1 | 8 |
| Yellow Medicine—Robert M. Baker | 5 | ..... | ..... | 3 | 38 | ..... | 1 | 2 |
| Totals | 1,757 | 98 | 63 | 179 | 32,855 | 665 | 115 | 705 |

*1954 cases will be reported in 1956 report of Attorney General.

**No report received for 1953.

## TABLE NO. 2

TABULATED STATEMENT OF CRIMINAL CASES AS REPORTED BY COUNTY ATTORNEYS FOR 1953*

| NATURE OF ACCUSATION | DISTRICT—MUNICIPAL—JUSTICE COURTS | | | |
|---|---|---|---|---|
| | Pleaded Guilty | Found Guilty | Acquitted | Dismissed |
| **I. Crimes Against the Person** (Ch. 619) | | | | |
| Murder—1st degree | ..... | ..... | 2 | ..... |
| 2nd degree | 1 | 1 | ..... | ..... |
| 3rd degree | ..... | ..... | ..... | 1 |
| Manslaughter—1st degree | 4 | 1 | 1 | ..... |
| 2nd degree | 3 | ..... | 1 | 1 |
| Assault—1st degree | 5 | ..... | ..... | 1 |
| 2nd degree | 36 | 4 | 6 | 7 |
| 3rd degree | 332 | 56 | 15 | 64 |
| Robbery—1st degree | 70 | 1 | 1 | 9 |
| 2nd degree | 18 | 1 | ..... | 1 |
| 3rd degree | 10 | ..... | ..... | 2 |
| Kidnapping | 3 | ..... | ..... | ..... |
| Slander | 5 | 1 | ..... | ..... |
| Miscellaneous | 2 | ..... | ..... | ..... |
| **II. Crimes Against Morality, etc.** (Ch. 617) | | | | |
| (a) Sex Crimes, Indecency, etc. | | | | |
| Rape | 12 | 4 | 3 | 4 |
| Carnal knowledge—Female under 10 | 1 | ..... | ..... | ..... |
| Female 10 to 13 | 6 | ..... | ..... | 11 |
| Female 14 to 17 | 66 | 2 | 2 | 2 |
| Indecent assault | 43 | 4 | 4 | 6 |
| Adultery | 2 | ..... | ..... | 2 |
| Abortion | 9 | ..... | ..... | 1 |
| Bigamy | 4 | ..... | ..... | ..... |
| Fornication | 2 | ..... | ..... | ..... |
| Incest | 3 | 2 | ..... | 2 |
| Sodomy | 17 | ..... | ..... | 1 |
| House of ill fame | ..... | ..... | ..... | ..... |
| Indecent exposure, etc. | 77 | 2 | 1 | 1 |
| Abduction | ..... | 1 | ..... | ..... |
| Miscellaneous | 6 | ..... | ..... | ..... |
| (b) Crimes against Children, etc. | | | | |
| Paternity, illegitimate child (Ch. 257) | 172 | 12 | 8 | 23 |
| Absconding to evade paternity proceedings | ..... | ..... | ..... | 1 |
| Abandonment, wife or child | 117 | 4 | 3 | 63 |
| Non-support, wife or child | 246 | 31 | ..... | 86 |
| Neglect of minor—endangering health | 3 | ..... | ..... | 2 |
| Contributing to minor's delinquency | 41 | ..... | ..... | 3 |
| Cruelty to child | 1 | ..... | ..... | ..... |
| Child labor law violations | 10 | ..... | ..... | ..... |
| (c) Miscellaneous Crimes against Morality, etc. | | | | |
| Public dance laws, violations | ..... | ..... | ..... | ..... |
| Gambling and lottery laws, violations | 7 | ..... | ..... | 2 |
| **III. Crimes Against Property** (Ch. 620-622) | | | | |
| Arson—1st degree | 3 | 1 | ..... | ..... |
| 2nd degree | ..... | ..... | ..... | ..... |
| 3rd degree | 18 | 2 | 1 | 4 |
| 4th degree | 1 | ..... | ..... | ..... |
| Burglary—1st degree | ..... | 1 | ..... | 1 |
| 2nd degree | 11 | ..... | ..... | 1 |
| 3rd degree | 168 | 5 | 1 | 22 |
| Unlawful entry | 12 | ..... | ..... | ..... |
| Forgery—1st degree | 3 | 1 | ..... | 1 |
| 2nd degree | 84 | ..... | 2 | 18 |
| 3rd degree | 5 | ..... | ..... | 5 |
| Larceny, grand—1st degree | 83 | 4 | 2 | 12 |
| 2nd degree | 341 | 8 | 8 | 34 |
| Larceny, petit | 396 | 18 | 1 | 35 |
| Giving check without funds | 409 | 2 | 1 | 60 |
| Receiving stolen property | 20 | ..... | 1 | 1 |
| Mortgaged chattels, sale, removal, etc. | 25 | 2 | ..... | 5 |
| Malicious mischief | 131 | 4 | 2 | 8 |
| Extortion | ..... | ..... | ..... | ..... |
| Trespass | 10 | 2 | 1 | 2 |
| Fraud | 29 | ..... | 1 | 1 |
| Fraud on innkeeper (Ch. 327) | 10 | ..... | ..... | 5 |
| Miscellaneous | 4 | ..... | 1 | ..... |

## TABLE NO. 2

TABULATED STATEMENT OF CRIMINAL CASES AS REPORTED BY COUNTY ATTORNEYS FOR 1953*

| NATURE OF ACCUSATION | DISTRICT—MUNICIPAL—JUSTICE COURTS | | | |
|---|---|---|---|---|
| | Pleaded Guilty | Found Guilty | Acquitted | Dismissed |
| **IV. Crimes Against Sovereignty** (Ch. 612), **Public Justice** (Ch. 613), **Safety** (Ch. 616), **Peace** (Ch. 615), **etc.** | | | | |
| Bribery (giving or receiving) | 2 | ..... | ..... | ..... |
| Perjury | 2 | ..... | 1 | ..... |
| Resisting or interfering with officer | 77 | 6 | 3 | 8 |
| Concealed weapons, carrying, etc. | 8 | ..... | ..... | ..... |
| Language provocative of assault | 24 | 3 | 3 | 4 |
| Contempt of court | 18 | 3 | ..... | ..... |
| Escape | 38 | ..... | ..... | 4 |
| Breach of peace | 59 | 5 | 1 | 4 |
| Disorderly conduct | 310 | 27 | 1 | 14 |
| Public Nuisance | 29 | ..... | 1 | 2 |
| Fireworks, prohibited sale, etc. | 11 | 1 | ..... | 1 |
| Miscellaneous | 6 | ..... | ..... | ..... |
| **V. Miscellaneous Crimes** (and various special statutes) | | | | |
| Cruelty to animals (Ch. 614) | 6 | 1 | ..... | 1 |
| Vagrancy | 45 | 2 | ..... | 1 |
| Violations of laws re: | | | | |
| Compulsory education | 23 | 1 | ..... | 6 |
| Forestry | 18 | ..... | ..... | ..... |
| Wild animals (game and fish) (Chaps. 97-102) | 1,329 | 40 | 19 | 22 |
| Health | 34 | 7 | 1 | 3 |
| Food | 23 | ..... | ..... | ..... |
| Motor vehicles—License | 2,148 | 20 | 7 | 58 |
| Traffic | 18,967 | 360 | 47 | 181 |
| Tampering | 22 | ..... | ..... | ..... |
| Intoxicated driver | 1,453 | 50 | 7 | 10 |
| Criminal negligence causing death | 21 | 3 | 4 | ..... |
| Unauthorized use | 148 | 6 | 1 | 5 |
| Drunkenness | 1,526 | 26 | 7 | 13 |
| Intoxicating liquor | 136 | 9 | 4 | 7 |
| Non-intoxicating liquor | 287 | 9 | 1 | 19 |
| Narcotics | 8 | ..... | ..... | ..... |
| Aeronautics | 6 | 1 | ..... | ..... |
| Gas tax | 60 | 4 | ..... | ..... |
| Miscellaneous crimes and ordinance violations | 4,669 | 2 | 1 | 10 |
| Confiscations | 2 | ..... | ..... | ..... |
| Totals | 34,612 | 763 | 178 | 884 |

*1954 Cases will be reported in 1956 Report of Attorney General.

# SELECTED OPINIONS

# AGRICULTURE

## EXTENSION SERVICE

## 1

**County Extension Committee—Qualifications for membership discussed—** M. S. 1949, Section 22.46, as amended by L. 1951, C. 390, and L. 1953, C. 202, Section 4.

### Facts

"Chapter 202, Minnesota Statutes for 1953, revises the procedure for the administration of Agricultural Extension work in the several counties.

"In advising county boards of commissioners in regard to making the appointments to the new county extension committees, as required in Chapter 202, questions are being raised that we do not feel qualified to answer and would therefore appreciate an opinion in regard to them.

"Section 4 of the Act outlines the method of setting up the county extension committee. One requirement is that in addition to two members of the county board of commissioners and the county auditor as members of the county extension committee there shall be six additional members, five of whom shall be selected and appointed by the county board, one from each of the several commissioner districts and the remaining sixth member of the county extension committee shall be selected and appointed at large from the county by the county board. The Act states that 'only persons actively engaged in agriculture as their principal source of livelihood shall be eligible for appointment to or membership on the county extension committee'.

"In a number of counties one or more of the county commissioner districts are located within the city limits. In order to appoint the required representation on the county extension committee county boards find it difficult to find an individual who is 'actually engaged in agriculture as the principal source of livelihood'."

### Question

1. "Does it [this clause] mean only persons who are operating farms as their principal source of livelihood, or could it mean persons actively engaged in an industry closely associated with agriculture?"

### Opinion

There are two rules of statutory construction which if borne in mind will eliminate most of the questions which trouble you. The first rule is that there is no room for construction unless there is ambiguity. The second rule is: "When the words of a law in their application to an existing situation

are clear and free from all ambiguity the letter of the law shall not be disregarded under the pretext of pursuing the spirit." M. S. 1949, Section 645.16.

The words with which you are concerned are contained in the provision of M. S. 1949, Section 22.46, as amended by L. 1951, C. 390, and L. 1953, C. 202, Section 4, which states:

> "* * * Only persons actively engaged in agriculture as their principal source of livelihood shall be eligible for appointment to or membership on the county extension committee."

This language is clear, unambiguous and simple. It means precisely what it says, nothing more and nothing less. We cannot write an explanation which would be as clear as this language is. If it is difficult to find persons who meet the qualifications prescribed by this provision, that is a matter which should be presented to the legislature, which alone can change these qualifications. You refer to "persons actively engaged in an industry closely associated with agriculture." If you will apply the rules of statutory construction above set forth, questions like this are easy to answer in the negative.

**Question**

2a. "If the commissioners cannot find a qualified person in the commissioner district could they appoint a qualified person from another commissioner district?"

**Opinion**

The answer to this question is in the negative. The law expressly requires the appointment of a qualified person from each commissioner district. There is no authority in the law to appoint the person of whom you speak from another commissioner district.

**Question**

2b. "* * * if there is no eligible person in the district should the place be left vacant until the law might be amended?"

**Opinion**

This question is answered in the affirmative. If there is no qualified person within the district, an appointment cannot be made in compliance with the law, and no appointment, therefore, can be made at all. The position will remain vacant until a person who meets the qualifications prescribed by the law is found by the county board and appointed by it.

**Question**

3a. "Could women be appointed from these commissioner districts?"

**Opinion**

It is difficult to understand just why this question is asked. It is a matter of common knowledge that no distinction is made in the law in this state between men and women as persons eligible to occupy a public office. It has been so since the amendment of Section 8 of Art. VII of the Minnesota Constitution on November 8, 1898. Answering your question specifically, the sex of a person has no bearing upon the eligibility of such person to be appointed as a member of an "extension committee".

**Question**

3b. "* * * how is the law to be interpreted in regard to women appointments as being 'actively engaged in agriculture as the principal source of livelihood'?"

**Opinion**

The foregoing language means exactly the same when applied to a woman as it does when applied to a man.

**Facts**

"Also in Section 4 of the Act the statement is made that 'not more than one member of the county extension committee shall be selected from or reside in a particular city, village or other municipality but there shall always be at least two women members of the committee'. We are interpreting that statement as applying only to the appointive members to the county extension committee and not to the county board members or the county auditor, who are also members of the county extension committee by law."

**Question**

4. "Is this the correct interpretation?"

**Opinion**

The question is answered in the negative.

The provision is that "there shall always be at least two women members of the **committee**". (Emphasis ours.) The designated members of the county board and the county auditor are members of the committee. If any of these three is a woman, she should be counted in determining the number of members of the county extension committee who are women.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Agricultural Extension Service
Institute of Agriculture
University Farm.
September 1, 1953.

763-B

SOCIETIES

## 2

**State Aid—Annual fair should be held in home county of society as a prerequisite to state aid—Merger of two or more societies, where merger societies are enumerated in M. S. A. 38.02, which comply with conditions therein prescribed would not be deprived of receiving state aid.**

**Questions**

"1. Is it possible for a county fair to hold its annual event outside of the confines of the given county and still be eligible under 38.02 to the aid specified?

"2. Supposing a merger was accomplished by two or more adjoining counties so long as they retained their separate names in the new merger corporation, would they then be eligible for the state aid so provided in Section 38.02?"

**Opinion**

1. M. S. A. Section 38.01 provides for the incorporation of county agricultural societies and has its origin in L. 1867, C. 21. Section 1 thereof reads as follows:

"That any number of citizens of any county, or two or more counties jointly, who shall associate themselves together and comply with the provisions of this act, shall be a body politic and corporate, and shall be known as the agricultural society of such county or counties; **Provided, That only one society shall be organized under this act in any county.**" (Emphasis supplied.)

It will be noted that the emphasized portion of the original law is included in substance in Section 38.01, which provides that only one society shall be formed in any one county except in counties having an area of 5,000 square miles or more in which two societies may be organized. This exception applies only to St. Louis county.

Laws 1868, C. 19, is the first legislative act appropriating money to a county agricultural society. This act appropriates $2,000 to the state agricultural society to be divided equally among agricultural societies complying with the conditions contained in this act, and for the purpose of promoting and improving the conditions of agriculture and horticulture, and to pay premiums at the annual exhibitions conducted by such societies. The purpose for which said aid has been granted by the legislature to county agricultural societies is aptly stated by our court in **State ex rel. Morrison County Agricultural Association v. Iverson**, 20 Minn. 247, 139 N. W. 498, on page 248 as follows:

"It has been the settled policy of the state, as indicated by its legislation for many years, in order to stimulate interest in agriculture and in the state agricultural society, to donate money for the purpose

of encouraging the holding of a fair in its several counties. This appears from the statutes which have been called to our attention by counsel in support of their contentions."

In the course of this opinion the court examined the various legislative acts relating to the incorporation of agricultural societies and acts appropriating moneys for the aid of said agricultural societies. It will be noted that the court, in the portion quoted from its opinion, refers to the holding of a fair in the several counties within the state. We understand that practically all of the organizations enumerated in Section 38.02 have been incorporated pursuant to L. 1867, C. 21, and amendatory acts now coded as M. S. A. Section 38.01.

In order that an agricultural society or an association which is named in Section 38.02 may be eligible to receive state aid it must comply with the conditions specified in paragraph (2) thereof which in part provides:

"Shall have held an **annual fair** for each of the three years last past, unless prevented from doing so because of a calamity or an epidemic declared by the local or state board of health to exist."

We have not found any statute which specifically prescribes that such annual fair above referred to must be held in the county where the society or association is domiciled as a condition prerequisite to its eligibility to participate in receiving state aid. However, it has been the custom and practice by all the organizations specified in Section 38.02 to hold an annual fair in its own county, which circumstance justifies the conclusion that by implication the annual fair referred to in said paragraph (2) must be held in the home county of the society or association. A contrary conclusion would permit the holding of the annual fair in not only another county but in a different state. We do not believe that the legislature so intended. Before such construction should be placed upon the statute here considered the law should be amended granting specific authority to such society or association to hold its annual fair outside of its home county.

2. Laws 1951, C. 550, Section 38 [317.38], so far as material, provides:
"The consequences of merger or consolidation are:
"(1) The several constituent corporations become a single corporation which (a) in case of merger is a surviving corporation, or (b) in case of consolidation is a new corporation.

"(2) Excepting the surviving corporation and subject to clause (3) and to section 40, the separate existence of each constituent corporation ceases.

"(3) When the agreement of merger or consolidation expressly provides for the continuance of the corporate existence of a constituent corporation and expressly declares the purpose for the continuance, the corporate existence of such constituent corporation continues in the single corporation for the purpose declared in the agreement.

"(4) The single corporation has all the rights, privileges, immunities, powers, and franchises, and is subject to all of the duties and liabilities of a corporation formed under this act.

"(5) The single corporation has all the rights, privileges, immunities, powers, and franchises, public and private, of each constituent corporation."

and Section 40 [317.40] thereof reads as follows:

"When any act or instrument is considered necessary or appropriate to evidence the vesting of property or other rights in the single corporation, the persons with authority to do so under the articles or by-laws of each constituent corporation shall do the act or execute and deliver the instrument; and for this purpose the existence of the constituent corporations and the authority of such persons is continued."

If the merger societies merely retain their separate names and all of their functions and corporate powers become vested in the new corporation, thereby divesting the merging societies of such functions and powers, then and in these circumstances the merging societies would not be eligible to receive state aid under the provisions of Section 38.02, supra.

**Additional Facts**

"In the event two or more adjoining county fairs arrange for the holding of a single fair, this arrangement is short of a so-called merger. It would be functioning by mutual agreement whereby the two or more counties would hold a single fair for the whole group, each fair retaining its own name in the newly named fair or organization as agreed upon and in so functioning, they would use a common premium list applicable to said fairs wherein each of the named societies or fairs would pay separate premiums to exhibitors from their particular county or areas."

**Question**

"Under such an arrangement would each fair individually qualify for the premium reimbursement as set up in Section 38.02, subdivision 1 (3) thereof?"

**Opinion**

We are not advised with respect to the proposed or any existing mutual agreement above referred to. However, any agricultural society which becomes or is now a party to any such mutual agreement must, in order to qualify so as to receive state aid, be one of the societies or associations named in Section 38.02, supra, and in addition thereto must comply with the provisions contained in said paragraph (2) and the other conditions imposed upon such society by this statute.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Traverse County Attorney.
December 29, 1953. 772-A-6

# CONSERVATION

## DRAINAGE

## 3

**Assessments—Where land assessed for benefits became tax-forfeited and no part of assessment for benefits has been paid—Rights of parties considered in light of cancellation of assessment under statutory direction—** M. S. 282.07.

### Facts

"On November 21, 1912 a total ditch lien in the amount of $20,772.75 was filed as a result of the construction of County Ditch No. 38 in Le Sueur County, Minnesota. One of the parcels owned by E. W. H. consisting of 80 acres of land was assessed for the sum of $1,811.54. A ditch lien in that amount was filed against said 80 acres. After the ditch lien was filed against the above 80 acre tract no taxes were paid and said lands were eventually sold and forfeited for taxes on the second Monday of May, 1928. Because this assessment was not paid, the ditch fund of Ditch No. 38 at the present time is overdrawn in the amount of $1,798.78, after allowing credit to said fund for moneys collected by virtue of said lands being sold on tax forfeiture.

* * *

"* * * moneys from the general revenue fund were in the first instance used to pay the costs of this ditch."

The expense of construction of the ditch, plus the administrative cost, was paid from money in the general revenue fund. I presume that a sum was transferred from the general revenue fund to County Ditch No. 38 and that the disbursements, in connection with the ditch, were charged to County Ditch No. 38.

### Questions

"1. Was the overdraft of $1,798.78 in County Ditch Fund No. 38 cancelled by reason of the tax forfeiture proceedings?

"2. If the same are not cancelled by virtue of such tax proceedings, what steps can the Auditor or County Board take to cancel such deficit from said ditch fund?"

3. What procedure should be employed to restore to the general revenue fund the deficit of the amount taken therefrom at the time the ditch was constructed?

### Opinion

After the contract was let for the construction of this ditch in 1912, it is presumed that the county auditor prepared and recorded the statement in the office of the register of deeds which was provided in G. S. 1913, Sections 5543 and 5544. The lands described therein were burdened by the liens stated

therein, the total of which equaled the cost of construction of the ditch, plus the administrative expense connected therewith. As provided in G. S. 1913, Section 5544, the liens thus imposed continued until paid, or otherwise discharged. The land mentioned was sold for taxes in 1928. We may assume that the sale was for the 1926 taxes. None of the installments of the ditch assessments having been paid, we may assume that all installments of the ditch assessments, which were included in the taxes for the year 1913 to 1926, inclusive, that is, the assessments which fell due in those 14 years, became due before the 1926 assessment. G. S. 1913, Section 5548, required that one-tenth of the principal of the lien should be due within one year from the filing thereof in the office of register of deeds and one-tenth should become due each year thereafter until the whole was matured. So, on these facts, it appears that before 1926, such entire assessment against the land was due and we must assume that the entire assessment and the accrued interest thereon were included in the taxes for years prior to 1926. But the land was sold for 1926 taxes which did not include these installments. It does not appear why there was no tax sale in prior years in which the taxes were unpaid. As I understand the facts, the unpaid assessment against the land sold for taxes is $1,798.78. In 16 years only $12.76 was paid on the principal of the ditch lien. That sum probably was interest, included in the 1926 taxes, on unpaid installments.

In this state of facts the account of this ditch in the county auditor's records shows that there has been paid out $1,798.78 on account of this ditch in excess of the total sums collected by the county to the credit of this ditch. This is the sum to which you make reference as an over-draft.

The fact statement says that the land was "sold and forfeited for taxes on the second Monday in May, 1928." I can understand that it could have been sold at that time and bid in for the state under the law then in force, but I fail to understand that it was then "forfeited" because the tax forfeiture statute was not enacted until 1935. Consequently, I assume that in May, 1928 the land was sold for 1926 taxes and bid in for the state. For the purpose of this opinion, it must be assumed that the land was forfeited to the state in tax proceedings authorized by L. 1935, c. 278, M. S. 1949, 281.16-281.27.

Upon this tax forfeiture, the ditch lien aforesaid was extinguished. See L. 1935, C. 386, Section 7, M. S. 1949, 282.07. See Report of Attorney General for 1938, opinion No. 456; **Fortman v. City of Minneapolis**, 212 Minn. 340, 4 N. W. 2d 349. The county has paid out more money on this ditch than it has collected from the owners of land benefited and public corporations benefited by its construction.

The cancelation of the lien did not change the state of the ditch account on the auditor's records. Those benefited by the ditch construction have not paid to the county the cost of the ditch which the county has paid out of the general revenue fund. The money in the general revenue fund is there as a result of general taxation of all the taxable property in the county. Every householder and every businessman in the county has paid taxes which make up that fund.

In **State ex rel. Kohler Contracting Co. v. Hansen**, 140 Minn. 28, 167 N. W. 114, Judge Dibell said in the opinion:

> "In the drainage scheme of the statute the county is an agency of the state. **State v. George**, 123 Minn. 59, 142 N. W. 945; **Van Pelt v. Bertilrud**, 117 Minn. 50, 134 N. W. 226; **Bowler v. County of Renville**, 105 Minn. 26, 116 N. W. 1028. The state may impose upon the county and its officers such duties as are appropriate to the working out of the drainage project. It requires the county to finance the undertaking. If all goes well, assessments for benefits will pay the cost of the project. If loss occurs to the county it is incidental to its position as an agency of the state, and such loss carries no suggestion of want of due process."

In this language I read the inference that the loss being incidental to the county's position as an agency of the state, the loss is borne by the county as a unit without the power to impose that loss upon property owners benefited by reason of the establishment of the ditch. In other words, it is consistent to say that this loss falls upon the general taxpayers of the county to pay something for which they received no benefit.

**Alden v. County of Todd**, 140 Minn. 175, 167 N. W. 548, held that no liability can be imposed upon a county in ditch proceedings except as provided by the drainage act. When the cost of the project exceeds the benefits assessed, the ditch cannot lawfully be established; and a contract for its construction at a price greater than the estimated benefits is void. But in the problem under consideration, we have the same result as though the cost had exceeded the benefits.

In the opinion in this case, Judge Holt said (140 Minn. 178):

> "* * * It is not contemplated that the county should permanently part with the money which the law requires it to provide for financing a drainage project. It is true, the county is primarily liable to third parties for the legitimate expenses preceding the order establishing or refusing to establish a drainage proposition, and for the construction of the work, including the bonds sold to provide the necessary funds. Van Pelt v. Bertilrud, 117 Minn. 50, 134 N. W. 226. But the plain direction of the law is that the amount the county thus advances or becomes responsible for must be assessed upon the lands benefited."

The inference in Mr. Justice Dibell's remark in **State ex rel. v. Hansen**, supra (140 Minn. 30), that "If loss occurs to the county it is incidental to its position as an agency of the state, * * * ," seems to imply that this loss is one which the county must bear. That is, the county loses the right to be reimbursed in the sum which was assessed against this land as benefits and which has been unpaid.

Under the mandate found in M. S. A. 282.07, the tract of land in question having been tax-forfeited, it was the duty of the auditor immediately after such forfeiture to the state to cancel the lien appearing on the records, both delinquent and current, and all special assessments, delinquent or otherwise. If this was not done, he may make a notation on the records in his office pertaining thereto to this effect, showing the amount cancelled and that it is cancelled by authority of M. S. A. 282.07.

After a careful examination of the statutes and a review of the decisions, I find no authority for any procedure to reimburse the general revenue fund so that it will be made whole as was intended by the law when the money was taken from that fund to construct this ditch and pay the administrative costs.

CHARLES E. HOUSTON,
Assistant Attorney General.

LeSueur County Attorney.
April 8, 1953. 602-B

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## 4

**Proceedings Dismissed — Cost — Liability of village for costs incurred — M. S. A. Section 106.031.**

**Facts**

Proceedings for the establishment of Yellow Medicine County Ditch No. 1-A were dismissed by the district court, which decision was affirmed by the supreme court. The petition for the ditch was signed by the mayor of the village of Echo; the costs which accrued in the ditch proceeding amounted to approximately $14,500. The petitioners are attempting to raise the amount of these costs by voluntary subscriptions, and approximately $10,000 has already been collected. Some of the petitioners have paid $500 toward such costs, and they feel that the village of Echo should pay $500 toward such costs for the reason that the storm sewers in the village and also the outlet for the treatment plant were to outlet into the proposed drainage ditch. Since the petition was dismissed the petitioners have filed another petition in which they were successful, and the ditch is now being constructed; the village will have an outlet for the village storm sewers and also for the treatment plant, and the assessment against the village is more than the assessment against any of the petitioning farmers who have paid $500 toward the cost of County Ditch A-1.

There are several petitioners who are not able to pay $500, and many of them have paid only $50. The petitioners have set a floor of $50 and a ceiling of $500 to be paid by each petitioner toward the costs incurred in the proceedings which were dismissed. It is difficult to determine how many petitioners are judgment proof, and consequently the pro rating of the costs would result in approximately $200 to $250 on each of the petitioners.

**Question**

May the village pay a reasonable amount as its pro rata share of the costs which were incurred in the ditch proceedings which were dismissed by the district court and upon appeal affirmed by the supreme court?

**Opinion**

From the facts recited it cannot be definitely determined whether the mayor had authority to sign the ditch petition in behalf of the village. M. S. A. Section 106.031, so far as here material, reads as follows:

> "The petition shall state that the petitioners will pay all costs and expenses which may be incurred in case the proceedings are dismissed or for any reason no contract for the construction thereof is let. Such petition may be signed by the authorized representative of any municipal corporation or by the commissioner of highways, or the authorized agent of any public institution or any corporation which may be affected by or assessed for the proposed construction; * * * ."

In the event that the council of the village of Echo authorized the mayor to sign the petition in behalf of the village then the village would be obligated to pay costs and expenses which might be incurred in case the proceedings were dismissed. However, no authority exists in this statute, or any other statute of which we are advised, which would authorize the village to make voluntary payments toward the costs and expenses incurred in the dismissed ditch proceedings. The amount which the village might be required to pay should be determined in a proper proceeding, and when so determined the village would be authorized to pay the same.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Attorney for Village of Echo.
October 15, 1953. 602-i

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## 5

**Petitions—Procedure where engineer's recommendations on preliminary hearing appear to be a departure from the plan of the petition—Suggested procedure—Where proceedings dismissed, cost of surveys may be paid in subsequent new proceedings under Section 106.621 — M. S.** 106.031; 106.081, subds. 1, 4; 106.101, subds. 3, 4, 5; 106.111; 106.061.

**Facts**

"A petition for the establishment of a county ditch was presented to the Jackson County Board of Commissioners with the necessary petitioners' bond. An engineer was appointed to make a preliminary survey. The preliminary survey was filed and a preliminary hearing was had on said survey. The engineer's survey showed that the only feasible plan required two outlets for two separate ditch systems. That is, the plan as set out in the petition would have to be divided into two parts with no connection between the two parts. An order for a detailed survey was made and viewers were appointed. The detailed survey and the viewers' report have now been submitted."

**Questions**

"1. Assuming that of the original petitioners there is a sufficient number from each part of the divided system to have originated a separate petition for each part, can the original petition be amended so as to conform to the engineer's preliminary survey?

"2. If new petitions are required, can the original petition be saved by amending it to conform with the engineer's survey as to only one of the two parts and can the viewers' report be used to the extent necessary?

"3. If a completely new proceeding is necessary can the costs already incurred be charged to the ditches to be established under the new proceedings?"

**Opinion**

M. S. 1949, 106.031, specifies the requirements for a petition for a county ditch. It is presumed that the petition conformed to the requirements thereof. The petition shows the land over which the proposed ditch passes. It shows the starting point, the general course and termination. This is a ditch which the petitioners sought to have established. But, in effect, the engineer is of the opinion that such plan is not feasible (Section 106.081, subd. 1) and reported accordingly, for he stated that the only feasible plan for the proposed drainage required two separate ditch systems with two outlets. Of necessity, the two systems would have separate starting points, courses and outlets. This was not the petitioners' plan. It was not the "proposed plan."

The engineer must confine his preliminary survey, as required by Section 106.081, subd. 4. It does not appear that this was done. It does not appear that his departure from the plan described in the petition was authorized by the county board with the consent of the bondsmen at a hearing after statutory notice to the petitioners and bondsmen.

At the preliminary hearing required by Section 106.101, the board must have determined the sufficiency of the petition, as required by subd. 3.

Subd. 4 of that section appears to contemplate that if the proposed ditch is not feasible, the engineer may report an improvement that will make it feasible. The language is:

"At said hearing or any adjournment thereof, if it shall appear that the proposed improvement is not feasible, and no plan is reported by the engineer whereby it can be made feasible, or that it is not of public benefit or utility, or that the outlet is not adequate, the petition shall be dismissed."

Subd. 5 reads:

"If the board or court shall be satisfied that the proposed improvement as outlined in the petition or as modified and recommended by the engineer is feasible, that there is necessity therefor, that it will be of public benefit and promote the public health, and that the outlet is

adequate, the board or court shall so find and by such order shall designate the changes that shall be made in the proposed improvement from that outlined in the petition. These changes may be described in general terms and shall be sufficiently described by filing with the order a map outlining the proposed improvement thereon. Thereafter the petition shall be treated as modified accordingly."

Here, we have the question whether the engineer's proposal is a modification of the plan described in the petition or is an entirely new proposal or plan. It seems to me that it is a new plan rather than a modification. But that is a question for the board and not for the Attorney General.

The foregoing statement of facts does not show what the board found on the preliminary hearing. But since it ordered a detailed survey, as provided in Section 106.111, such order must have been based upon the findings provided in Section 106.101, subd. 5. The board must have been of the opinion that the plan recommended by the engineer was but a modification of the plan of the petition. Section 106.101, subd. 6, provides that the findings required by subd. 5 shall be construed as conclusive as to the nature and extent of the proposed plan. But it is not conclusive as to the practicability of the plan.

It appears to me that if the engineer's preliminary report recommends two ditches, the petition should have been dismissed and two new petitions filed for the two ditches. The petition was for a ditch, not two ditches. But the proceedings have passed that point.

Section 106.031 contemplates a petition for a ditch. Any amendment thereof must still contemplate a ditch, not two or more. It does not appear that new petitions have been required by the board. I fail to appreciate how the second question applies to the fact situation.

If all the petitioners unite, they may dismiss the petition before an order is made establishing the improvement. Section 106.061.

If this proceeding shall be dismissed and new proceedings commenced on new petitions for new ditches according to the engineer's recommendation aforesaid, and the engineer in such new proceedings shall use part or all of the former survey, the amount saved in the subsequent proceedings should be paid to the proper parties. The parties who pay the expense in connection with the first petition may petition the board to determine the benefits derived in the subsequent proceedings from the former survey and the board will order the amount of benefits found to be paid to the parties entitled thereto as a part of the cost of the new proceedings. Section 106.621. It will be noted that this applies to surveys, not to other expenses.

CHARLES E. HOUSTON,
Assistant Attorney General.

Jackson County Attorney.
April 8, 1953. 602-i

## 6

**Repairs—Cost—Funds—Financing cost when funds inadequate—M. S. A. 106.471, subds. 5 (a) and 7 (e); 106.451.**

**Opinion**

The subject of repair of drainage ditches is covered in M. S. A. 106.471. The county board has authority under subd. 6 to create a repair fund for each ditch. This should be done. Then, when money is needed, it is available. The legislature has declared the policy. County boards should follow it. Such a policy would avoid spending money before it is available.

This section in subds. 5 (a) and 7 (e) is authority to the county board to assess lands theretofore determined to have benefited by reason of the construction of the ditch in the same manner as provided by law for their assessment at the time of construction.

If, when the repair is made, there is not money to the credit of the ditch from which the cost of the repair may be paid, we consult Sec. 106.451. It is there provided that:

> "The county board shall provide the funds for the payment of the costs and expenses incurred in any drainage system."

It appears that this language is broad enough to cover a repair proceeding. This section further provides:

> "* * * If no funds are available in the ditch fund on which the warrant is drawn, the board may, by unanimous resolution, transfer funds from the **general revenue fund** of the county to such ditch fund. In such case the county board shall thereafter cause the general revenue fund to be reimbursed from the funds of such ditch together with interest for the time actually needed at the same rate per annum as is charged on the liens and assessments.
>
> "In all cases where a warrant shall be issued by the auditor of any county under the provisions of this chapter, and there shall be no cash in the fund therein mentioned to pay the warrant when the same is presented, the county treasurer shall endorse the warrant 'Not paid for want of funds', and date and sign the endorsement. In that event interest on the warrant shall be paid thereafter at the rate of four per cent per annum until the warrant is called in and paid by the treasurer. No interest shall be paid on any warrant after funds are available in the hands of the treasurer for the payment thereof. Such warrant shall be deemed a general obligation of the county issuing the same.
>
> "The county board of any county having in any ditch fund a surplus over the amount required for payment of obligations presently due and payable from the fund is authorized to invest any part of the surplus in bonds or certificates of indebtedness of the United States of America or of the state of Minnesota."

The legislature having specifically provided how such business shall be discharged, there is no other way to do it.

No money should be transferred to the credit of a ditch fund except that so authorized.

CHARLES E. HOUSTON,
Assistant Attorney General.

Public Examiner.
August 3, 1953. 602-F

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## 7

**Repairs—Removal of encroachment—Duties of county board to maintain drainage ditch—Status of rights of lands assessed for benefits—Trespassers against ditch are without rights.**

**Facts**

"County Ditch No. 51 was established in the year of 1912. This Drainage System was constructed of an underground 54 inch segment tile. As established and laid out it ran through the village limits of Olivia, Minnesota, in Renville County. The area through which the ditch ran, at the time it was laid out and constructed, was platted and unplatted urban lands, consisting of lots and outlots. Since the time the Drainage System was established and constructed, the Village of Olivia has grown and this area of platted and unplatted lands through which the Drainage System ran has been improved by the construction of commercial buildings and residences. In that portion of the area devoted to residential improvements lawns, trees and shrubbery have been seeded and planted. These commercial buildings, residences, lawns, shrubbery and trees have been, in many instances, constructed and planted near or **on and over** the 54 inch tile drain.

"A petition has been presented to the County Board for the needed repair of this drainage system. In repairing the system it will be necessary to excavate along its entire course and remove the old 54 inch tile, which has deteriorated and crumbled, and relay new 54 inch tile. The original tile is very deep in certain areas. To repair this system will necessitate deep excavations. Lawns, shrubbery and trees are likely to suffer serious damage, not only by reason of the excavation but also by the enormous excavated material which will be piled up along the sides of the ditch until new tile is relaid and the dirt moved back into place. Where commercial buildings and residences have been constructed **near or over** the ditch it will be necessary to either remove the structures or tunnel under and jack the tile through. The cost of straight excavation will run about $2.00 per foot in these areas. The cost of tunneling under these buildings and jacking the tile under the buildings will cost approximately $25.00 per foot.

"A very serious situation faces the County Board. The drainage system is in need of repair. It will have to be repaired, but in making such repairs the County Board is faced with the unusual situation of trying to repair a drainage system which runs through a residential and business section of a village, **and over which commercial buildings and residences have been constructed.**

**Questions**

"1. Under the present drainage code and existing law does the County Board have authority to order a repair of this particular drainage system, where, if repair proceedings are carried out, damages will necessarily result to existing buildings, structures, lawns, shrubbery and trees which have been constructed on or growing so close to the drainage system as to make it impossible to repair the ditch without committing damages?

"2. Does the board have authority in the repair proceedings to order a removal by the property owner of any and all buildings which have been constructed on and over the drainage system, or so near to it, as to interfere with the repair job?

"3. What authority does the board have in removing these structures if the property owner refuses; and what is the liability of the County in the event it undertakes to remove these structures and in so doing causes damages?

"4. Would the County Board be liable for damages to lawns, shrubbery and trees which are now growing over and along the ditch and which will certainly be damaged in the repair job? In answering this inquiry you will have to accept the fact that these lawns, shrubbery and trees were landscaped, planted and grown since the ditch was laid out and constructed.

"5. In order to avoid a removal of the commercial buildings and residences will the board be justified, and does it have the authority, to tunnel under these structures and jack the tile through at an additional cost of some $23.00 per foot, all of which additional expenses would be borne by all of the property owners by way of increased assessments?

"6. If the board has authority to remove or order the removal of the commercial buildings and residences what authority would the board have, in behalf of the County, in lieu of such removal by the County, to enter into an agreement with the property owners to tunnel under the structures and jack the tile through and provide for payment of the additional cost of $23.00 per foot by the owner of the property on which such structure is located?"

**Opinion**

The duty of the county board to maintain a county ditch is plainly stated in M. S. A. 106.471, subd. 2 (a). If the county board had performed such duties, I apprehend that the present situation would not have developed.

When this ditch was made, a new status was thereby created for the lands affected. Where a benefit was derived and land was assessed for such benefit, it became a property right, appurtenant to the land, not to be taken or impaired, except by due process of law. **Lupkes v. Town of Clifton,** 157 Minn. 493, 196 N. W. 666. Property owners had no more right to erect structures over such ditch than they had to erect structures on a trunk highway. Their ownership of lands over which the ditch passed was subject to the easement of such ditch.

The county board should give notice to property owners over which such ditch passes to remove any such structures or obstructions. In the event of a refusal, it is my opinion that in appropriate action the court will compel removal and restoration of the premises to the condition at the time of completion of the ditch. See **Lupkes** case, supra. It is conceivable that in such an action defendants will claim adverse possession or other facts to defeat the claims of plaintiff. Such claims must be tried and determined.

The plain duty of the board is not to compromise by recognizing that trespassers have rights. Whether they have rights is for the court to determine.

The questions have been answered by the statement of principles above.

CHARLES E. HOUSTON,
Assistant Attorney General.

Renville County Attorney.
March 11, 1954. 602-J

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## 8

**Soil Conservation Districts—Funds—Appropriation by county board to aid—M. S. 1953 Section 375.19—should be for soil conservation purposes—purposes for which moneys may be expended by district should be within scope of exercising powers of district and supervisors—Section 40.07 and regulations adopted by authority of Section 40.08.**

**Facts**

"The County Commissioners (Wright County) have appropriated $300 for the use of the soil conservation district through 1954, under the amendment to the county commissioners law which provides that they may appropriate up to one cent per acre for all land in soil conservation district in the county.

"The commissioners, however, wish to limit the purposes for which these funds may be used. They are particularly desirous of using them only for purposes for which they can legally appropriate. Will you, therefore, please clarify how these funds may be used.

**Questions**

"1. Can they be turned over in lump sum to the district governing body to use as they see fit in the promotion of soil conservation?

"2. Can they be used for paying such items as posters, expenses of holding annual meetings, materials for preparing fair booths, awards to be presented to outstanding conservation farmers, refreshments at the annual meetings, and miscellaneous expenses for educational materials?

"3. Are the county commissioners limited to the type of expenses that may be paid to districts out of funds appropriated to the State Soil Conservation Committee? If so, will you please clarify what this includes."

**Opinion**

1. The answer to the first question is found in M. S. 1953, Section 375.19, and so far as here material reads as follows:

"In addition to all other powers now or hereafter by law conferred upon county boards, authority hereby is given * * * to permit use of county equipment for soil conservation projects and to make **annual expenditures** from the general revenue fund for **soil conservation purposes** not exceeding an aggregate amount of one cent per acre of all lands included within soil conservation districts in the county."

By authority of this statute the county board may make an annual expenditure not exceeding the limitation of one cent per acre to a soil conservation district and for soil conservation purposes.

2. A categorical answer cannot be given to this question. Generally speaking, the funds of a soil conservation district may be expended by the supervisors for the purpose of carrying out the powers granted to a soil conservation district and its supervisors under the provisions of M. S. 1953, Section 40.07, and the rules and regulations adopted by the supervisors by authority of Section 40.08.

3. Section 375.19, supra, authorizes the county board to make annual expenditures from the general revenue fund for soil conservation purposes, and does not specify the particular type of expenses or purposes for which the money so appropriated by the county board may be used except that such use must be for soil conservation purposes.

As previously pointed out, the duties and powers of a soil conservation district and supervisors are prescribed in Section 40.07, and by authority of Section 40.08 the supervisors may adopt reasonable rules and regulations. I believe that it is for the supervisors to determine in the first instance whether or not a particular expenditure is for the purpose of carrying out the duties and performing the services imposed upon the supervisors by authority of the statutes above referred to.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Minnesota State Soil Conservation Committee.
April 1, 1954. 705-A-3

# COURTS AND CRIMINAL LAW

COURTS

## 9

**Actions—Costs—Lien of judgments for costs in an action instituted in the name of the state on the relation of a citizen—M. S. 1949, Section 549.15.**

**Facts**

In an action entitled **State ex rel. "A" v. "B"**, a writ of certiorari was issued by the District Court of Hennepin County directed to certain officials and employees of the City of Hopkins. A trial in the district court resulted in a verdict in favor of the defendants which was sustained by the Supreme Court on appeal. Judgments for costs have been entered against the plaintiff in both courts.

**Question**

"Are these judgments a lien against the property of 'A' and may they be enforced by execution against his property?"

**Opinion**

Under the provisions of Minnesota Statutes, Section 606.04, the party prevailing on a writ of certiorari in any proceeding of a civil nature shall be entitled to his costs against the adverse party.

Minnesota Statutes, Section 549.15, provides as follows:

"Relator Entitled to, and Liable For, Costs. When an action or proceeding is instituted in the name of the state on the relation or petition of any citizen, **such relator or petitioner is entitled to, and liable for costs** and disbursements in the same cases and to the same extent as if such action or proceeding had been instituted in his own name." (Emphasis supplied.)

See **State ex rel. Security Trust Co. v. Probate Court**, 67 Minn. 51, 55, 69 N. W. 609, 908; **State ex rel. Koski v. Kylnanen**, 178 Minn. 164, 172, 226 N. W. 401, 709.

A judgment requiring the payment of money constitutes a lien upon real property of the judgment debtor located in any county where the judgment has been docketed, Minnesota Statutes, Section 548.09; and such judgment may be enforced by execution, Minnesota Statutes, Section 550.02. See **Daniels v. Winslow**, 4 Minn. 318, Gil 235; **Messerschmidt v. Baker**, 22 Minn. 81.

It is our opinion, therefore, that these judgments, if properly docketed, constitute a lien upon the real property of "A" which may be enforced by execution, provided, however, the property is not exempt from such process.

GEORGE H. GOULD,
Special Assistant Attorney General.

Hopkins City Attorney.
April 1, 1954. 520-D

# 10

**Actions—Paternity Proceedings—Complaints—Civil and not criminal in nature—42 Minn. 32, 231 Minn. 1—Need not be certified to juvenile court where defendant is minor as required by**—M. S. 1953, Section 260.22.

**Facts**

"* * * the woman, who is pregnant with child, and the alleged father are both minors being of the age of 16 years. The question that rises in the form of proceedings is that while the proceedings are quasi-criminal still the criminal practice is not followed."

**Question**

"If the complaint is filed in Municipal Court must the case be certified to Juvenile Court by the Municipal Court, when it is established that the alleged father is a minor, and then transferred back for further proceedings? I am assuming that the Juvenile Court would be without jurisdiction to establish paternity or can the Municipal Court act without making such reference and have it certified back for the examination, if desired, and if the evidence warrants bind the Defendant over to District Court for trial?"

**Opinion**

A proceeding to establish paternity of an illegitimate child under M. S. 1953, Sections 257.18 through 257.33, is civil in nature. **State v. Sax,** 231 Minn. 1, 42 N. W. (2d) 680; Dunnell's Minn. Digest, Vol. 1, Section 827.

The five-sixths jury law is applicable. **State v. Longwell,** 135 Minn. 65, 160 N. W. 189.

Where a complaint has been filed under Section 257.18 in the municipal court the only power of the court is to ascertain whether there is probable cause to believe that the defendant is the father of the child and, if so, to require him to enter into a recognizance to answer the complaint at the next term of the district court which alone has jurisdiction to try and determine the case. Dunnell's Minn. Digest, Vol. 1, Section 829.

For the reason that a paternity proceeding is civil in nature and subject to rules of procedure in a civil case, we are of the opinion that the provisions of Section 260.22, relating to the transfer and certification of a criminal case where a minor is arraigned upon a criminal charge, are not applicable.

No question has been raised with respect to the necessity of appointing a guardian ad litem for a defendant minor in such a proceeding.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Koochiching County Attorney.
May 13, 1954. 840-C-2

# 11

**Actions—Paternity Proceedings—Evidence—Children—Illegitimate—Preliminary hearing before justice of the peace in paternity proceedings—Accused may be called for cross-examination as an adverse witness—** M. S. A. 595.03.

**Facts**

"Section 595.03 of Minnesota Statutes Annotated (Section 43.02 of the Rules of Civil Procedure for the District Courts of Minnesota) provides that a party in an action may be called for cross-examination by an adverse party. In the case of State v. Henry C. Jeffrey, 188 Minn. 476, 247 N. W. 692, the Supreme Court held that this statute applied to a bastardy proceeding and that the defendant in a bastardy proceeding could be called for cross-examination."

**Question**

Does this statute apply to the preliminary examination in such proceeding?

**Opinion**

The answer is "yes".

A proceeding to determine paternity, "is, in substance, a civil action or proceeding governed in the main by the rules of practice in civil cases. 1 Dunnell, Minn. Dig. (2ed.) Section 827; State v. Jeffrey, 188 Minn. 476, 247 N. W. 692." **State v. Rudolph**, 203 Minn. 101, 102, 280 N. W. 1.

Before the adoption of the rules of procedure in the district court, cross-examination of an adverse party in a civil suit or proceeding was conducted by authority of M. S. 1949, Section 595.03. The statute still applies in civil proceedings not governed by the rules. It has not been repealed. It is superseded by Rule 43.02 only in proceedings in district court, where the rules apply. The new rules do not apply to proceedings in justice court. In that court the practice is the same now as before the adoption of the rules. But Section 595.03 applied in justice court before the rules and it applies there now. This section, by its terms, is not limited in application to the district court. It applies in all civil proceedings not governed by the rules of civil procedure in the district court. In **State v. Jeffrey**, supra, it was held that the defendant in a bastardy proceeding was subject to cross-examination under the statute. In that case the court quotes (188 Minn. 479) from **State v. Brathovde**, 81 Minn. 501, 502, 84 N. W. 340, saying:

"So far as the rules of evidence and pleading are concerned, such proceedings are of a civil nature, not criminal, and the sufficiency of the complaint is to be tested by the rules applicable to civil actions. * * * "

The hearing before the justice is held under Sections 257.20, 257.21. There is no good reason why the prosecutor does not have at his command

all of the resources available to the plaintiff in a civil action. In my opinion Section 595.03 is authority to call the defendant for cross-examination on a preliminary hearing before a justice of the peace in a paternity case.

CHARLES E. HOUSTON,
Assistant Attorney General.

Sibley County Attorney.
June 18, 1953. 840-C-7

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## 12

**Actions—Paternity Proceedings—Expenses—Incurred in connection with confinement and maintenance of child as provided for in judgment may be enforced after adoption proceedings**—M. S. A. Section 257.23.

**Facts**

"In 1950, a defendant was adjudged guilty of paternity and ordered to pay the confinement expense and so much a month for the support of the child.

"In 1953, the child was adopted and at the time of the adoption the defendant had not paid the entire confinement expense nor had he paid all of the monthly payments due for support up until the time of the adoption. The confinement expense had been paid by Mower County."

**Questions**

1. "* * * whether the defendant continues to be liable under the adjudication of paternity for the payment of the rest of the confinement expense and the delinquent support payments up to the time of the adoption?"

2. "If the defendant is so liable, may his liability be enforced by contempt proceedings?"

**Opinion**

M. S. A. 257.23 in part provides:

"If he (defendant) is found guilty, or admits the truth of the accusation, he shall be adjudged to be the father of such child and thenceforth shall be subject to all the obligations for the care, maintenance and education of such child, and to all the penalties for failure to perform the same, which are or shall be imposed by law upon the father of a legitimate child of like age and capacity. Judgment shall also be entered against him for all expenses incurred by the county for the lying-in and support of and attendance upon the mother during her sickness, and for the care and support of such child prior to said judgment of paternity, the amount of which expenses, if any, shall also be found by the judge, together with costs of prosecution. If the defendant

fails to pay the amount of such money judgment forthwith, or during such stay of execution as may be granted by the court, he shall be committed to the county jail, there to remain until he pays the same or is discharged according to law."

The facts do not disclose whether a judgment was entered as authorized by the aforesaid statute.

In our opinion the duty of the defendant should be determined from the judgment or the order which was made and entered in the paternity proceedings. In the event that the judgment required the defendant to pay the lying in expenses and a fixed amount for the support and the maintenance of the child, we believe that the putative father would be liable for the amount as determined in such order or judgment notwithstanding the fact that the child has been adopted.

Section 257.23 further provides:

"The court shall further fix the amount, and order the defendant to pay all expenses necessarily incurred by, or in behalf of, the mother of such child, in connection with her confinement and the care and maintenance of the child prior to judgment. If the defendant fails to comply with any order of the court, hereinbefore provided for, he may be summarily dealt with as for contempt of court, and shall likewise be subject to all the penalties for failure to care for and support such child, which are or shall be imposed by law upon the father of a legitimate child of like age and capacity, and in case of such failure to abide any order of the court, the defendant shall be fully liable for the support of such child without reference to such order."

It seems to us that the answer to the second question is a matter for the court to pass upon after consideration is given to the order or judgment which has been entered. No doubt the court may take such action as may be necessary in order that its order and judgment may be enforced.

As bearing upon each of the questions submitted see **State v. Sax**, 231 Minn. 1, 42 N. W. (2d) 680.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Mower County Attorney.
July 2, 1953. 840-A-3

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## 13

**Actions—Paternity Proceedings—Guardian ad litem—Necessity of appointment of guardian ad litem for minor mother as complainant in a proceeding to establish paternity of an illegitimate child pursuant to—** M. S. 1953, Sections 257.18 through 257.33.

**Question**

In a paternity proceeding instituted upon the complaint of a minor mother under M. S. 1953, Sections 257.18 through 257.33, is it necessary to have a guardian ad litem appointed for the minor mother?

**Opinion**

A paternity proceeding is civil in nature: "the state merely loans its name to be used as plaintiff." **State v. Sax**, 231 Minn. 1, page 6, 42 N. W. (2d) 680.

A proceeding to establish the paternity of an illegitimate child may be initiated on the written complaint of the mother, under oath, as provided in M. S. 1953, Section 257.19[1]. Such complaint may be signed by a minor mother without the necessity of appointing a guardian ad litem.

The institution of a paternity proceeding upon the complaint of a mother under Section 257.19 is not the exclusive manner by which such a proceeding may be commenced. See Section 257.18.

The primary question before the court in the Sax case was whether the mother of an illegitimate child has a personal financial interest in an award of support made by the court under Section 257.23, and therefore may appeal therefrom as an aggrieved party under Section 605.09. The court held that a mother did have such a financial interest, and that she was an aggrieved party within the purview of the appeal statute, Section 605.09. The court pointed out that in a paternity proceeding due process requires that the court shall afford the interested parties an opportunity to be heard and to present evidence in support of their rights. Denial of the mother's request to present competent and relevant evidence on the ground that the trial court had already informed itself thereof, is a denial of due process.

The substance of the court's holding in this case is that the mother has a right to appeal and present competent and relevant evidence in a proceeding to determine the amount which shall be awarded as support for an illegitimate child, and that such mother has a definite personal financial interest therein, and, consequently, is an aggrieved party and as such has the right to appeal.

The question of the minority of the mother was not involved in that case. We do not believe that it is necessary for a minor mother to appear by her general guardian or by her guardian ad litem for the purpose of giving testimony in a proceeding to adjudicate a support order for an illegitimate child. However, if in such a proceeding the support order is premised upon a stipulation to which the minor mother is required to be a party, then and in such circumstances she should be represented by her general guardian or by a guardian ad litem in the manner provided by Rule 17.02 of the Minnesota Rules of Civil Procedure for District Courts. It seems to us that such a stipulation which is adopted by the court as a basis for an order for the support of an illegitimate child is of a contractual character, and in which the mother has a personal financial interest. Under Section 257.23 the mother is entitled to recover the lying in and other expenses, together with the cost of care and support of the child prior to the judgment of paternity.

By virtue of Section 257.24 a mother may, as therein provided, institute a civil action in her own name to recover from the father all expenses necessarily incurred by her in connection with her confinement and other items

[1]All sections hereinafter referred to will be from M. S. 1953.

of expense as specifically authorized by this statute. In the event that the mother is a minor, then it would be necessary, in our opinion, for her to appear by general guardian or by guardian ad litem in such a civil action, as prescribed by said Rule 17.02.

As bearing generally upon the question of acquiring jurisdiction by serving upon an infant in commitment proceedings see In Re Wretlind, 225 Minn. 554, 32 N. W. (2d) 161.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Swift County Attorney.
May 5, 1954. 840-C-2

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## 14

**District—Clerk—Fees—Condemnation Proceedings—M. S. A. Section 485.02, having no application, the clerk of court is unauthorized thereunder to charge a public utility corporation for moneys deposited by it with the clerk in payment of condemnation awards under the facts considered. See also—M. S. A. Section 357.02, Subd. 1 (25).**

### Question

Is the clerk of court entitled to a one per cent commission for receiving and paying out moneys deposited in said office by a public utility corporation in payment of condemnation awards?

### Opinion

M. S. A. Section 485.02 reads as follows:

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

The first sentence thereof has been superseded by the Minnesota Rules of Civil Procedure for the District Courts. See Sections 67.02, 86.01, 86.02,

and Appendix B (1), B (2), of such rules. M. S. A. Section 357.02, relating to fees of clerks of court in a county not containing a city of the first class, reads in part as follows:

"Subdivision 1. The fees to be charged and collected by the clerk of the district court shall be as follows, and no lesser or greater fees shall be charged for:

"* * *

"(25) In actions for partition of land or proceedings in assignments for the benefit of creditors, and proceedings under the right of eminent domain, the court, or a judge thereof, may, by order, from time to time, fix the amount which may be charged and collected, which may be in excess of the amounts hereinbefore provided; except, however, no fee shall be allowed the clerk of court for receiving and paying over any money deposited with the clerk of court where the money is paid or deposited by or for the state of Minnesota, pursuant to Section 117.10;". M. S. A. Section 117.10 reads in part as follows:

"* * * In case any party to whom an award of damages is made be not a resident of the state, or his place of residence be unknown, or he be an infant or other person under legal disability, or, being legally capable, refuses to accept payment, or if for any reason it be doubtful to whom any award should be paid, the petitioner may pay the same to the clerk, to be paid out under the direction of the court; and, unless an appeal be taken, as hereinafter provided, such deposit with the clerk shall be deemed a payment of the award."

The condemnor's payment to the clerk of district court under Section 117.10 is a payment of an award, and such payment is not made to abide the result of any legal proceeding in which said condemnor is a party. It, therefore, appears to us from the statutory provisions above referred to that Section 485.02 has no application to the payment of a condemnation award to the clerk of court.

Fees in a condemnation proceeding, and not enumerated in Section 357.02, must be fixed both as to items and amount by the judge in whose court the condemnation proceedings are pending before they can be legally charged (under Subd. 1 (25)). There is nothing in your letter to indicate that any order has been made by the judge of the district court fixing the amount of the commission which the clerk of court may charge for receiving and paying out a condemnation award, and in the absence thereof such charge is not one authorized by law.

Your inquiry is, therefore, answered in the negative.

The views expressed herein conform to the opinions of the Attorney General printed in the 1926 report at Nos. 57 and 59.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Lyon County Attorney.
August 11, 1953. 144-B-18

## 15

**District—Clerk—Fees—Old Age Assistance lien—Foreclosure by state—Clerk entitled to statutory fees incident thereto—Same to be paid by state—M. S. A. 256.26.**

**Facts**

Recently an old age assistance lien was foreclosed and the property was bid in by the county at the foreclosure sale.

**Question**

May the clerk of district court collect from the county his statutory fees incident to the foreclosure of an old age assistance lien?

**Opinion**

By statute, M. S. A. Section 256.26, subds. 3 and 4, no person shall receive old age assistance without giving the state a lien upon all real estate of the recipient within the state. Such lien is in favor of the state and may be enforced in the manner provided by law for the enforcement of a mechanic's lien upon real property. Section 256.26, subd. 8. Section 9 authorizes, upon certain conditions as therein provided, the release of the lien with the approval of the state agency.

The lien being in favor of the state, it necessarily follows that the state must be named as the plaintiff in an action to enforce such lien. The clerk of the district court would be entitled to receive fees as prescribed by statute for filing in his office pleadings or papers incidental to the foreclosure proceedings. The state, and not the county, should pay the clerk his fees and the amount thereof, together with other taxable items, should be included in the judgment. When the property has been sold to satisfy the lien, the cost and expenses incurred and paid in connection therewith should first be deducted and the residue disbursed as prescribed in Section 256.27.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Rice County Attorney. 521-P-4
September 29, 1953. 144-B-15

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## 16

**Justice — Attorney — Justice not authorized to employ attorneys to defend persons in his court.**

**Facts**

"A justice of the peace engaged an attorney to represent a defendant charged with a misdemeanor in his court. The defendant had previously been a patient at the U. S. Veterans Hospital and upon the advice

of the attorney, the defendant was taken to Probate Court where he was recommitted to the U. S. Veterans Hospital. The attorney represented the defendant in Probate Court and was paid the statutory fee by the county.

"The Village of Waite Park, for which the justice of the peace was acting, had a regularly employed and appointed attorney other than the attorney engaged by the justice of the peace, who was not consulted in regard to this matter. The Village Council did not authorize the employment of this attorney by the justice of the peace."

**Questions**

"(1) May such employment by the justice of the peace financially obligate the Village for the attorney's fees?

"(2) May the Village Council legally pay this attorney's fee charged for representing this defendant?"

**Opinion**

M. S. A. 1949, Section 412.111, of the village code, provides in part herein material as follows:

"The council may create such departments and advisory boards and appoint such officers, employees, and agents for the village as may be deemed necessary for the proper management and operation of village affairs. The council may prescribe the duties and fix the compensation of all officers, both appointive and elective, employees, and agents, when not otherwise prescribed by law. * * * "

Section 412.171, which relates to duties of village justices of the peace, provides as follows:

"Village justices of the peace shall possess all the powers of town justices and shall be governed by the same laws except that their official bonds shall run to the village and shall be approved by the council. They may hear and determine accusations made against persons for the violation of any ordinance of the village and upon conviction may impose the penalties prescribed. Whenever a village is situated in more than one county, each justice may exercise his authority and shall file his bond or a duplicate thereof in both counties."

Neither this section nor any other statutory provision to which our attention has been directed authorizes a village justice of the peace to employ attorneys to defend persons charged with misdemeanors in his court.

Accordingly, upon the basis of the facts stated, both of your questions are answered in the negative.

IRVING M. FRISCH,
Special Assistant Attorney General.

Attorney for Village of Waite Park.
December 14, 1953. 779-K

# 17

**Justice—Criminal cases—Costs—Justice of the peace must prepare and file itemized statement of costs in each criminal case—M. S. A. 633.27.**

**Facts**

"Standard practice around this part of the country seems to be for the justice to charge a set cost of $4.50 or $3.50 for every criminal case, whether it be a plea of guilty or not guilty, whether it be a trial or not. My examination of the fee schedule in the action of justices of the peace doesn't give me any indication as to why this tradition of practice has been accepted. The ordinary traffic matter, which is the traditional justice of the peace problem, merely calls for a complaint and warrant, a commitment, or merely a report if the defendant should pay the fine."

**Question**

Is the above practice in conformity with law?

**Opinion**

There is no statutory provision authorizing the charging of a set cost for every criminal case tried by a justice of the peace.

M. S. 1953, Section 633.27, in part herein material provides:

"* * * Within ten days after the trial of any criminal action before him, such justice shall prepare an itemized statement of the costs taxed therein against the state and file the same with the county auditor. No bills for justice fees shall be allowed by the county board until such statement is filed, and until all fines collected by such justice have been forwarded as provided by law. For each of such reports, required to be made by this section, the justice may include in his taxable costs 25 cents."

Thus, under the foregoing statutory provision the justice must prepare and file with the county board an itemized statement of the costs taxed by him against the state in each criminal case. The fees which may be taxed as costs by justices of the peace in criminal cases are as provided in Section 357.14.

IRVING M. FRISCH,
Special Assistant Attorney General.

Becker County Attorney.
May 5, 1954. 266-B-7

# 18

**Justice — Jurisdiction — Change of venue — Violation of village ordinance— Town justice of the peace has jurisdiction within county to hear cases involving violation of village ordinance where the village does not have a municipal court—Action may be transferred for bias or prejudice or other grounds as prescribed in M. S. A. 531.11—M. S. A. 633.01.**

### Facts

"The Village of Walker is a duly incorporated village under the general law and is situated in Shingobee Township but has been fully separated from the township for all purposes. There is only one justice of the peace in the Village of Walker, who is elected by the voters and qualified. The village does not have any municipal court. One of the justices of the peace elected by Shingobee Township maintains an office in the Village of Walker."

### Questions

1. "Can a person who violates an ordinance of the Village of Walker be brought before the justice of the peace of Shingobee Township at his office in the Village of Walker?"

2. "If a person is brought before the village justice of the peace for prosecution under village ordinance, can this person demand a change of venue, and, if so, can the action be transferred to the justice of the peace of Shingobee Township?"

### Opinion

1. M. S. A. Section 633.01 provides that justices of the peace shall have power and jurisdiction throughout their respective counties as therein specifically provided. Inasmuch as the Village of Walker does not have a municipal court, it is our opinion that any justice of the peace within Cass County has jurisdiction to hear and determine cases arising out of a violation of an ordinance of the Village of Walker. We therefore answer question 1 in the affirmative.

2. In our opinion the provisions of M. S. A. Section 531.11 are applicable to change of venue or transfer of the cause of action as therein prescribed.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Walker Village Attorney.
July 16, 1953. 266-B-24

# 19

**Justice—Vacancy—Appointment—Term.**

**Questions**

"1. Since the organization of a municipal court in Albert Lea, should two justices be elected each two years or may we dispense with the justice system because of the presence of the municipal court?

"2. Upon the death of one of our justices, assuming the justice system is to be retained, who has the power and authority to appoint the successor?

"3. Is the appointment to be made for the unexpired term of the justice who died or for some other period?"

**Opinion**

The legislative act incorporating the City of Albert Lea, to be found in Special Laws 1878, provided that, among other officers, there should be "two justices of the peace for the city who shall be styled city justices." The passage of an ordinance by the city council on June 4 of that year pertaining to each justice of the peace indicates the existence of such officers in the city as early as 1878. Special Laws of 1889, Chapter 10, reduced to one act the special law incorporating the City of Albert Lea and all acts amending the same so as to constitute the 1889 act a charter of the City of Albert Lea. This act also provided for two justices of the peace.

Section 1 of the city charter adopted in 1902 likewise provided for two justices of the peace for the city, to be styled as city justices.

Section 109 of the charter adopted in 1927 contained the following:

"All ordinances and regulations of the city in force when this charter takes effect, and not inconsistent with the provisions thereof, are hereby continued in full force and effect until amended or repealed." Section 24 of your present charter contains the following provision:

"* * * At the regular election there shall be elected, in addition to the officers of the city, such justices of peace or municipal judges as may be provided by law."

Section 107 of your present charter provides that officers of the city in office at the time of the adoption of your last charter "shall continue in their respective offices and functions."

In 1927, when the present charter was adopted, there were among the city officers two justices of the peace. It was then known that the justices of the peace offices had been in existence for nearly half a century. The incumbents thereof were continued in office by the new charter. Such justices were permitted by Section 107 of the charter to hold their offices until the first Monday in January, 1929. The new 1927 charter had directly provided

in Section 24 thereof for the election in 1928 and biennially thereafter of justices of the peace "as may be provided by law." I assume that at the regular election in 1928 successors to the justices of the peace who then held office were elected for the term beginning on the first Monday in January, 1929. There was no provision in the charter requiring that the offices so held be terminated in 1929, and, as I understand the situation, they were not then and never have been abolished. The provision in Section 107 was obviously intended to provide only for a termination in January of 1929 of the incumbents' right to hold such offices without being re-elected. Since 1878 two offices of justice of the peace had been provided for the city by law. The 1927 charter continued the offices so provided. Section 24 of your charter provides for the election of such justices of the peace at each regular biennial municipal election as may be provided by law.

It is, therefore, my opinion that the existence of the offices of justice of the peace in your city at least since the ordinance above referred to was adopted in 1878, the creation of such offices by the charters of 1889 and 1902, and the above quoted provisions contained in the present charter, together with the practical construction thereof for more than 25 years, require a holding that, unless your charter is amended to provide otherwise, two justices of the peace shall be chosen at the regular municipal election every two years notwithstanding the "presence of the municipal court."

Your second question involves the authority to appoint a successor to fill the vacancy recently caused by the death of one of your justices.

The Constitution of Minnesota, Article VI, Section 8, provides that "The legislature shall provide for the election of a sufficient number of justices of the peace in each county * * * ." Section 10 provides:

> "In case the office of any judge become vacant before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and qualified. And such successor shall be elected at the first annual election that occurs more than thirty days after the vacancy shall have happened." Article V, Section 4, of the Constitution contains the following provision:
>
> "* * * He [the governor] shall * * * fill any vacancy that may occur in the office of secretary of state, treasurer, auditor, attorney general, and such other state and district offices as may be hereafter created by law * * * ."

If the legislature had created and considered the office of justice of the peace in question as an office within the meaning of the above cited Article V, Section 4, or had empowered the governor to fill a vacancy therein, or if it could properly be held that a justice of the peace is a judge within the meaning of the above quoted Article VI, Section 10, it would be quite clear that the governor should be held to be the officer authorized to fill the vacancy here considered.

However, in your city the office of justice of the peace appears to have been established, not directly by the legislature, but under the authority granted by the state constitution to a city to adopt a charter for its own

government. Offices of justice of the peace have been created under numerous city charters, and the authority to fill vacancies therein frequently conferred upon the city council. By M. S. 1949, Section 351.03, the legislature has given to the governor the power of removing any justice of the peace for malfeasance or nonfeasance in his office. The court, in the case of **State ex rel. Dann v. Hutchinson,** 206 Minn. 446, 288 N. W. 845, held that the removal power conferred upon the governor is exclusive, notwithstanding the charter provision giving the power to the city council. The authority to fill a vacancy in the office in question was not involved in that case, but it has at no time been conferred by the legislature upon the governor. If the governor has that power, it must have been conferred upon him through the state constitution. To hold that such authority is conferred upon the governor by the constitution, there must be a construction that a justice of the peace is a judge within the meaning of the constitutional provision above quoted giving the governor the authority to fill a vacancy "In case the office of any judge become vacant" or that an office of justice of the peace created by a city charter is an office within the meaning of the above quoted provision of Article V, Section 4, of our constitution.

We have been unable to find any legislation, court decision in our state, or practical construction which would justify the holding that a justice of the peace is a judge within the meaning of the term "judge" as used in the constitutional clause empowering the governor "In case the office of any judge become vacant" to fill the same, or that the office of justice of the peace established by charter is an "office * * * created by law" within the meaning of above cited Article V, Section 4. Practical construction and legislation from the beginning of the state's history have been to the effect that the constitution does not require the filling of such vacancy by the governor. Our statutory law has never imposed that duty upon him. **Minnesota** statutes have for many decades provided for the filling of a vacancy in the office of justice of the peace in a town by the town board, in a village by the village council, and in unorganized territory within a county by the county board. In the case of the creation of the office of justice of the peace by a city charter the legislature has made no provision as to the filling of a vacancy therein by the governor. Usually a city charter authorized by Article IV, Section 36, of the state constitution provides for the filling of such a vacancy by the city council.

My attention has been called to no vacancy in a justice of the peace office, created by a city charter or otherwise, where such vacancy has been filled by the governor of the state. We have found no court decision holding that such a vacancy must be filled by that officer. The case of **Dann v. Hutchinson,** above cited, involved a situation where the legislature had conferred upon the governor the power to remove "any" justice. If the governor had by statute been given the power to fill a vacancy in the office of any justice of the peace, his authority to do so would be clear. A state law conferring such power on the governor would supersede any provision in the charter to the contrary. However, no such legislation has been passed by the legislature.

In view of the practice, custom, and statutes that have thus prevailed in our state for nearly a century, and under which the governor has never been required to fill vacancies in the office of justice of the peace, I do not believe that the Attorney General should now hold that the governor is empowered, upon the death of one of your city justices, to appoint his successor.

Your present charter provides for the filling of vacancies in ward representation and in the office of mayor. As it does not contain any expressed authority specifically applicable to vacancies in the office of justice of the peace, an attempt has been made to find some constitutional or statutory provision which expressly confers upon a designated official, board, or council the power to fill a vacancy in that office. As our search has disclosed no constitutional or statutory provision for the filling of the vacancy in question, a request was made yesterday that you furnish us with a copy of your 1902 charter in order that we might discover whether that charter contained some authority for filling such vacancy that could be connected with the provisions of your present charter. We have found such a section in the 1902 charter. Section 10 of C. II thereof contains the following provision:

> "Section 10. Whenever any vacancy shall occur in the office of any elective office of said city, excepting that of mayor, which is hereinafter provided for, such vacancy shall be filled by appointment, by the city council, which incumbent so appointed shall hold his office until the next succeeding election."

Your present charter provides in part in Section 2 thereof the following:

> "* * * and save as herein otherwise provided and save as prohibited by the constitution or statutes of the state of Minnesota, it [the city] shall have and exercise all powers, functions, rights, and privileges possessed by it prior to the adoption of this charter; * * *."

As one of the powers possessed by the city prior to the adoption of the 1927 charter was that conferred upon the council by the above quoted provision of the 1902 charter to fill any vacancy in any elective office except that of mayor, such power, I believe, is still in the city council.

Therefore, it is my opinion that the council of your city has the power to fill the vacancy in the office of justice of the peace, an elective officer of your city.

By your third question you require an opinion as to whether the appointment is to be made for the unexpired term of the justice who died, or for some other period.

The wording of the above quoted Section 10 of the 1902 charter, giving the council authority to fill the vacancy in question, provides that the justice appointed as therein provided "shall hold his office until the next succeeding election."

J. A. A. BURNQUIST,
Attorney General.

Albert Lea City Attorney.
March 19, 1953. 266-A-12

## 20

**Juvenile — Juvenile offenders — Jurisdiction — Traffic violation — Vests in Juvenile Court exclusively in first instance. Justice of the Peace has no such jurisdiction in first instance. For Malfeasance in assuming such jurisdiction wilfully a justice may not be impeached but may be removed from office. Jurisdiction may not be conferred upon a justice of the peace by consent of juvenile since state does not consent and justice does not have jurisdiction of the subject matter**—M. S. A. 260.02.

### Facts

"There have been a number of incidents in Hennepin County where Justices of the Peace have taken jurisdiction over boys below the age of eighteen years in traffic matters and other violations of ordinances. This has occurred mostly in traffic matters where they tell the juvenile that they will fine him five or ten dollars and costs; that if the juvenile will not tell the Juvenile Judge or the authorities about it that the matter can be handled in this way, and that then their license will not be suspended. I ran across three incidents of this type today."

You comment upon M. S. A. 260.01-260.34, which relates to dependent, neglected and delinquent children, the jurisdiction of the court over juvenile offenders, procedure, and treats generally the public policy relating thereto.

Your view appears to be that in cases of this character, in counties of more than 100,000 population in harmony with Section 260.02, the district court has original and exclusive jurisdiction of all cases coming within the terms of Sections 260.01-260.34, and there is no room for jurisdiction of a municipal court or a justice of the peace in the first instance to entertain jurisdiction in a matter pertaining to a juvenile below the age of 18 years.

### Questions

1. "Has a justice of the peace or a municipal court any jurisdiction over a child below the age of eighteen in regard to traffic violations or other ordinance violations, including misdemeanors?

2. "If a justice of the peace does take this jurisdiction after being warned not to do so, is he subject to impeachment?

3. "Does a juvenile who has not objected to the jurisdiction of a justice of the peace, or consented to it, have any right to recover the money that he has paid in fines, or has he any relief where his license has been taken away by a justice of the peace where the justice has stated that he may do so under an agreement with parents, the child and himself?"

### Opinion

There appears to be no doubt that in cases of juvenile delinquents in counties having more than 100,000 inhabitants, the only court which has jurisdiction in the first instance is the district court. The municipal court and justices of the peace have no jurisdiction in such cases in the first instance.

M. S. A. 260.02. This section defines the term "delinquent child." The definition includes a child who violates any law of this state or any city or village ordinance. It includes all misdemeanors.

The Minn. Const. in Article XIII, Section 1, specifies certain officers, including judges of named courts, who may be impeached. Justices of the peace are not therein named.

Section 2 thereof enables the legislature to provide for the removal of inferior officers from office for malfeasance in the performance of their duties. **State ex rel. v. Hutchinson**, 206 Minn. 446, 288 N. W. 845. Under this power was enacted M. S. 1949, 351.03, which enables the governor to remove a justice of the peace from office, when it appears to him by competent evidence, that he has been guilty of malfeasance in the performance of his official duties. It is thus provided by statute that the justice of the peace may, in proper circumstances, be removed under statutory authority and the Constitution appears to contemplate that impeachment is not the remedy.

Consent of a juvenile offender to the jurisdiction of a justice of the peace to try and determine a criminal complaint against him does not confer jurisdiction upon the justice to proceed. In some cases, jurisdiction of the person may be conferred by consent of the parties. But in a criminal case the state is a party and the state, speaking through its policy-maker, the legislature, has stated in Section 260.02 that it does not so consent but vests exclusive authority in the district court in such a case as we have under consideration. Furthermore, the last cited section deprives a justice of the peace of jurisdiction of the subject matter. Jurisdiction of the subject matter may not be conferred by consent. The distinction between jurisdiction over the person and the subject matter is important as stated by Dunnell in his Digest, Section 2346. So, it appears that whether a juvenile has objected to the jurisdiction of a justice of the peace in a criminal case wherein he is accused, is not important. The law does not contemplate that he shall be so accused therein. It says in effect that in the first instance, he shall not be there so accused. He is without power to confer upon a justice of the peace authority of which the law deprives a justice. Therefore, such procedure before a justice of the peace is a nullity. It is form without substance. If a justice of the peace so proceeds, and in form convicts an accused juvenile offender, and thereupon imposes and collects what he chooses to call a fine, he has obtained money from the juvenile offender under a pretense of legal procedure but without authority of and contrary to law. In my opinion the juvenile is entitled by law to recover any money so paid. It is still his money.

Although the conduct of a juvenile may warrant procedure, such as the law authorizes, looking toward the forfeiture of a license to drive a motor vehicle, such cancellation or forfeiture may not be based upon the void procedure herein discussed.

CHARLES E. HOUSTON,
Assistant Attorney General.

Honorable Earl J. Lyons,
Judge of the District Court.
April 29, 1953. 268-F

# 21

**Municipal—Minor—Arraignment upon criminal charge—Transfer to juvenile court determined by age of minor when arraigned—M. S. A. 260.22, Subd. 1.**

### Statement

M. S. A. 260.22, Subd. 1, which, so far as is presently material, provides that, "When any minor is arraigned upon a criminal charge before a judge of the municipal court or justice of the peace * * * the judge or justice shall inquire concerning the age of such minor and, if it satisfactorily appears that he is under the age of 18 years, the case shall forthwith be transferred to the juvenile court of the county."

### Facts

"A minor, 18 years of age, now stands charged in the Municipal Court of the City of Faribault with grand larceny—2nd degree. After his arrest and before arraignment in Court it was learned that the minor was 17 years of age at the time of the commission of the offense with which he is now charged. He is to be brought before our Municipal Court for further proceedings. Inquiry therefore is made as to the inquiry the Court must make at the arraignment to know at what step in the proceedings under the above statute the minor must be transferred to the Juvenile Court for further proceedings."

### Questions

1. "Under the provisions of this section [260.22, Subd. 1], does the Court also have the duty to inquire as to the age of the minor at the time of the alleged commission of the crime with which he is charged?

2. "May the Court limit its inquiry to the age of the minor at the time of the arraignment?

3. "When a minor appears [upon arraignment] before a Municipal Court, and at that time said minor is over the age of 18 years, must the court forthwith transfer the cause to the Juvenile Court, when the Court is advised that said minor was not 18 years of age at the time of the commission of the alleged offense charged against him?"

### Opinion

The material portion of the statute here considered, reduced to its essentials for the purposes of this opinion, reads: "**When** any minor **is arraigned** * * * and * * * it satisfactorily appears that **he** is under the age of 18 years, the case shall * * * be transferred * * *."

The question whether the statute involved applies or does not apply in any particular case is controlled, in my opinion, by the age of the minor at the time of his arraignment, and not by his age at the time of the commission of the alleged offense resulting in the criminal proceeding in which

he is arraigned. There is nothing in the statute considered which indicates any different intention on the part of the legislature. Just as the legislature has fixed the age at the time of apprehension as the determinative age for the application of the Youth Conservation Act, rather than the age at the time of the commission of the alleged crime, see M. S. A. 260.125, Subd. 12, the legislature, in the statute here considered, has adopted as determinative the age of the minor when the "minor is arraigned."

Accordingly, your specific inquiries are answered as follows:

Question No. 1 is answered in the negative.

Question No. 2 is answered in the affirmative.

Question No. 3 is answered in the negative.

LOWELL J. GRADY,
Assistant Attorney General.

Rice County Attorney.
January 29, 1954. 268-F

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## 22

**Probate — Estates — Representative — Sale of Real Estate — Auctioneer's license—Representative of an estate licensed by order of court to sell real estate of decedent at public sale not subject to M. S. A. Sections 330.01 through 330.06.**

**Facts**

"A local attorney has informed me that in probating a small estate there is involved a house which the probate court has ordered the representative of the estate to sell. The probate court, pursuant to M. S. 525.641 and 525.65, has authorized the representative to sell the property at public auction. The representative has, of course, furnished to the court adequate bond."

**Question**

"Is it necessary that the administrator of an estate, in selling real estate at public auction pursuant to court order employ an auctioneer in the actual conduct of the sale?"

**Opinion**

An executor or representative of an estate in selling real estate which constitutes a part of the assets of the estate is doing so pursuant to a license and order granted by the judge of the probate court. Before a sale may be made by such representative, either at public or private sale, it is necessary for him to file a bond in such an amount as the court shall prescribe. The court by requiring an additional bond from the representative as a condition to the license authorizing the representative to sell property belonging to the estate has, by the requirement of such additional bond, provided pro-

tection to all interested parties in the estate. The statutory provisions of M. S. A. Sections 330.01 through 330.06, which provide for the licensing of public auctioneers is not, in our opinion, applicable to representatives appointed by the probate court who, by authority of the court, are authorized to sell property of the estate either at private or public sale.

It necessarily follows from what has been stated that the question submitted should be answered in the negative.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Steele County Attorney.
August 3, 1953. 16-B

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## 23

**Probate—Mentally ill—Commitment—Discharge—Re-Commitment—Certificate of findings—L. 1953, C. 723.**

**Question**

"What proceeding should the Probate Court take at the expiration of sixty days when a patient is returned to Probate Court after the Chief Medical Officer files a certificate saying that the patient needs no further treatment?"

**Opinion**

A reconsideration of the question which you then submitted requires further study of that portion of L. 1953, C. 723, which reads as follows:

"* * * Each commitment to a public institution shall be for a period of not more than 60 days. At the end of such 60 day period, the chief medical officer of the institution shall be required to file a certificate with the committing court and a copy with the director of public institutions setting forth the condition of the patient, his diagnosis and his findings as to whether or not the patient is in need of further institutional care and treatment. Upon filing such finding, the patient shall (1) be returned to the committing court by the institution and the guardianship of the director of public institutions discharged, if the patient is found not to be in further need of institutional care and treatment; or (2) remain under commitment and subject to all the laws, rules, and regulations pertaining to such institutions."

It will be noted that each commitment to a public institution shall be for a period of not more than 60 days. In now re-answering the question that you heretofore submitted, it is assumed that the commitment to which you therein referred was for a period of 60 days.

The construction herein given by the undersigned to the above quoted provisions requires that, upon the filing with the committing court of the certificate therein required of the chief medical officer of the public institution to which a patient has been committed for 60 days, the patient shall be physically returned to the committing court if such finding is to the effect that the patient is in no further need of institutional care and treatment. As the 60-day commitment has then expired and the official custody of such patient is at an end, he is discharged by virtue of the law in question.

However, if the chief medical officer files with the committing court at the expiration of the 60-day commitment a finding that the patient is in need of further institutional care and treatment, the patient need not be returned to the committing court but shall remain under commitment and be subject to all laws, rules, and regulations pertaining to the public institution to which he was committed. His commitment is thus extended by the operation of the statute under consideration and will continue until the patient is discharged as by law provided.

It is, therefore, my opinion that, whenever a probate judge finds a person to be mentally ill, senile, or inebriate and commits him to a public institution for a period of 60 days and the finding of the chief medical officer of such institution is then filed as above stated, official custody of the patient is thereby terminated and no further hearings or findings by the committing court are authorized unless that court again acquires jurisdiction over such patient by the filing of another petition as by law provided.

This opinion supersedes the opinion dated August 14, 1953 (file 248-b-3).

J. A. A. BURNQUIST,
Attorney General.

Mower County Attorney.
November 20, 1953. 248-B-3

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CRIMINAL LAW

## 24

**Extradition—Reciprocal Support Act—Defendant may be proceeded against under extradition statute without regard to Reciprocal Support Act.**

**Facts**

M. S. is now in custody in the state of Montana upon a criminal charge of abandonment instituted in your county. This charge was placed against the defendant without first proceeding under the Reciprocal Support Act. You make reference to a meeting of the Association of Attorneys General where the law relating to the Reciprocal Support Act was considered, and you ask these

**Questions**

1. Was a resolution adopted at a meeting of the attorneys general requiring persons to avail themselves of the Reciprocal Support Act before extradition?

2. If the above mentioned defendant, M. S., resists extradition should the defendant be proceeded against under the provisions of the Reciprocal Support Act?

3. Would a claim on the part of the defendant that we had not availed ourselves of the Reciprocal Support Act defeat our extradition?

**Opinion**

We will consider these questions in the order stated.

1. We do not have information with respect to any resolution or other action taken at a meeting of the association of attorneys general of the United States requiring persons to avail themselves of the Reciprocal Support Act before extradition. However, it would not appear to us that any action so taken could in any manner affect the statutory and constitutional provisions relative to extradition proceedings or the statutory provisions relative to the Reciprocal Support Act.

2. The request for a writ in extradition proceedings is addressed to the Governor of the rendering state. These proceedings are essentially criminal. The statute, M. S. 1953, Ch. 629, prescribes the necessary steps to be taken in an extradition proceeding.

The Reciprocal Support Act, Section 518.41, is essentially civil in nature. Proceedings initiated under this act are entirely independent of any proceeding of extradition proceedings. Consequently, the proceedings which have been instituted in your county to extradite the defendant, M. S., may proceed and are not in any manner dependent upon the institution of proceedings under the so-called Reciprocal Support Act.

3. For the reasons hereinbefore stated, we answer the third question in the negative.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Otter Tail County Attorney.
June 17, 1954. 193-A-3

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## 25

**Traffic Violations—Arrests—Officials and private persons in matter of arrests for traffic violations—M. S. A. 161.03, subd. 21; 169.14, subd. 2, 4, 5; 626.33; 629.37.**

**Question**

"1. What agencies of state government are authorized under the constitution and under statutes to make arrests for traffic law violations?"

**Opinion**

The commissioner of highways is authorized under Minnesota Statutes Annotated, Section 161.03, Subd. 21, to employ and designate 198 patrolmen, 8 supervisors, 6 assistant supervisors and 8 sergeants. These appointees constitute the Highway Patrol and are authorized "to enforce the provisions of the law relating to the protection of and use of trunk highways." They "have upon all trunk highways the same powers with respect to the enforcement of laws relating to crimes, as sheriffs, constables, and police officers have within their respective jurisdictions, so far as may be necessary for the protection of life and property upon such trunk highways."

Upon the superintendent and members of the state bureau of criminal apprehension are conferred, under Minnesota Statutes Annotated, Section 626.33, the following powers:

> "* * * The superintendent, from time to time, shall make such rules and regulations and adopt such measures as he deems necessary, within the provisions and limitations of Sections 626.32 to 626.50, to secure the efficient operation of the bureau. * * * The various members of the bureau shall have and may exercise throughout the state the same powers of arrest possessed by a sheriff, but they shall not be employed to render police service in connection with strikes and other industrial disputes."

To what extent the services of members of the bureau of criminal apprehension should be devoted to the making of arrests for traffic violations is a question which the superintendent of the bureau may, under the above quoted provision, determine in the exercise of sound discretion.

The director of the Division of Game and Fish, game refuge patrolmen and game wardens are given by statute the authority to arrest without a warrant, any person detected in the actual violation of any provisions relating to the game and fish laws contained in chapters 97 to 102 of Minnesota Statutes Annotated.

No state officer is empowered by statute to confer upon the above referred to persons connected with the Division of Game and Fish the power to make arrests for traffic violations or impose upon them the duties to make such arrests. However, each of them, as any private person, may, under Minnesota Statutes Annotated, Section 629.37, make an arrest "For a public offense committed or attempted in his presence;".

It is therefore my opinion that the only agency of the state whose members are specifically authorized to make arrests for traffic violations on the trunk highways of the state is the state highway patrol. However, the superintendent of the Bureau of Criminal Apprehension may require, in the exercise of sound discretion, members of that agency to devote a reasonable portion of their time to the apprehension and arrest of violators of traffic laws. It is also clear that every officer or employee of all state agencies, regardless of his statutory authority, may, as a private person, under the above cited Section 629.37, arrest anyone who violates a traffic or any other law in his presence.

**Question**

"2. What agencies of state government can be utilized to join in an enforcement campaign to supplement the efforts of the state highway patrol, either by way of making actual arrests or issuing warnings?"

**Opinion**

What was said in answer to your first question is also applicable in responding to your second inquiry. In addition, I wish to state that it is, of course, the duty, not only of those peace officers above mentioned, but also of all sheriffs, constables, marshals and policemen throughout the state, to make arrests for violations of our traffic statutes and ordinances within their respective jurisdictions.

If we are to bring about through such efforts a reduction of the death rate, of the intense suffering and of the enormous loss due to traffic accidents, it is obvious that much attention must be paid to the enforcement of our speed laws.

Minnesota Statutes Annotated, Section 169.14, Subd. 2, establishes the lawful speed limits where no speed hazard exists:

"(1) 30 miles per hour in any municipality;

"(2) 60 miles per hour in other locations during the daytime;

"(3) 50 miles per hour in such other locations during the nighttime."

The law requires a reduction in speed when approaching and in crossing an intersection or railway crossing, going around a curve, approaching a hill crest, traveling on a narrow or winding road, and when special hazards exist with respect to pedestrians, traffic, weather, or highway conditions. The speed limit of 30 miles per hour established as lawful within any municipality is absolute. Exceeding that limit constitutes a violation of the law. Any speeds in excess of the 60 and 50 mile limitations shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful.

Minnesota Statutes Annotated, Section 169.14, Subd. 4, gives the commissioner of highways the authority to determine upon the basis of engineering and traffic investigation that any speed as above limited is greater or less than is reasonable or safe under the conditions found to exist on any trunk highway or upon any part thereof. After such determination, the commissioner may erect appropriate signs designating a reasonable and safe speed limit. The speed limit so designated shall be in effect when such signs are erected. Any speeds in excess of such limits shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful.

Minnesota Statutes Annotated, Section 169.14, Subd. 5, pertains to speeds on streets and roads that are not a part of the state trunk highway system. Under that subdivision local authorities may request the state highway commissioner to authorize, upon the basis of an engineering and traffic

investigation, the erection of appropriate signs designating proper speed limits on any such street or highway located within their respective localities. As municipalities have the right thus to avail themselves of the services of the state highway commissioner, it may be possible thereby to secure more numerous and more effective speed regulations on local roads through the zoning thereof by a more extensive use of such speed signs for the purpose of warning travelers that any speed in excess of that so designated is prima facie unlawful.

J. A. A. BURNQUIST,
Attorney General.

Governor.
October 3, 1953. 989-A-24

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## 26

**Traffic violation—Prosecutions—Costs—How paid**—M. S. A. 161.03, subd. 22.

**Facts**

"We have a situation where an arrest was made by a member of the State Highway Patrol for violation of the motor vehicle law and we are wondering what is the proper method and manner of paying the witness fees of those witnesses who appeared on behalf of the prosecution."

You comment that the opinion of the Attorney General, No. 35, 1950 report, covers the reverse of the situation. You say that a $75 fine was imposed and paid.

**Question**

May the judge pay the witness fees out of the fine money?

**Opinion**

As pointed out in the opinion No. 35, 1950 report, dated April 1, 1949, the fine is paid to the State Treasurer by the justice of the peace or officer collecting the same. This money is credited to a separate fund established for that purpose. Out of that fund is paid to the counties the costs and expenses incurred by the counties in prosecution and punishment of the persons arrested. Such costs and expenses are not paid out of the fine, but out of the fund. If the fine is not paid, the costs and expenses are still paid out of the fund. M. S. A. 161.03, Subd. 22. The practice is set up in this very subdivision. Payment is made by the State Treasurer upon the claim of the county, verified by the county auditor.

CHARLES E. HOUSTON,
Assistant Attorney General.

Brown County Attorney.
October 29, 1953. 989-A-6

# EDUCATION

## SCHOOL DISTRICTS

## 27

**Annexation—Bonded Indebtedness—Spreading Taxes**—M. S. A. 122.15, subd. 2 applies only to the fact situation related in Subd. 1. (L. 1953, C. 744)

**Reorganization—Manner of voting according to school districts and classification thereof**—M. S. A. 122.52, 131.01, Subd. 2 (a) (b).

### Facts

Common School Districts A, D and E have ungraded elementary schools. Common School District B has a graded elementary school. Common School District C has a secondary school.

You call attention to M. S. A. 122.52 and ask these

### Questions

"1. Does school district B vote with school district C as one unit, or is their vote counted separately? I would like to know whether or not the election would have to be carried in each district?

"2. Taking into consideration Section 122.15 would the bonded indebtedness of school district C be spread among all the other school districts?"

### Opinion

Laws 1953, C. 744 amends M. S. 1949, 122.15. Subd. 2 thereof provides that when land is annexed by authority of Subd. 1 to a school district, upon the petition of a freeholder, to a district which has outstanding bonds, the county auditor shall thereafter include such land and personal property assessed to the owner thereof, when taxes are spread, in the same manner as he would have done if such property had been taxable in the district before such bonds of the district, as are at the time outstanding, were delivered.

M. S. A. 131.01, Subd. 2, paragraph (a) defines a graded elementary school and paragraph (b) defines an ungraded elementary school. The term "urban school district", as used in M. S. A. 122.40-122.54, means a school district which maintains a graded elementary or secondary school. Section 122.52 requires that each school district maintaining a graded elementary or secondary school, at a reorganization election, votes separately. All territory in the proposed reorganized district not included in an urban district votes as a unit.

In your illustration, the districts called A, D and E have ungraded elementary schools and are classed as outside the limits of an urban district and vote as a unit.

District B has a graded elementary school. District C has a graded elementary and secondary school and these two districts are classed as urban and each votes separately.

Your second question requires a negative answer. M. S. A. 122.15, Subd. 2 relates only to taxation of land detached from one school district and attached to another on petition of the owner. But in your problem, I understand that the change is brought about by reorganization proceedings, M. S. A. 122.40-122.57. The operation of Subd. 2 aforesaid is limited in its application and does not apply to a fact situation where the change in school district organization is brought about through re-organization proceedings.

CHARLES E. HOUSTON,
Assistant Attorney General.

Pine County Attorney. 166-C-5
May 26, 1953. 166-E-4

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## 28

**Annexation—Bonded Indebtedness—When property is taken from one district and included in another under M. S. A. 122.09, as amended by L. 1953, C. 591—Order cannot provide that owner will pay taxes on the then outstanding bonds of the district to which the land is attached even if owner consents.**

**Facts**

"A petition for change of school boundaries under Section 122.09 M. S. A., as amended by chapter 591 of the 1953 Minnesota Session Laws, was filed with the county board of Freeborn County. After due notice, a hearing was held and the county board made its order changing the boundaries in the manner requested. In the order, the following provision was inserted:

'IT IS FURTHER DETERMINED AND ORDERED, that the premises described above, which were heretofore situate in said School District No. 53, and which are by this order being included in said School District No. 38, shall be subject to their proportionate share of the unpaid bonded debt of said School District No. 38. However, in the event that the County Attorney of Freeborn County, Minnesota, shall obtain an opinion from the Attorney General of the State of Minnesota to the effect that it is not within the power of this Board to so subject said premises to the payment of said unpaid bonded debt, or if for any other reason this paragraph is held invalid, this paragraph shall be of no force and effect but the other portions of this order changing said boundary lines shall be effective the same as if this last mentioned paragraph was never included in this resolution and order.'

"The petitioners were formerly a part of a common school district and the result of the proceedings was that a portion of the territory of the common school district was annexed to an independent school district. Nothing was stated in the petition with respect to assumption of bonded indebtedness."

**Question**

Is the provision in the above quoted order with reference to the proportionate share of the unpaid bonded indebtedness of school district No. 38 valid?

**Opinion**

It is assumed that the petition for the change of school boundary was presented pursuant to M. S. A. Section 122.09, as amended by L. 1953, C. 591, and that the order granting such petition for a change was made by the county board as authorized by this statute.

When the boundary of the school district was changed so that the premises involved, which were situated in school district No. 53, were included and made a part of school district No. 38, the land so annexed to school district No. 38 continues to pay the taxes for the outstanding bonds of the district from which it was detached. See **In Re Appeal of Consolidated School District No. 16, Blue Earth County**, 179 Minn. 445, 229 N. W. 585.

No change in the boundaries of school districts shall in any way affect the liability of the territory so changed upon any bonded indebtedness, and the property detached is not subject to the bonded indebtedness of school district No. 38 then existing. The board does not have any authority in making its order, under the statute above referred to, to predicate its order upon the condition that the premises affected shall be subject to the proportionate share of the unpaid bonded debt of said school district No. 38.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Freeborn County Attorney.
July 7, 1953. 166-C-5

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## 29

**Annexation—Detachment—County Board—Reconsidering action—County board having entertained petition under M. S. A. 122.15 to detach lands from a school district and attach them to an adjoining school district, having made an order to accomplish that result, and having adjourned, cannot at a subsequent time, at another meeting, reconsider the action taken and set it aside—Administrative proceedings, when res adjudicata.**

**Facts**

Before the change in the school district boundaries herein mentioned, the lands herein described in Township 126, Range 40 of Pope County, Minnesota were included in School District No. 49 of Pope County:

N½ of Sec. 1
SE¼ of Sec. 1
NE¼ of SW¼ of Sec. 1
S½ of Sec. 2
N½ of Sec. 11
SE¼ of Sec. 11
Sec. 12
Sec. 13
N½ of Sec. 14

The following described lands were in Independent School District No. 42 of Douglas County:

W½ of SW¼ of Sec. 1
SE¼ of SW¼ of Sec. 1
N½ of Sec. 2
Sec. 3
Sec. 10
SW¼ of Sec. 11
S½ of Sec. 14
Sec. 15

Three petitions were filed with the county board of Pope County under authority of M. S. A. 122.15 praying that lands described therein be set off from District No. 49 to District No. 42 aforesaid. Orders were made granting such petitions which resulted in detachment of the following described lands from the district first named and attachment to the district last named, viz.:

W½ of NW¼ of Sec. 1
W½ of SW¼ of Sec. 1
SE¼ of SW¼ of Sec. 1
S½ of Sec. 2
SE¼ of Sec. 11
SE¼ of Sec. 14
NW¼ of Sec. 13

Such action resulted in leaving the NW¼ of Section 14 unaffected by the change except that it is surrounded by land included in District No. 42 while it is in District No. 49.

It is said that when such orders were made the county board did not realize that the making of such orders would produce this result. I have not seen the orders and I do not know the language thereof and do not express an opinion concerning their meaning.

Attention is called to M. S. A. 122.03 which reads:

> "All districts shall be composed of adjoining territory and any part of a district not so situated and not containing a schoolhouse used as such shall be attached to a proper district by the board of county commissioners, upon notice as in other cases, except when an entire district or districts is or is to be a part of a district which maintains a secondary school located within the same high school area, and there is no intervening or adjoining district maintaining a secondary school."

**Question**

May the county board by appropriate resolution reconsider and rescind its action taken as aforesaid?

**Opinion**

In view of Section 122.03, supra, and in view of the orders aforesaid, if the NW¼ of Section 14 does not contain a schoolhouse used as such, then this quarter section must be attached to a proper district by the county board under the procedure required.

Validity of all proceedings mentioned is assumed. The only question considered herein is the authority of the county board to reconsider action taken upon its own motion.

"The powers of the county board are purely statutory. They are such as are expressly granted, and such as may be fairly implied as necessary to the exercise of those expressly granted." Dunnell's Digest, Sections 2249, 2281. The power to reconsider action theretofore taken by the board is not expressly granted by statute. No statute is pointed out from which we must conclude that this power is fairly implied because of the power granted in Section 122.15.

Before the petitions aforesaid were presented to the county board, it had no authority to change the school district boundaries. It was only because of the filing of such petitions that the board gained such powers. What the board did was rooted in the petitions. It appears that the board had the power to do what it did. If, at the same session of the board, after making such orders it chose to reconsider its action, it is my opinion that it would have had the power to do so. But it did not. What it did is a thing accomplished. It is finished. There comes a time when such proceedings end. A bad decision has as much finality as a good decision. It was a final order.

**In re Judicial Ditch No. 6**, 156 Minn. 95, 194 N. W. 402, held that where an order had been made in drainage proceedings determining questions of the propriety, practicability and public utility of the proposed improvement, such order was final as to the questions determined and the order could be reviewed only by certiorari.

The proceedings on the petition having been completed, the county board exhausted its powers. It is my opinion that the board has no power to change the order lawfully made. Before it can take new action there must be a new petition invoking its lawful powers.

Without a new petition it may upon proper notice make an order affecting the NW¼ of Section 14 aforesaid, under the authority mentioned by virtue of Section 122.03.

CHARLES E. HOUSTON,
Assistant Attorney General.

Pope County Attorney.
March 31, 1954. 166-C-2

# 30

**Consolidation—Boundaries—Change in boundary shall not be made so as to leave old district without at least one schoolhouse and at least four sections of land in certain districts—District containing less than four sections may be merged or consolidated with another district—M. S. A. 122.09, as amended by Laws 1953, Ch. 591; M. S. A. 122.10.**

**Questions**

"(1) Is this law of general application or does it apply only to certain districts in this state?

"(2) Does M. S. A. 122.10 apply so that the old district may not be left with less than four sections?

"(3) Does this law apply where the present school district which is to be merged is less than four sections in area?"

**Opinion**

1. M. S. A. Section 122.09, as amended by L. 1953, C. 591, is a law of general application.

2. M. S. A. Section 122.10, so far as here material, provides:

"No change in the boundaries of a district by organization of a new district, by detachment of land on petition of the owners, or otherwise **shall be made so as to leave the old district without at least one school house used for school purposes and without at least four sections of land, if not a consolidated district, and not less than 24 sections, if a consolidated district.**" (Emphasis supplied.)

The limitation contained in this statute is clear and positive. It means that in case of a consolidated district no change shall be made in the boundary thereof by organization of a new district or otherwise which would result in leaving the old district without at least one schoolhouse and without at least four sections of land.

3. Section 122.10 does not prohibit an existing district, having less than four sections of land in area, from merging or consolidating with another district upon compliance with the statutory provisions relating thereto.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Mower County Attorney.
August 20, 1953. 166-C-8

## 31

**Consolidation—Procedure—It is not required that the consolidation shall include a district which maintains a graded elementary or secondary school—M. S. A. 122.01, 122.18-122.27; 131.01**

**Question**

May several common school districts consolidate by authority of M. S. A. 122.18-122.27 when none of the school districts has a graded elementary or secondary school?

**Opinion**

M. S. A. 122.18 permits consolidation of districts or parts of districts. There is no limitation which requires that one or more of the districts to be consolidated shall conduct a graded elementary or secondary school. School districts are divided into certain classes specified in M. S. A. 122.01 for organization purposes. For purposes of administration all public schools are classified under the heads specified in Section 131.01.

CHARLES E. HOUSTON,
Assistant Attorney General.

Fillmore County Attorney.
June 18, 1953. 166-F-6

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## 32

**Dissolution—Annexation of district which is to be dissolved—Adjoining territory—Adjoining district—Meaning of corner to corner—M. S. A. 122.03.**

**Facts**

Under authority of M. S. A. 122.28, a petition in due form was presented to the county board of Cottonwood County praying dissolution of Common School District No. 32. If the petition is granted, it will become the duty of the county board to attach the territory now included in such school district to one or more existing districts or to unorganized territory. The problem involves consideration of Section 122.03 which reads:

> "All districts shall be composed of adjoining territory and any part of a district not so situated and not containing a schoolhouse used as such shall be attached to a proper district by the board of county commissioners, upon notice as in other cases, except when an entire district or districts is or is to be a part of a district which maintains a secondary school located within the same high school area, and there is no intervening or adjoining district maintaining a secondary school."

The county board will have for consideration attaching such territory to Common School District No. 9 at Cottonwood. No. 9 maintains a secondary

school; but its boundaries are not common with the present boundaries of No. 32, nor do they touch at any point. No. 32 corners with Consolidated School District No. 46 of Watonwan County, which maintains a secondary school, but the two districts have no common boundary.

**Question**

Within the meaning of M. S. A. 122.03, does the term "adjoining" include districts which are corner to corner?

**Opinion**

An examination of Words & Phrases shows a great variety of views of various courts on the meaning of "adjoining" as used in various different contexts. It has been said to mean adjacent, abutting, attached, beside, bordering, close, contingent, neighboring, next, contiguous, lying close by, near to, in the neighborhood or vicinity of, touching.

In determining the meaning in which the word "adjoining" is used, we must consider the entire section. We read an exception to the rule. The exception deals with a situation where the territory to be annexed is to be made a part of a district which maintains a secondary school, located in the same high school area. In that event, the fact that there is no intervening or adjoining district which maintains a secondary school makes it possible to annex the proposed territory to the district with which it has no common boundary. This provision appearing in this section leads me to the conclusion that the rule to which the exception applies uses the term "adjoining" as describing a district with a common boundary. Otherwise, there would have been no need to write the exception.

If the legislature had intended the rule, absent the exception, to refer to a nearby district, no exception would have been needed.

In the interpretation of statutes, we seek to discover the intent of the legislature. M. S. A. 645.16. What was the object to be attained by the law? Presumably, it was the best interests of the patrons of the schools. This involves convenience, the furnishing of the best educational advantages, means of travel over good roads, the operation of school buses, and any other material factors bearing on the question. If the consideration of these things brings the county board to the conclusion that annexation to District No. 9 is to be desired, would it not be absurd to say that it must be annexed to District No. 46 even though not in the public interest? See M. S. A. 645.17.

In **U. S. v. Monia**, 317 U. S. 424, 432, we read:

> "* * * A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining

inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning.* * * "

Before the section under consideration was amended in 1953, it contained no exception. Before amendment, it was considered that a school district must contain a single tract of land, one body. The 1953 amendment is the outgrowth of recent legislation which has resulted in consolidation, reorganization, dissolution of school districts and annexation of territory to districts. This process has resulted in new problems arising therefrom. The overall legislative intent which promoted this new legislation was to improve the educational system in Minnesota. It has the ultimate object of affording to all children of school age equal opportunity to obtain the best education reasonably available. It is my opinion that in administering this law the county board should have that ultimate object in mind. It should not stumble over a single word, but it should keep in mind the ultimate goal to be attained as expressed in the whole body of the school law which the legislature has written.

With these things in mind, I reach the conclusion that, there being no common boundary between Districts Nos. 32 and 46, they do not adjoin within the meaning of Section 122.03 and this section does not prevent the county board from annexing this territory to Consolidated District No. 9, should the board decide that all of the people and the public interest will thereby be best served.

CHARLES E. HOUSTON,
Assistant Attorney General.

Cottonwood County Attorney.
March 29, 1954. 166-C

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## 33

**Dissolution—Consolidation—After school district is dissolved, it cannot be resurrected—Authority of Commissioner of Education—M. S. A. 122.19.**

**Facts**

In proceedings under M. S. A. 122.28, the county board of Goodhue County has made an order dissolving School Districts Nos. 24, 27, 29, 93 and 127 of Goodhue County. I assume that such order of dissolution was made pursuant to a petition signed by a majority of the resident freeholders of each of the districts named, who were entitled to vote at school elections therein. The county superintendent does not say how the county board acquired jurisdiction. As I understand the facts, such persons also petitioned (without statutory authority) that the territory embraced in all such districts should be annexed to School District No. 4 of Wabasha County. After dissolving such districts, the county board of Goodhue County continued the hearing (I assume this means the hearing on the petitions to attach the territory to School District No. 4 aforesaid) until June 2, 1954.

The county superintendent of Wabasha County has (on April 12, 1954) submitted a plat for the consolidation of School Districts Nos. 4, 90 and 94 of Wabasha County, and Districts 24, 27, 29, 93 and 127 of Goodhue County, to the commissioner of education for his approval preliminary to consolidation. See M. S. A. 122.19. This was done, as I understand, after the order of dissolution aforesaid was made.

**Questions**

"1. May the Commissioner of Education approve the plat of the proposed consolidation which has been filed by the county superintendent of schools of Wabasha County under the circumstances mentioned above?

"2. May the board of county commissioners of Goodhue County take action to rescind their earlier action on the dissolution of Districts 24, 27, 29, 93 and 127 of Goodhue County since the Wabasha county commissioners have delayed a decision on the dissolution-annexation of these districts? (The county superintendents feel that if the board of commissioners of Goodhue County could rescind their earlier action, it would clear the way for the consolidation procedure.)"

**Opinion**

If the county superintendent has strictly complied with the requirements of M. S. A. 122.19 so that the commissioner of education has before him a plat for his approval, modification, or rejection, such commissioner may act as authorized. In this connection, I do not pass upon the sufficiency of the plat or the authority of the county superintendent, since facts have not been submitted sufficient for the purpose.

The second question should be submitted to the county attorney. He is the advisor of the county board. But it may do no harm to say that after several school districts have been dissolved by action of the county board, such board has no power to resurrect the dead districts.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.
May 6, 1954. 166-E-3

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## 34

**Dissolution—Petition—Freeholder—M. S. A. 122.28, relating to dissolution of districts, relates to all school districts—Owner of cemetery lot is a freeholder, if deed of conveyance to him conveys an estate of inheritance—Petition for dissolution may be signed by freeholder before county board acts thereon irrespective of the fact that signer previously signed and then withdrew his name.**

**Questions**

1. "Does M. S. A. 122.28 apply to an independent school district which maintains a graded elementary and high school and which was created under the reorganization act (M. S. A. 122.40-122.57)?

2. "Do persons who own cemetery lots in such a school district and owning no other real estate in the school district but who do actually reside in the school district qualify as resident freeholders for the statutory purposes of executing a petition to dissolve as provided in this section of the law?

3. "Can a qualified resident freeholder who withdraws his name from a petition to dissolve a school district reinstate his name on said petition prior to the time the County Board considers the petition on its merits if said freeholder executes in writing a statement canceling or annulling or withdrawing his preceding written statement of withdrawal from the petition?

4. "Does a person who owns only a life estate in real estate situated in a school district qualify as a freeholder within the meaning of Minn. St. 122.28 inasmuch as a life estate is not an inheritable interest in land?"

**Opinion**

1. The first question shows that the district involved is maintaining school; so, the first condition stated in Section 122.28 does not apply. The language "such district or any other district may be dissolved", found in this section is not ambiguous. There is nothing for construction. It must be read as it is. The legislature has, in effect, said that this provision applies to every school district.

However, your attention is called to the case of **Bricelyn School District No. 132 v. Board of County Commissioners**, 55 N. W. 2d 597. In that case the Supreme Court held that M. S. 1949, Section 122.05 does not authorize the freeholders therein designated to petition the county commissioners to make a school district of a portion of the reorganized school district there involved. A question as to whether that court would take the same position with reference to M. S. 1949, Section 122.28, cannot be answered with certainty. However, the fact situations existing under and the powers granted by Section 122.05 and Section 122.28 are different. Section 122.05 may, as the court says in the above entitled case, permit "all or parts of a reorganized school district to be withdrawn so as to form a new district upon the petition of a dissident minority within the reorganized district and upon the affirmative vote of a majority of the county board." To prevent "freezing" all land in such district, the court suggests that M. S. 122.15 may be applied. Section 122.28 requires the petition to be signed by a majority of the resident freeholders of the district who may be entitled to vote thereon, thereby overcoming the "dissident minority" objection to Section 122.05. Section 122.28 authorizes a petition for the dissolution

of the entire reorganized district, and, if such dissolution petition should be construed as inapplicable to such reorganized district, there appears to be no statutory authority for resident freeholders to petition therefor.

The facts under consideration and those involved in the **Bricelyn School District** case appear to warrant different conclusions in the event a petition under Section 122.28 becomes involved in litigation, but it is impossible for this office to predict with definiteness what position the Supreme Court would take if it is required to pass upon the question here considered.

The Attorney General does not consider that he should hold that Section 122.28 is inapplicable to the districts reorganized under the school reorganization act. Until the Supreme Court so holds, it is our opinion that resident freeholders have the right to petition the county board as is authorized under Section 122.28.

2. In M. S. A. 500.05, it is provided that estates of inheritance shall be denominated estates of freehold. The purpose for which land is used does not determine the nature of the estate of the owner. The conveyance to the owner must be examined to determine the nature of the estate conveyed. M. S. A. 306.09 provides that after the filing of the map provided in Section 306.05, the trustees of a cemetery association may sell and convey lots. Every conveyance of such lots shall be expressly for burial purposes and no other. Still, the estate conveyed is an estate of inheritance. See M. S. A. 306.15 (2). Such owner is a freeholder and, according to the conditions of Section 122.28, an eligible petitioner. We are not concerned in this opinion whether the legislature made a proper classification of petitioners.

3. It is the fact that the person who signs the petition is a resident freeholder of the district which qualifies him to sign. It is not the fact that he never changes his mind which qualifies him. When he has signed the petition and then withdraws his name, he is still a resident freeholder, a changeable one, indeed, but he is still an eligible signer until such time as the county board has acted on the petition.

4. An estate for life is an estate of freehold. M. S. A. 500.05. Consequently, the fourth question requires an affirmative answer.

CHARLES E. HOUSTON,
Assistant Attorney General.

Attorney for School District, Worthington, Minnesota.
May 12, 1953. 166-E-3

# 35

**Board members—Contracts—Financial interest prohibited—M. S. A. 471.87—unless excepted by Section 471.88—Where contract is made in good faith and without collusion but contrary to statutory requirement recovery may be had for benefits actually received—Kotschevar v. Township of North Fork, 229 Minn. 234, 39 N. W. (2d) 107 followed.**

### Facts

"On May 18, 1953, Eveleth Independent School District No. 39 ordered from its local newspaper, the Eveleth News-Clarion, five hundred teacher application blanks. On May 26th an order for five hundred junior college commencement programs was made from the same newspaper and on May 27th a final order of twelve hundred high school commencement programs was ordered from the Eveleth News-Clarion. The bill for these orders was in the amounts of $46.50, $34.25 and $53.25 respectively making a total of $134.00. The orders were placed by the superintendent's office of the school district and delivery was duly made and the items utilized by the school district.

"When the bills were presented for payment, as attorney for the school district, I refused to approve their legality in view of the fact that J. O., Chairman of the Eveleth School Board, was at the time the items were supplied also one of the owners of the newspaper from which the supplies were ordered. Furthermore, there were other sources in the district which could furnish these commodities. When the bills were presented for payment the school board refused payment.

"Now that the commodities have been delivered and utilized by the school district the question arises as to whether the school district can compensate Mr. O. for these items on a 'reasonable value' basis."

### Question

May the district pay the newspaper for the commodities above enumerated, which have been delivered to and utilized by the district, on the basis of the reasonable value of the benefits which the district has received?

### Opinion

From the facts it appears that during the time when the above enumerated commodities were purchased by the school district from the newspaper a member of the school board was a part owner of the newspaper. In these circumstances such board member had a personal financial interest therein, and the purchases made by the district here considered were prohibited by statute. M. S. A. Section 471.87. Such purchases are not within the exceptions as provided in Section 471.88.

In the absence of fraud or collusion, or a concerted purpose between the members of the school board and the newspaper to intentionally evade or violate the law in connection with the purchase of the commodities above

referred to, we are of the opinion that the school board may pay the newspaper the value of the benefits which it has actually received as the result of the commodities received from the newspaper and appropriated for the use and benefit of the school district. See **Kotschevar v. Township of North Fork**, 229 Minn. 234, 39 N. W. (2d) 107, and cases therein cited.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Department of Education.
August 19, 1953. 90-C-8

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## 36

**Board members—Resignation—All members of board—Oath of office—Vacancies—How filled**—M. S. A. 124.13, 125.03, 358.05, State Const. Art. 5, Sec. 8.

**Questions**

"1. What happens if the school board of a district resigns and no person will accept the position if elected or appointed or refuses to qualify?

"2. What will be done to provide educational services and facilities in a district which has no school board?"

**Opinion**

When a school board member is elected, the law requires that he file an acceptance of the office and his official oath. M. S. A. 124.13. Section 358.05 requires that he take and subscribe the oath defined in the constitution, Art. V, Sec. 8. That oath states that the officer will "support the Constitution of the United States and of this State, and faithfully discharge the duties of his office to the best of his judgment and ability."

The board cannot and does not resign. It is a continuing agency of the state. A member can resign. Thereupon the members remaining, acting as a board, fill the vacancy. Section 125.03.

Whoever raised this question must have been under the apparent misapprehension that a school board in a district without a secondary school has a duty to find a secondary school which will furnish instruction to its resident pupils. See opinion of Attorney General to you, dated May 10, 1954, file No. 180-D, which reaches a conclusion to the contrary. Perhaps the members of the board, upon being informed that they have no such duty, will not care to resign.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.
May 10, 1954. 161-A-22

# 37

**Finances—Bonded indebtedness—Payment—Consolidated district—Neither one mill tax nor school aids may be used to pay bonded indebtedness of part of District.**

**Facts**

"The original Balaton Independent School District No. 46 was composed primarily of the land area included in the Village of Balaton. The district at that time voted on selling its bonds for the purpose of the erection of a school building. There is $30,000 left to be paid on such bond issue. After the bonds had been sold and the monies received the Balaton District was enlarged by some rural districts merging with the original Balaton District. We have no record as to when these mergers occurred but we are informed that such mergers occurred after the bonds had been issued. Therefore, the old or the original portion of District No. 46 has been carrying the tax levy for the retirement of the bond issue.

"The Balaton School Board is anxious to retire the indebtedness at the earliest possible date and has submitted questions as to the legality of using some of the funds which are being received from various tax sources. The questions which have been submitted are as follows:"

**Question**

"1. May the receipts from the one mill tax be used for the purpose of retiring the indebtedness?"

**Opinion**

M. S. 1949, Section 127.02 reads as follows:

"The county auditor shall extend upon the tax lists of the county, in the same manner as district school taxes are extended, a tax of one mill on the dollar of the taxable property in each district, to be known as the county school tax, and be credited to the school district in which the property taxed is situated."

The purpose of this one mill tax is for the benefit of the entire school district but not merely for the part thereof that is subject to a bonded indebtedness. It is therefore our opinion that the receipts from the one mill tax cannot be used for the purpose of retiring the bonded indebtedness of the original Balaton Independent School District No. 46.

**Questions**

"2. May the income tax prorated for the pupils that reside within the old district 46 which incurred the indebtedness be used for debt retirement?

"3. May the apportionment received by this district for the pupils that reside in the old portion of District 46 be used for retiring the current indebtedness?

"4. May the $20 of the tuition charge as specified in Laws 1953, Chapter 756, Section 5, Subdivision 6, be used to apply on the indebtedness which exists against the old District 46?"

**Opinion**

M. S. 1949, Section 128.06 states the purposes for which State aid from the special state aid fund and any other money set apart for use with the special state aid fund shall be used. Neither does this nor any other statutory provision authorize the use of state aid or related funds for the payment of the bonded indebtedness of a part of the school district to which any state aid is given. It is therefore our opinion that the state aids enumerated in questions 2, 3 and 4 may not be used for paying the bonded indebtedness of the original Balaton Independent School District No. 46. We also call to your attention that the tax for the payment of the bonds in question has already been levied under the provisions of Section 475.61, as amended.

IRVING M. FRISCH,
Special Assistant Attorney General.

Commissioner of Education.
December 14, 1953. 166-F-4

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## 38

**Finances—Funds—Loans—Special election—Authority of district under law to borrow moneys for "acquisition, betterment, furnishing and equipping of a new schoolhouse" construed as authority to acquire new site for construction of schoolhouse—Opinions inconsistent therewith based on law in effect prior to L. 1949, C. 682 superseded—**M. S. 1949, Section 475.51, Subds. 2, 7, 8; Section 475.52, Subd. 5.

**Facts**

"The School Board of Independent Consolidated School District No. 24 of Blue Earth County, Minnesota, on the 9th day of July, 1952, passed a resolution, part of which is as follows:

" 'It is necessary and expedient for this School District to borrow monies in an amount not exceeding $140,000.00, which will not increase its indebtedness beyond the limit fixed by law, by issuing its school bonds for the purpose of the acquisition, betterment and equipping of a new schoolhouse.'

"On the 22nd day of July, 1952, a special election was held for the purpose of voting whether or not the district should borrow the money as stated in the resolution. The election was held after the proper preliminary steps had been taken. The notice for the special election and the ballot itself stated that the purpose of said money was for the acquisition, betterment, furnishing and equipping of a new schoolhouse. Nothing was said as to acquiring a new site. The bond issue was carried."

**Question**

Whether or not the language acquisition, betterment, furnishing and equipping of a new schoolhouse is sufficient to authorize a school board to select a new site for the school other than the site of the present school, for the purpose of constructing a new schoolhouse thereon.

**Opinion**

Unless otherwise stated, the statutory sections hereinafter cited are those of Minnesota Statutes 1949.

From the wording of the resolution by the School Board of Independent Consolidated School District No. 24 and by reason of the notice of the special election and the question on the ballot, I assume that the proceedings for the issuance of bonds were instituted under Sections 475.51-475.75 and were duly commenced by the resolution required by Section 475.57.

For the purpose of above cited sections, Section 475.51, Subd. 2, provides that " 'Municipality' means a * * * school district." Subd. 7 of that section contains the following: " 'Acquisition' includes purchase, condemnation, construction, and acquisition of necessary land, easements, buildings, structures, machinery or equipment." Subd. 8 thereof provides: " 'Betterment' includes reconstruction, extension, improvement, repair, remodeling, lighting, equipping, and furnishing."

Section 475.52, Subd. 5, authorizes any school district to "issue bonds for the acquisition and betterment of schoolhouses * * * ."

The school board resolution above referred to, as well as the question submitted to the voters, stated that among the purposes of the proposed loan were the "acquisition and betterment" of a new schoolhouse. Under the definition of "acquisition" in Section 475.51, acquisition of land is included, and under the definition of "betterment" in that section are included, among other matters, "equipping and furnishing."

By reason of the authority granted a school district in Section 475.52, Subd. 5, to issue bonds for the acquisition and betterment of schoolhouses and the definition of such words in Section 475.51, I am of the opinion that the special election held on July 22, 1952, authorized Independent Consolidated School District No. 24 to borrow $140,000 "for the acquisition, betterment, furnishing and equipping of a new schoolhouse" and thereby also authorized the school board of that school district to acquire a new site for the purpose of constructing a new schoolhouse thereon.

Opinions of this office written prior to the enactment of L. 1949, C. 682 (coded as Sections 475.51-475.75) and based on the law in effect before the passage of such chapter are, of course, superseded by the above cited sections of M. S. 1949, in so far as such opinions are inconsistent therewith.

J. A. A. BURNQUIST,
Attorney General.

Blue Earth County Attorney.
July 7, 1953. 159-A-5

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## 39

**High school areas—How formed and changed—Transportation aid—M. S. A. 120.11, subd. 3.**

**Facts**

"In June, 1953, the Board of Education of the Spring Valley District 112 notified common school districts located within the Spring Valley High School area that they would not accept any nonresident high school pupil for the year beginning September 1, 1953, until the common school districts which had previously been sending their high school students to Spring Valley indicated their desire to consolidate with District 112 of Spring Valley by July 1, 1953.

* * * * *

"The State Board of Education allocates not to exceed $48.00 per year per high school pupil for transportation aid. In addition thereto the County Board of Commissioners levies and allocates not to exceed one-half of the foregoing amount per high school pupil for transportation aid."

On July 9, 1953, the board in Independent School District No. 112 rescinded a resolution adopted June 3, 1953, restricting registration of nonresident pupils at the Spring Valley schools.

On August 12, 1953, a number of persons calling themselves "the citizens committee" advised the director of rural education in the department of education that they recommended that until May 1, 1954, no change be made in the now designated high school area in which is situated the village of Spring Valley. The department of education has received a protest in behalf of the businessmen in Spring Valley against a building program in Spring Valley which will result in increasing the tax burden.

On August 12, 1953, the chairman and clerk of District No. 112 wrote the director, reviewing the history of the situation under consideration, stating that the board had resolved that no nonresident pupils would be accepted at the Spring Valley schools in the year 1953-1954 unless the district signified its intention to join a consolidated district with the Spring Valley

district and that ten days was given to signify this intent, which was later extended to July 1 so that action could be taken at the annual school meeting.

The department of education has also called attention to a manual for Ungraded Elementary Schools, published in August, 1942. The publication appears to contain regulations not limited to ungraded elementary schools, as, for example, regulations on the subject of high school areas. See pages 30, 31. I will not set forth these regulations for the reasons hereinafter stated.

**Questions**

1. "By such action would the Board of Education of School District 112 of Spring Valley relinquish the common school districts involved as part of their high school area?

2. "If such action resulted in such common school districts being released from the high school area of School District 112 of Spring Valley, would it require such common school districts to petition for reentry into such high school area in order to again become a part thereof?

3. "Assuming that the State Board of Education has the right to withhold the transportation aid allocated by them from state funds, does the State Board of Education also have the right to withhold the additional transportation aid levied and allocated by the County Board of Commissioners?"

**Opinion**

No one involved seems to have considered M. S. 1949, 120.11, subd. 3. A high school area must contain one classified public high school. It is the **right** of a school district, upon a vote of its board, to be assigned by the state board of education to the area of any adjoining or nearby district containing a classified high school, if the latter, by a vote of its board, is willing to have such district assigned to its area. This is subject to the qualification that the voters of the district set into a high school area, by its board, may call a special election to decide which high school area they desire to join, with a limitation as to transportation aid.

The reason that I do not quote herein the regulations of the state board of education on this subject is that this statute seems to meet the situation that we have under consideration and if the school board in any particular district wishes to have that district set over into an adjoining or nearby district, under the statute mentioned, it may proceed to accomplish that end. The state board of education must follow the law.

It is my opinion that your first question should be answered in the negative. The action taken by the school district in the first instance was subsequently vacated by the board itself and has no bearing upon the question here considered.

The answer to your first question renders an answer to your second question unnecessary.

Statutory procedure is a sufficient guide to the people in forming these high school areas according to the wishes of the people. You will observe in the section and subdivision cited the only provision in respect to transportation aid is that the aid is limited. There is no authority for withholding it.

If these people will proceed in accordance with the statute, there should be no difficulty in meeting the wishes of the majority.

CHARLES E. HOUSTON,
Assistant Attorney General.

Fillmore County Attorney.
August 20, 1953. 161-B-5

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## 40

**High school areas—How formed and changed—Transportation—Bus route in certain circumstances may pass through another high school area—Significance of high school area committee considered**—M. S. A. 120.11, subd. 3.

**Facts**

"Pursuant to Section 120.11, subd. 3, the State Board of Education formulated certain rules and regulations relative to high school areas, which are contained in a publication of the Department of Education dated August, 1942, entitled 'Manual for Un-Graded Elementary Schools.' Reference is made to page 33 of said Manual, particularly section 3—Petitions, subdivision e (1) which reads as follows:

'That the territory to be transferred shall be adjoining the high school area to which such territory is to be assigned.'

"For years the Committee has assumed that all high school areas must be contiguous, so that when a Common School District petitions for transfer from one high school area to another, it must necessarily border the high school area to which it is to be transferred. The Wabasha County Committee has now for consideration three petitions for transfer of districts from one area to another that do not meet the 'contiguous area' requirement. The petitioners contend that the regulation as originally promulgated by the State Board was unreasonable and invalid. They further contend that the adoption of Chapter 744, laws of 1953 nullify the 'contiguous area' theory.

"Buses from high school area 'A' pass through high school area 'B' in order to reach the school of area 'A'. Of course the bus picks up no children in area 'B'. It is contended by one group that this is illegal.

"A meeting of the Wabasha County High School Area Committee was held last evening after due notice to the area committee, but without notice to the petitioning districts or without notice to opposition groups. However, many of the petitioning districts were represented by one or more of their board members and some opposition groups attended and were heard. However, some districts were not represented at the meeting at all. The Board resolved to recommend a transfer of most of the petitioning districts. The opposition contend that such action is a nullity in that no notice was given to the parties-in-interest."

**Questions**

1. Must all territory embraced in a high school area be contiguous?

2. May a school bus travel a route through a portion of another district or districts outside the high school area of the school to which pupils are carried?

3. What is the effect of the resolution of the board mentioned in the last above paragraph of facts?

**Opinion**

Opinion dated August 20, 1953, answers first question in the negative. M. S. A. 120.11, subd. 3, which relates to high school areas, enables the school district itself to determine the high school area in which it shall be situated within the limitations there stated. The high school area within which the district will be situated after the proposed change must (1) adjoin, or be (2) nearby. If it is a nearby district but not adjoining the area as once composed and pupils are transported by bus from their place of residence outside the original area to the classified public school in the area, it would be necessary to travel through a portion of another area. To deny the right of the district to route the bus through the other area would be to deny the district the right to transport the pupils and, in view of existing law, this right may not be denied. Accordingly, the second question requires an affirmative answer.

As stated in opinion No. 39 of this report, the state board of education has promulgated a manual for ungraded elementary schools bearing date of August, 1942. There is a considerable amount of material therein on pages 30-34 relating to high school areas, county advisory committee, procedure before that committee and before the state board of education in respect to these subjects. It goes without saying that in so far as any of these rules are inconsistent with statute, the statute controls. Much of the material mentioned is of legislative nature and not within the statute. There is no suggestion of such rules in the statute relating to high school areas that the set-up found in this manual is to apply. The state board of education cannot divest itself of authority and transfer that authority to another body of its own creation.

I presume that the Wabasha County High School Area Advisory Committee was established under claim of authority growing out of these regulations. But any person interested in the situation here considered has

the right to avail himself of the statutory procedure and in so far as the rules are in derogation thereof we must disregard the rules. Any action taken by this advisory committee could not be more than advisory and the law gives it no more dignity than the advice from the humblest taxpayer in the district, providing his advice is based on facts. I would consider the action of the advisory committee of no more consequence than the advice of any other voluntary organization not existing under authority of statute. So, I would consider the resolution as coming from the people who adopted it but having no official significance.

CHARLES E. HOUSTON,
Assistant Attorney General.

Wabasha County Attorney.
August 21, 1953. 161-B-5

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## 41

**Officers and employees—Veterans Preference—Act does not apply to a transfer of a person from one position to another in a school district—Act does apply in filling the position of janitor-engineer and a qualified veteran should be appointed ahead of any qualified non-veteran—Where school district contains more than one school at different places all veteran applicants applying for a vacant position at any school within the district are entitled to equal preference providing such applicants have resided in the district five years prior to the filing of their applications.**

### Facts

The City of Tower and the mining location of Soudan are both within School District No. 9. There is a school house at each place.

To fill the head janitor-engineer position at the Tower school, the school district transferred the head janitor-engineer from the Soudan school. It then promoted the second janitor-engineer at the Soudan school to the head janitor-engineer at that place. There still remains a vacancy in the janitor-engineer force at the Soudan school.

### Questions

1. Was the school district authorized to transfer the head janitor-engineer from the Soudan school to fill a vacancy in the position of head janitor-engineer at the Tower school?

2. Was the school district authorized to promote the second janitor-engineer at Soudan to the head janitor-engineer position at Tower without considering applications for such position which had been filed by war veterans?

3. In filling the existing vacancy in the janitor-engineer force at Soudan, is a war veteran applicant living in Soudan entitled to any different preference from a war veteran applicant residing at Tower?

**Opinion**

We answer the questions in the order in which they are stated.

Question 1. This question is answered in the affirmative.

From the information contained in your letter we necessarily assume that the positions of head janitor-engineer at Soudan and at Tower are of the same class and that the transfer of the head janitor-engineer from Soudan to Tower involved no promotion and was merely a reassignment of a member of the school district staff.

On the basis of the information contained in your letter and the facts which we have necessarily assumed, we are unaware of any statutory provision prohibiting the school district from making the transfer. The Veterans Preference Law, M. S. A. Sections 197.45 et seq. relates to appointments, employment and promotions of war veterans in the public service. It does not relate to transfers under the facts discussed herein and therefore this law has no application to the transfer of the head janitor-engineer from Soudan to Tower.

Question 2. We assume, as did your inquiry, that the position of head janitor-engineer at the Soudan school is within the purview of the Veterans Preference Law, there being no facts contained in your letter indicating the contrary. When a vacancy occurred in this position, a qualified veteran applying for such appointment was entitled to the appointment as against a non-veteran applying for the same. See M. S. A., Section 197.45, subd. 2, reading 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,** * * * "

See also **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.

If there were war veteran applicants for the position of head janitor-engineer at Soudan, those applications should have been considered by the school district before filling the position. We therefore answer your second question in the negative. However, in expressing this view, we express no opinions on the rights of any one because of the fact that the position has already been filled.

Question 3. M. S. A. Section 197.45, Subdivision 1, defines war "veteran" under the Veterans Preference Law. It 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, navy, marine

corps, * * * in the * * * World War * * * who is a citizen of the United States, and has been a resident of the state of Minnesota and of the county, city, town, village, school district, or political subdivision thereof to which application is made for five years immediately preceding his application, * * *"

From your letter we assume that there are war veterans as defined in the foregoing statutory provision applying for the position vacant in the janitor-engineer force at the Soudan school and that such applicants have resided in the State of Minnesota and School District No. 9 for five years immediately preceding the filing of their applications for employment. Under such circumstances, the war veteran applicant who resides in Soudan and the war veteran applicant who lives in Tower are entitled to the same preference under the Veterans Preference Law. The school district is required by law to appoint a war veteran applicant to fill the vacancy if he is qualified to perform the duties of the position. If two war veteran applicants equally qualified — one from Tower and the other from Soudan — apply for the position, the school district may appoint either. Such a qualified war veteran applicant must be appointed ahead of a non-veteran applicant.

Your third inquiry is therefore answered in the negative.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Department of Education.
January 15, 1954. 85-F

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## 42

**Property — Athletic field — Leasing — May permit lease of athletic field to various organizations providing that lease does not interfere with recreational program — Beer may not be sold upon licensed premises.**

### Facts

The Council of the Village of Foley has transferred to Independent School District No. 45 of Foley an athletic field in the village limits which has been used in the past by the school, the town baseball team, the sportsmen club and by others, and it is expected that the school will continue to rent out this field, which has night lights and a baseball fence, to others.

### Question

May the school district rent out these grounds to other organizations for baseball games, sportsmen's picnics, etc.?

### Answer

In an opinion of this office dated May 1, 1947, File 469-C-8, it was held that a village may, under certain conditions, lease the use of a park to third persons if its use would not interfere with the reasonable public use of the park.

The same principle holds in the case of an athletic field owned by a school district. It may lease the athletic field to various organizations for baseball games and other events, providing such lease does not interfere with the recreational program of the school district.

**Question**

May these organizations, if licensed to do so, sell beer on these athletic grounds?

**Answer**

There is no authorization in law for any school district to permit the sale of either intoxicating liquor or nonintoxicating malt liquor on grounds used by it for recreational purposes.

IRVING M. FRISCH,
Special Assistant Attorney General.

Attorney for Independent School District No. 45 of Foley. 622-B
September 15, 1953. 217-F-1

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## 43

**Property — Schoolhouse site — Sale or trade — Acquisition — Authority of board in consolidated district — Bond issue — Use of funds — M. S. A. 125.06, subd. 2; 125.09, subd. 1.**

**Facts**

"A number of school districts were consolidated with Independent Consolidated School District No. 24, Blue Earth County, under M. S. 122.18 with the order of consolidation issued April 3, 1952 by the County Superintendent of Schools. All of the rural school districts had closed their schools several years prior to the consolidation and all students were housed both prior to and after the consolidation in the school house of Independent Consolidated School District No. 24 at Vernon Center, the said school house being located on a four and one-third acre site in the incorporated Village of Vernon Center.

"On July 22, 1952, the school board submitted a bond issue of $140,000 to the people of the district, which carried by a substantial majority.

"On August 23, 1952, the school board submitted the question of purchasing a new site west of the village to the people. This proposal was rejected by a vote of 91 voting yes and 164 voting no.

"On January 19, 1953, the school board submitted the question of a second new site northeast of the village. This proposal was rejected by a vote of 110 yes and 171 no.

"In February, 1953, Tom Champlin, Attorney for Independent Consolidated School District No. 24 received an opinion from the Attorney General stating that the school board had a right to select a site.

"On March 21, 1953, the school board submitted to the people the question of a third new site northwest of the village. This proposal was rejected by a vote of 94 yes and 243 no.

"On July 7, 1953, the Attorney General issued an opinion to Carl W. Peterson, County Attorney of Blue Earth County, which stated that the school board had the authority to acquire a new site.

"On December 5, 1953, the school board submitted to the people the question of a new site for the fourth time. This proposal was rejected by a vote of 100 yes and 175 no.

"Prior to the election the school board promised the people at a public meeting that they would proceed to build the new school house on the site favored by the majority of the voters.

"Shortly after the December 5, 1953 election, a group of voters presented a petition to the school board on which they stated were signatures of the majority of the voters of Independent Consolidated School District No. 24. With this in mind, the school board, on February 6, 1954, passed a resolution to acquire the northeast site, which was the same site voted on by the people on January 19, 1953.

"The owner has agreed to sell the site mentioned in the above paragraph to the school district for $3,500, with the stipulation that if the school district sells the old site for more than $3,500, the present owner shall receive the amount above $3,500 up to and including $5,000."

**Question 1**

"Does the school board have the authority to acquire a new site for the school building notwithstanding the votes of the people?"

**Opinion**

As stated in a previous opinion dated February 5, 1953 (622-i-11), the school board of the district in question was said to have the power to acquire by purchase or condemnation a school site without the vote of the people. The opinion holds that such authority exists by reason of M. S. A. 125.09, subd. 1, which reads, in part, as follows:

> " * * * the board in a consolidated school district is authorized to * * * locate and acquire sites of not less than two acres and erect necessary and suitable buildings thereon, including a suitable dwelling for teachers, when money therefor has been voted by the district. They shall submit to the commissioner of education a plat of the school grounds, indicating the site of the proposed buildings, plans, and specifications for the school building and its equipment, and the equipment of the premises."

On July 7, 1953, in an opinion (159-A-5) in answer to an inquiry as to whether the vote in an election held on July 22, 1952, in favor of authorizing a bond issue for $140,000 for the purpose of the acquisition, betterment, furnishing, and equipping of a new schoolhouse was "sufficient to authorize a school board to select a new site for * * * the purpose of constructing a new schoolhouse thereon," it was held that, by the provisions of M. S. A., C. 475, the school board was authorized by the vote on the bond issue for the purposes stated in the question submitted to the people to acquire a new site.

If the board had purchased a new location without submitting sites to a vote by the electors, it is my opinion that the validity of such acquisition by the board could not have been questioned. However, the board has submitted three different locations to be passed upon by the voters of the district. All of these proposed sites have been rejected, and on December 5, 1953, another question was submitted to the electors of the district. On the ballot then used was printed the following:

> "Shall the School Board of Consolidated School District No. 24 of Blue Earth County, Minnesota, acquire a new site on which to build the new school building for the district?
>
> YES ☐
> NO ☐"

The "INSTRUCTIONS TO VOTERS" printed on the ballot were as follows:

> "If you desire to vote in favor of acquiring a new site for the new building, mark a cross (X) opposite the word 'YES.' If you desire to have the new building located on the present (old) site, mark a cross (X) in the square opposite the word 'NO'."

On the question so submitted, the electors voted 100 for a new site and 175 for the old site.

If the submission of the four different questions to the people constitutes a legal procedure and the vote of the electors of the district is controlling, the board had no authority on a later petition of the voters, without an election, to select on February 6, 1954, a site previously rejected in the election held on January 19, 1953, or to proceed to purchase a new site in violation of the election result on December 5, 1953, which obviously was in favor of the construction of a new school building on the old site.

M. S. A. 125.06, subd. 2, authorizes selection of a new site by a school board when empowered to do so by the voters at a regular meeting or election or at a special meeting called for that purpose. M. S. A. 125.09, subd. 1, above quoted, authorizes the board of a consolidated school district to "locate and acquire sites of not less than two acres and erect necessary and suitable buildings thereon, including a suitable dwelling for teachers, when money therefor has been voted by the district."

By reason of the phraseology of the two above cited subdivisions and the powers therein granted, the question arises as to whether the latter

subdivision, applicable to a school board of a consolidated district, was intended to exclude the right of the voters in a consolidated district to pass upon the question of the acquisition of a new site.

The situation is analogous to that considered by the Supreme Court in the case of **Borgerding v. Village of Freeport**, 166 Minn. 202, 207 N. W. 309, where the court held that, "The legislature sometimes offers alternative methods for reaching the same result," and that the appellants in that case had the option to proceed in one of three methods.

Under that decision, it is my opinion that in the matter of acquiring a new site, the school board here could legally have proceeded to select and purchase a site without a vote of the people if the board had done so before it submitted the question of a new site to the voters. As the option was exercised to submit such question to the electors of the district, who on December 5, 1953, decided by the above referred to vote of 100 to 175 that the new school house should be built on the old site and in the January 19, 1953, election had rejected the site that the school board on February 6, 1954, decided to buy, it is my opinion that the board and the district are bound by the results of the elections heretofore had unless changed by a majority of the voters at a subsequent regular or special election.

**Question 2**

"Does the school board have the authority to sell the present site with the approval of the voters of the district?"

**Opinion**

This question is answered in the affirmative.

**Question 3**

May "the school board purchase the new site on the sliding scale price * * * as indicated earlier in this letter?"

**Opinion**

The above quoted question pertains to the agreement to which you refer wherein the owner of a site has agreed to sell same to the district for $3,500, with the stipulation that, if the school district sells the old site for more than $3,500, the owner shall receive the amount above $3,500 up to and including $5,000.

The school board in buying property should not pay for it more than its reasonable value. If $3,500 is the reasonable value of the site in question, it would certainly be illegal to pay more than that amount because the sale of some other property resulted in the receipt of more than $3,500.

**Question 4**

May "the school board trade the present property for a new site with the approval of the voters of the district?"

### Opinion

This question is answered in the affirmative.

### Question 5

May "the school board use the $140,000, or a part thereof, to remodel and extend the present building?"

### Opinion

The authority granted to the school board in the election of July 22, 1952, in authorizing the sale of a bond issue of $140,000 was for the "purpose of the acquisition, betterment, furnishing, and equipping of a new school house."

In the case of **Warren v. Freeman**, 187 Pa. 455, 41 A. 290, the court held:

> "Newness of structure in the main mass of the building — that entire change of external appearance which denotes a different building from that which gave place to it, though some parts of the old may have entered into it — is that which constitutes a 'new building' as distinguished from one altered."

What constitutes a new building is, therefore, a question of fact rather than of law.

J. A. A. BURNQUIST,
Attorney General.

Commissioner of Education. 622-i-11
March 2, 1954. 159-A-5

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## 44

**Teachers—Contract—Change in form of government from common to independent school district under M. S. A. 122.30 does not affect existing contracts of common district—Officers of common district govern independent district until election and qualification of officers and organization of new board.**

### Facts

"Common School District No. 24 of St. Louis County (Biwabik, Minnesota) was changed by proper proceedings on March 8, 1954, to an Independent School District. Members of the school board of the new district will not be elected until March 26, 1954. The new board will be organized within ten days after March 26, 1954. In the meantime, the officers, namely, a chairman, a clerk and a treasurer of the old common school board act as officers of the new independent district board until the qualification of the new board's officers and organization of the new board, but they do not constitute a quorum of the new board."

**Questions**

"1. Are the so-called continuing teachers' contracts with the old Common School District terminated by virtue of the fact that 'the newly created district is a new entity' and that 'the former district has lost existence'? 1952 A.G.O. 39 and 1950 A.G.O. 52 and M. S. Section 130.18 and Laws 1951, Ch. 332.

"2. Do the three former officers of the old Common School District of three members (who are the acting officers of the new Independent School District of six members and who do not constitute a quorum of the new district board until the new district board is elected and organized) have power to contract in the name of the new school district and its board for new teachers before the new district board is elected and the new board is organized?"

**Opinion**

The independent school district comprises the same territory as the former common district. It is the identical public corporation that it was before the people voted to become an independent district. The only change is in its form of government. M. S. A. 122.01, subd. 2, defines a common school district as follows:

"Common school district. 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 amount of the tax levy." Subd. 4 defines an independent school district as follows:

"Independent school district. An independent school district is a district organized as such having a board of six members, which board is vested with the authority to determine the length of school term and the tax levy."

Therein lies the difference which is only in government.

This school district under authority of M. S. A. 122.30 has changed its form of government from that of a common district to that of an independent district. It is the same corporation as before with some new powers and some changes in procedures. But the contracts made before the change in form of government are the contracts of the district. The teachers' continuing contracts are in no manner affected by the change in the government of the district.

The officers of the common district (now extinct), by virtue of M. S. A. 122.30, subd. 4, "shall act as officers of the new district until the qualification of officers and organization of the new board." It is my opinion that such quoted language means that during such period the three former officers of the common district shall govern the independent district. If they are to act as officers, then they govern, for that is the function of a school board. M. S. A. 125.01, 125.06, subd. 1. The board has general charge of the business of the district. The three are not the board of the new district, but they are the agents of the district created by law with such powers. These three

persons as such agents have power in the name of the independent school district to make any contract which the new board, when elected and qualified, can make. They constitute the governing authority of the district; but when the new officers are elected and qualified and the new board is organized, then the authority of the three is at an end.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.
March 15, 1954. 172-C

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## 45

**Tuition—Nonresident pupil—Computation—Effect of L. 1953, C. 756, Section 5, amending M. S. 1949, Section 128.082, subd. 6, as amended.**

### Facts

"This situation arises in one of the schools in our County: The actual cost of maintenance, as defined in Laws of 1953, Chapter 756, Section 5 (amending M. S. 1949, Section 128.082, subd. 6, as amended), per pupil unit in average daily attendance, would amount to approximately $250. The difference between $170 and $250 would be $80, and one half of that would be $40. Thus, the school proposes to charge the sum of $210 in addition to the $20 per pupil unit, representing the costs as a result of capital outlay and debt service."

### Question

Does M. S. 1949, Section 128.082, subd. 6, as amended, permit the proposed charge of $170 plus one half of the difference between $170 and $250, the alleged cost of instruction chargeable to maintenance, and, in addition thereto, $20 per pupil unit as a result of capital outlay and debt service?

### Opinion

There appears to be no doubt as to the right to include the $20 unit above referred to in the charge to be made. The question as to whether it is proper to add to the sum of $170 one half of the difference between that amount and $250 requires a construction of the first paragraph of above cited subd. 6, as amended, which reads as follows:

"Every school district which provides instruction in other districts and which receives basic aid, and the county as provided in Section 128.088, subdivisions 2 and 3, shall pay to the district furnishing elementary and secondary or area vocational-technical school instruction on account of such instruction, the actual cost thereof chargeable to maintenance exclusive of transportation but not to exceed $170 per pupil unit in average daily attendance of the district; except that where the main-

tenance cost provided for in this subdivision is more than $170 the school district furnishing the instruction may charge a rate of tuition equal to $170 plus one-half of the excess over $170 up to and including $210."

In my opinion, the wording of the amendment requires the following construction: If the actual cost of instruction chargeable to maintenance, as in the subdivision provided, is $210 or less, and more than $170, the provision in question authorizes a charge of $170 plus one half of the difference between $170 and such cost. If such cost is more than $210, the subdivision authorizes an additional charge of one half of the difference between $170 and $210, or $170 plus one half of $40, which would equal $190.

It is my understanding that, prior to the 1953 amendment, the same phraseology was used by the 1951 legislature, with the exception that the figures were "$160 up to and including $180," and that during the biennium while the 1951 law was in force the Department of Education interpreted this language in accordance with the views herein expressed.

J. A. A. BURNQUIST,
Attorney General.

Commissioner of Education.
August 21, 1953. 180-D

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# ELECTIONS

## CORRUPT PRACTICES

## 46

**Removal of county seat—Effect on election of offer of site and money.** M. S. A., C. 211. Supersedes opinion No. 518, 1920 report, dated January 20, 1920.

### Facts

You state that a number of citizens of a village in your county have formed a committee which is offering to pay $100,000 toward the cost of a new courthouse, a site for the same, and certain enumerated benefits in connection therewith. You also state that such offer is made on the condition that the county seat be moved from its present location to the village designated by the citizens constituting the above referred to committee.

### Questions

"1. We understand from your previous opinions that the Corrupt Practices Act applied to elections for the change of a county seat. Would the offers heretofore made constitute a violation of the Corrupt Practices Act if they were made for the purpose of influencing the vote of those voting at an election to be held sometime in the future, for the

purpose of determining whether the county seat should be moved from Montevideo to Clara City when the date of that election has not been set?

"2. If this offer is renewed or not withdrawn, and if it is made for the purpose of influencing votes at the election to be held, would it constitute a violation of the Corrupt Practices Act when the petition is being circulated or after the date has been set for the election?"

**Opinion**

It is true that previous opinions of this office have held that "The Corrupt Practices Act, except certain provisions thereof which quite obviously can apply only to the election of persons to office, applies to an election for the removal of a county seat."

However, there appears to be no provision of the so-called Corrupt Practices Act, contained in M. S. A., C. 211, which expressly prohibits the making to a county of the offers to which you refer during or prior to an election for the removal of a county seat even if it can be shown that they are made for the purpose of influencing voters at such an election. But there are opinions of this office to the effect that the offer of a free site for a courthouse or of a sum of money to apply on the construction of a new building might constitute a violation of Section 612, G. S. 1913. That section is now Section 210.03 of M. S. 1953. In 1913 it was not a part of what is known as the "Corrupt Practices Act" and is not now a part thereof. The present wording is the same as that contained in Section 612, G. S. 1913, and reads as follows:

"Every person who wilfully, directly or indirectly, pays, gives, or lends any money or other thing of value, or who offers, promises, or endeavors to procure any money, place, employment, or other valuable consideration, to or for any voter, or to or for any other person, in order to induce any voter to refrain from voting, or to vote in any particular way, at any election, shall be guilty of a felony."

The writer of the January 20, 1920, opinion No. 518, 1920 Report said that, as the section of G. S. 1913 which is the same as the one above quoted provided that a violator thereof should be guilty of a felony, the only safe course for the writer of the 1920 opinion was to advise that the suggested offer then in question was not lawful. In so far as that opinion or any previous opinion is inconsistent with what is herein stated, it is hereby superseded.

The issues involved in the above referred to questions which you submit have not, in so far as we have been able to discover, been judicially determined by our Supreme Court. The legality of offers similar to those here considered and made under similar statutes has been passed upon in a considerable number of states where elections have been held for the relocation of county seats. Most of the cases hereinafter cited take the position that an offer or promise made to electors generally to donate money or property to a county or municipality if certain action is taken does not

constitute a violation of the corrupt practices act or other statutes prohibiting the giving, promising, or accepting of any thing of value for the purpose of influencing voters at any election.

The theory back of these decisions appears to be that "the party to be influenced is the entire county, and that the thing offered is of a public nature pertaining to the public and not to individuals"; that the elements requisite to constitute bribery or a corrupt and unlawful influence within the meaning of bribery and corrupt practices statutes are lacking; and that "a self-governing people are self-respecting, and that whole communities will not do any act that reflects upon their honor or integrity."

Among the cases holding that the offers of site and giving of funds in the event of the location of a courthouse in a particular community do not constitute a crime within the meaning of bribery laws are the following:

**Wells v. Taylor,** 5 Mont. 202, 3 Pac. 255;

**Dishon v. Smith,** 10 Iowa 212;

**State v. Elting,** 29 Kan. 397;

**Hawes v. Miller,** 56 Iowa 395, 9 N. W. 307;

**Neal v. Shinn,** 49 Ark. 227, 4 S. W. 771;

**Douglass v. Baker County,** 23 Fla. 419, 2 So. 776;

**Hall v. Marshall,** 80 Ky. 552.

There is at least one judicial decision which appears to arrive at a conclusion different from the view expressed in the above cited cases. It is that of the Supreme Court of Nebraska in **Ayres v. Moan,** 34 Neb. 210, 51 N. W. 830, where the court said:

> "It may be well to say that our laws are designed to secure the free and voluntary expression of the electors at every election. To secure this, every form of bribery is frowned upon by the courts; and the fact that the election is for the relocation of a county seat, instead of calling for a relaxation of the rule, renders it important that no corrupt means be sanctioned which would or might have a tendency to prevent the voluntary expression of a part or all of the electors."

It is, of course, clear that, if money or any thing of value is offered directly to individual voters for voting for some specified county seat, such offer would constitute a crime under the above cited Section 210.03. However, our Minnesota Supreme Court has not passed upon the question as to whether such general conditional offers to a county as that involved here and in above cited cases would be legal or illegal.

As above stated, the courts of other states are somewhat divided in the determination of the legality of the offers similar to that here involved, but it is apparent that a large majority of the courts of this country which have passed upon the validity thereof hold that the making of such gifts or promises if made to and accepted by a county is not considered as bribing or unlawfully influencing voters within the meaning of the laws prohibiting bribery or corrupt practices in elections. The view contrary to that of the

majority is represented by the decision of the Supreme Court of Nebraska, whose opinion in the case above cited contains no discussion of pertinent decisions in other states.

Whether our Supreme Court would follow in the matter here considered the majority or the minority of the courts, it is, of course, impossible for the Attorney General to say with certainty. However, it is my opinion that the legislature did not intend by enacting Section 210.03 to provide that the making in good faith by a group of citizens to an entire county of such offers as the one here in question should constitute a felony.

**Questions**

"3. If this offer is made and if it is a violation of the Corrupt Practices Act, what effect would this have upon the validity of any election held on the question of moving the county seat from Montevideo to Clara City?

"4. If this offer is made under circumstances which would be a violation of the Corrupt Practices Act, and the offer is accepted by the county board, would the results of the election be subject to challenge on the grounds that the voters had received benefits as provided in the M. S. A. Section 211.11?

"5. Would the board of county commissioners of Chippewa County have the authority to accept this offer made upon these conditions and under these circumstances?"

**Opinion**

If our court should hold, contrary to most of the above cited decisions, that the offer concerning which you inquire, if made during the election for removal of your county seat, constitutes a violation of M. S. A. Section 210.03 and should find that such election is materially influenced by such violation, the general rule also discussed in answer to your next inquiry would require the setting aside of the election. See 29 C. J. S. p. 320, Section 218.

M. S. A. Section 211.11, to which you refer in your fourth question, reads as follows:

"No person or candidate shall, either by himself or by any other person, while such candidate is seeking a nomination or election, directly or indirectly, give, provide, or pay, wholly or in part, the expenses of giving or providing any meat, drink or other entertainment or provision, clothing, liquors, cigars, or tobacco, to or for any person for the purpose of or with intent to influence that person or any other person to give or refrain from giving his vote at such primary or election to or for any candidate or political party ticket, or measure before the people or on account of such person or other person having voted or refrained from voting for any candidate or the candidates of any political party or organization or measure before the people, or being about to vote, or refrain from voting, at such election. No elector shall

accept any such meat, drink, entertainment, provision, clothing, liquor, cigars, or tobacco, and such acceptance shall be a ground of challenge to his vote and of rejecting his vote on a contest."

If there is an acceptance by the county board of the offer here considered, you inquire as to whether election results would be subject to challenge on the ground that the voter had received benefits as provided in the above quoted section. The provisions thereof are limited in their application to the paying directly or indirectly of the expenses of giving or providing the articles of entertainment therein enumerated for the purpose of influencing a voter. If any person or committee engages in such practice during a county removal election, there would, of course, be a violation of the provisions of Section 211.11, but the courts have held that the violation of a corrupt practices act will not render an election void unless its influence is so extensive and general throughout the county as to make its effect unascertainable. **City of Tecumseh v. City of Shawnee**, 148 Okla. 128, 297 Pac. 285; **Dunn et al. v. Board of County Commissioners**, 165 Kan. 314, 194 P. 2d 924.

M. S. A. Section 465.03 provides as follows:

"Any city, county, school district, town, or village may accept a grant or devise of real or personal property and maintain such property for the benefit of its citizens in accordance with the terms prescribed by the donor. Every such acceptance shall be by resolution of the governing body adopted by a two-thirds majority of its members, expressing such terms in full."

The legality of the acceptance by the board of county commissioners of the offer made in the matter under consideration depends, as above stated, upon the position taken by the courts, in the event of litigation, as to whether such offer is valid and not a bribe as held by most of the courts above referred to, or illegal and a form of bribery in accordance with the holding in the Nebraska case, supra.

It is my opinion that there is no law preventing the county commissioners, in the exercise of sound discretion, from accepting an offer of a free site for a courthouse and cash to assist in the construction thereof, which gift, I assume, would be on condition that the property so accepted will be returned to the offerers if the voters of the county shall not petition as by law required and legally vote at a duly called election in favor of the removal of the county seat to the village which is the residence of the group making the offer. However, I wish to call your attention to the fact that, in a matter of the nature here considered, our state statutes do not provide, as they do in some cases, that the opinion of the Attorney General shall have the effect of law until reversed by the courts.

J. A. A. BURNQUIST,
Attorney General.

Chippewa County Attorney.
May 6, 1954. 627-B-3

PERMANENT REGISTRATION

## 47

**Voter—Person may not vote unless registered. M. S. 1953, Sections 201.01, 206.04. Registered voter must sign "Certificate of Registered Voter"—** M. S. 1953, Section 206.12.

**Questions**

1. May an unregistered voter vote?

2. The local judges of election have been requiring the voters to sign a certificate that they are qualified voters permanently registered on the form of certificate which is enclosed. Will you please advise whether it is necessary for the properly registered and otherwise qualified voter to sign this certificate before he is given his ballot.

**Opinion**

Question 1 is answered in the negative.

M. S. 1953, Section 201.01 provides that judges of elections in any election district to which C. 201 applies " * * * shall not receive the vote of any person at any election whose name is not registered in accordance with the provisions of this chapter." Again, it will be noted that Section 206.14 which relates to voters receiving ballots provides in part:

> "Having registered, when necessary, and, in case of a challenge, the same having been determined in his favor, every voter shall be entitled to a political party ballot and a non-partisan ballot. * * * "

Question 2 is answered in the affirmative.

The form of "Certificate of Registered Voter" which you forwarded to us is the form set out in M. S. 1953, Section 206.12. This section states in part:

> "In all municipal corporations operating under a permanent registration system, before any person offering to vote receives the ballots from the judges, a certificate containing the following information shall be signed by the applicant: * * * "

DONALD C. ROGERS,
Assistant Attorney General.

Northfield City Attorney.
August 17, 1954. 183-R

PRIMARY

## 48

**Candidate—Filing—On two party tickets forbidden by M. S. 205.72; affidavit required by Section 202.03 must disclose the party of affiliation of candidate**—Laws 1953, Ch. 718.

### Question

May a person file for Lieutenant Governor on both the Democratic-Farmer-Labor and the Republican tickets?

### Opinion

Minnesota Statutes 1949, Section 202.03, as amended by L. 1953, C. 718, provides for the filing of affidavits of candidacy for primary elections. This section of the statute provides in part that a candidate for a partisan office must state in his affidavit of candidacy the name of his political party and "if for a political party office that he affiliated with such political party at the last general election, and either that he did not vote thereat or voted for a majority of the candidates of such political party at such election and intends to so vote at the ensuing election."

Again, we find that M. S. 1949, Section 205.72, relating to political parties, provides:

> "A political party which has adopted a party name shall be entitled to the exclusive use of such name for the designation of its candidates on the official ballot, and no candidate of any other political party shall be entitled to have printed thereon as a party designation any part of such name. **Nor shall any person be named on the official ballot as the candidate of more than one political party, or of any political party other than that whose certificate of his nomination was first properly filed."**

I believe that the statutes herein referred to provide the answer to the question you have asked.

J. A. A. BURNQUIST,
Attorney General.

Honorable Leonard A. Johnson.
August 5, 1953. 911-K

SPECIAL

## 49

**County Bond Issue—County board may call special election to be held at the same time as primary election but may not adopt resolution calling for such election more than 60 days prior to primary election—M. S. A., Section 375.20.**

### Question

"May the County Board of Commissioners of Rice County call a special election on the same day as the forthcoming primary election for the purpose of voting upon whether a county hospital building is to be erected and bonds issued?"

### Opinion

Under M. S. 1953, Section 375.20, the county board of your county is authorized to call a special election for the purpose of voting upon the erection of a county hospital building and the issuing of bonds to pay for the cost thereof. The special election for any purpose authorized by said section may be held on the same date as the primary election. This is in accordance with an opinion of this office dated April 15, 1922, File 37-A-1.

### Question

Is the county board of Rice County now authorized to call a special election for such purpose to be held at the same time as the primary election?

### Opinion

M. S. 1953, Section 375.20, which authorizes the calling of a special election for such purpose, in part material herein reads as follows:

> " * * * provided, that the county board may call a special county election upon any such question to be held within 60 days after a resolution to that effect shall be adopted by the county board. * * * "

In view of the foregoing statutory provision, the county board of Rice County is not at this time authorized to call a special election to be held at the same time as the primary election, because the primary election will take place more than 60 days from the date this opinion is given. We see no objection, however, in having the county board postpone the adoption of the resolution calling the election to a date that is within the 60 day period provided by statute.

IRVING M. FRISCH,
Special Assistant Attorney General.

Rice County Attorney.
May 25, 1954. 37-A-1

# INSURANCE

**TELEVISION**

## 50

**Picture tube—not covered by**—M. S. 1949, Section 60.29, Subd. 1, Clause (3).

**Facts**

"The Capitol Mutual Insurance Company, St. Paul, Minnesota, is in the process of being organized to write the following type of risk:

'In consideration of a premium of $..... the picture tube is insured in the event of its failure in the course of normal service except as hereinafter excluded. The company's liability is limited to the replacement of the picture tube described in the certificate of insurance with a new picture tube

'This policy does not insure against loss or damage from any external cause including the following: fire and lightning, windstorm, cyclone and hail, collision and upset, theft, burglary and holdup, vandalism and malicious mischief, earthquake, strikes, labor dispute, auto, aircraft and falling objects, hostile or warlike actions.' "

**Question**

Is this type of insurance covered under Clause (3), of Section 60.29, Minnesota Statutes (1949)?

**Opinion**

Minnesota Statutes 1949, Section 60.29, Subd. 1, Clause (3), authorizes an insurance corporation, under conditions therein provided

"To insure against any loss from either direct or indirect damage to any property or interest of the assured or of another, resulting from the explosion of or injury to (a) any boiler, heater or other fired pressure vessel; (b) any unfired pressure vessel; (c) pipes or containers connected with any of said boilers or vessels; (d) any engine, turbine, compressor, pump or wheel; (e) any apparatus generating, transmitting or using electricity; (f) any other machinery or apparatus connected with or operated by any of the previously named boilers, vessels or machines; and including the incidental power to make inspections of and to issue certificates of inspection upon, any such boilers, apparatus, and machinery, whether insured or otherwise."

Before its amendment by L. 1949, C. 489, the above quoted Clause (3), as it appeared in Minnesota Statutes 1945, Section 60.29, read as follows:

"To insure steam boilers and pipes, flywheels, engines and machinery connected therewith or operated thereby, against explosion and accident, and against loss or damage to persons or property resulting

therefrom, and against loss of use and occupancy caused thereby; and to make inspection of and to issue certificates of inspection upon such boilers, pipes, flywheels, engines, and machinery * * * ."

It is clear that the legislature did not, by its original boiler insurance enactment, intend to authorize the insurance of picture tubes in the manner proposed in the above quoted provision.

The question to be determined now is whether the 1949 amendment, above quoted, was intended to extend what had been authority for insuring boilers and machinery connected therewith and operated thereby so as to permit the insuring against loss "resulting from explosion of or injury to" picture tubes by the use of the words "(e) any apparatus generating, transmitting or using electricity."

It is the contention of the insurance department which, I understand, was instrumental in drafting the amendment, that all the clauses in paragraph (3) were intended to apply only to insurance against loss resulting from explosion of or injury to boilers, vessels and machinery or apparatus connected with or operated by any boilers, vessels or machines referred to in paragraph (3).

The amendment adopted by the legislature in 1949 contains the same phraseology as the insurance law of New York. The insurance authorized in that state by the phraseology copied into the Minnesota 1949 amendment is defined in McKinney's Consolidated Laws of New York Annotated, Book 27, Part I, Insurance Laws, Section 46, paragraph 9, as "Boiler and machinery insurance." As the New York clause was thus clearly limited in its application to boiler and machinery insurance, it would appear that our legislature, in enacting the same clause in Minnesota, intended it to be limited to that form of insurance

To construe the meaning of the words "any apparatus * * * using electricity," contained in the paragraph here considered, as authorizing insurance thereunder against loss resulting from injury to the picture tubes, referred to in your communication, would, it appears to me, require a holding that it would be legal under that provision to insure against loss by reason of injury to electric bulbs, electric clocks, electric shavers, neon lights, refrigerators, and every other form of the thousands of apparatuses operated by or using electricity which are not connected with boilers, vessels and machinery named in the law in question. Such broad interpretation of Clause (3) would not, in my opinion, be in accordance with the intention of the legislature.

If there is any ambiguity as to the meaning intended by the enactment of the law under consideration, the construction given to it by the department of insurance should be given weight. That construction for the past four years has, I am informed, been to the effect that the insurance intended to be authorized by Clause (3) is insurance against loss resulting from the explosion of or injury to any boiler, vessel, or other machinery or apparatus connected with or operated by any of the boilers, vessels, or machines referred to in that clause.

It is therefore my opinion that the type of insurance concerning which you inquire is not covered by Minnesota Statutes 1949, Section 60.29, Subd. 1, Clause (3).

J. A. A. BURNQUIST,
Attorney General.

Commissioner of Insurance
September 10, 1953.

249-B-23
850-i

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# LABOR

## CHILDREN

## 51

**Minors—Domestic relations—Parent and child—Control of parent—Both sexes under age of 21 years are minors—M. S. 1949, Section 525.54; M. S. 1949, Section 525.80.**

### Question

"Can a girl of the age of eighteen accept employment without her parents' consent and contrary to her parents' wishes?"

### Opinion

In **Townsend v. Kendall,** 4 Minn. 412 (Gil. 315), our Supreme Court said:

"* * * The father is the natural guardian of his children, and may control their persons, as to the place of their domicile, the place of their education, the course of their travels for health, pleasure, or instruction, and in all the various aspects in which the exercise of such control may be invoked, depending upon the station in life of the parties, and other circumstances of each individual case."

The court in **In re Guardianship of Campbell,** 216 Minn. 113, 11 N. W. 786, said (216 Minn. 120):

"No one has denied, nor can he deny, the general rule that parents have a paramount right to the custody of their children. It is a right given by statute (Minn. St. 1941, Section 525.54 [Mason St. 1940 Supp. Section 8992-129]), sustained by a long and uninterrupted line of our cases, one of the latest of which is **State ex rel. Olson v. Sorenson,** 208 Minn. 226, 227, 293 N. W. 241, 242, where many of our prior cases are cited and where we held, touching this phase:

" 'The principles of law involved are so well settled that they hardly bear repetition. All other things being equal, the natural parents have the paramount right to the care and custody of a child. [Citing many

cases.] That right is not absolute, however, and must yield to the child's welfare. If its best interests will be served by granting custody to someone else that will be done. [Citing cases.]' "

The statute in Section 525.54, supra, plainly recognizes the rights of father and mother, if suitable and competent, as the natural guardians of their minor children. So, assuming that the father and mother of a girl 18 years of age are suitable and competent, the law recognizes that they are the natural guardians of the child until she attains the age of 21 years. If you conclude that the parents of the girl are suitable and competent, then they have control over conduct, including the approval or disapproval of employment which she may seek. The foregoing is qualified only in the event of emancipation of a minor but I assume that the emancipation of the minor is not involved since you make no mention of it.

**Question**

"If parental consent is necessary before a minor can accept employment, does that mean that until the minor reaches the age of 21, he or she is unable to accept employment if the parents refuse to give their consent to the same?"

**Opinion**

This question involves the thought: When does minority cease? The word "minor" means a person under the age of 21 years. M. S. 1949, 525.80. This definition, according to the context thereof, applies only to Chapter 525 of the statutes, which is the Probate Code. See also **Vlasak v. Vlasak,** 204 Minn. 331, 283 N. W. 489.

CHARLES E. HOUSTON,
Assistant Attorney General.

Big Stone County Attorney.
April 8, 1953. 270-A-3

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# LIQUOR

## INTOXICATING

## 52

**Dance halls—Prohibiting the granting of a dance hall license where liquor containing one half of 1 per cent or more is sold—M. S. A. 617.42, 617.46.**

**Facts**

You request a reconsideration of an opinion of this office dated March 9, 1954 (802a-15), in which it was held that a license for the sale of 3.2 beer in a dance hall could not be legally issued.

You refer to a previous opinion by a former Assistant Attorney General dated October 26, 1945 (802a-15), in which it was held that a dance permit could be issued for a place which did not sell intoxicating liquor in which the content exceeded 3.2 per cent alcohol by weight. On October 28, 1948, an opinion of this office, No. 74, 1948 report, in effect, reversed the October 26,1945, opinion by applying in the matter of dance hall permits the definition of intoxicating liquor as given in M. S. A. 617.42; namely, that prescribed in L. 1919, C. 455, Section 1.

It is true, as stated in the October 26, 1945, opinion, that the 1919 law defining "intoxicating liquor" to mean those liquors containing one half of 1 per cent or more of alcohol by volume had been repealed. However, the opinion further correctly states, "Even so the legislature could still refer to it for the purpose of pointing out a definition of intoxicating liquor."

Laws 1923, Chapter 139, Section 1, relating to dance halls, originally provided that the term "intoxicating liquor" when used in that act should be given the same meaning as is prescribed therefor in Section 1 of C. 455, L. 1919, "and acts amendatory thereof."

Up to the time of the passage of the 1923 law the definition of "intoxicating liquor" as applied in connection with sale thereof in dance halls had not been amended, but the section containing that definition was amended in other respects prior to the enactment of L. 1923, C. 139, Section 1. If, between the date of the 1919 act and that of 1923, the definition of "intoxicating liquor" in the former had been amended so as to establish a different content of alcohol before the enactment of the 1923 act, it is clear that the definition of "intoxicating liquor" contained in the last amendment would be controlling. However, to construe the words "and acts amendatory thereof" to include amendments to the 1919 definition which have been adopted since the enactment of the 1923 law, or amendments which will hereafter be adopted, would result in such uncertainty that it cannot, in my opinion, be reasonably held that the legislature intended the words "and acts amendatory thereof" to include such future unknown and then unascertainable amendments.

Even if a construction requiring inclusion of such future and unknown amendments were possible, it is clear that the passage of M. S 1945, Section 617.42, by which the words "and acts amendatory thereof" were omitted, must now be the law. In the case of **State ex rel. Bergin v. Washburn**, 224 Minn. 269, 28 N. W. 2d 652, decided in 1947, the court said:

> "In re-enacting a statute, intention to change meaning may as clearly appear from omission of old as by adding new language."

In speaking of M. S 1945, the court said the legislature adopted and enacted said compilation and revision of the general statutes as the "Minnesota Revised Statutes" and that, "We may only apply the law as the legislature has enacted it, and we are only giving effect to the change as the language chosen and used by the legislature made the change. The language is clear and unambiguous, and, as such, there is no room for construction or interpretation."

On April 9 of this year, the Supreme Court took the same position in the case of **Village of Tonka Bay, Relator v. The Commissioner of Taxation.** In the Clerk's compilation of the cases, it is said with reference to that case that:

> "Where the language of a revised statute is clear and unambiguous, there is no room for construction or interpretation and prior statutes may not be referred to for the purpose of creating an ambiguity."

The Supreme Court of our state in the cases above cited holds as above stated that M. S. 1945 have been "adopted and enacted as the 'Minnesota Revised Statutes' " and "must be given effect as 'the latest expression of the legislative will'." Such was the holding by the Supreme Court notwithstanding the provision in L. 1945, C. 67, Section 4, which provides:

> "The laws contained and compiled in Minnesota Statutes 1945 are to be construed as continuations of the acts from which compiled and derived and not as new enactments."

It is true that L. Sp. Sess. 1933-1934, C. 46, Section 7 expressly repeals Section 6 of C. 139 of the 1923 Session Laws. However, M. S. 1945, Section 617.46, which is a part of the original C. 139, L. 1923, contains the provision that no application for dance permits shall be granted "for any place which has any direct or indirect communication with any room in which intoxicating liquor is sold, given away, or otherwise used." There were, I assume, some features of the repealed Section 6 which were thought unsatisfactory by the legislature. However, obviously the legislature decided that the part of Section 5 of L. 1923, C. 139 above referred to which is now in Section 617.46 would be sufficient restriction in matter of sale of liquor in dance halls, especially as Section 617.42 requires the application to said Section 617.46 of the meaning of "liquor" prescribed in L. 1919, C. 455, Section 1, which defines "intoxicating liquor" as any liquor containing one half of 1 per cent or more of alcohol by volume.

When a policy has been established by the legislature through legislation which prohibits in dance halls the sale of liquor containing one half of 1 per cent or more of alcohol by volume, such state legislation is under the constitution paramount to charter provisions. In this matter it would also appear that the rule of construction contained in M. S. A. Section 645.26 should be applied. That section in part reads as follows:

> "* * * If the conflict between the two provisions be irreconcilable, the special provision shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted at a later session and it shall be the manifest intention of the legislature that such general provision shall prevail."

There is ample reason for the placing of dance halls in a separate class for legislative purpose and for concluding that in the enactment of the legislation here considered the legislature intended that a different definition of intoxicating liquor should be applied to the sale thereof in dance halls from that applied to places for which liquor licenses are usually issued.

Since the 1948 holding of this office that the definition of "intoxicating liquor" as given in L. 1919, C. 455, Section 1 applies to sale of liquor in dance halls, the legislature has not changed the law with reference thereto as then construed and no legislation has been enacted disclosing any manifest intention that the provision in question shall not prevail.

It must, therefore, be presumed that the legislature is satisfied with that construction, which, after reconsideration thereof on your request, it is my opinion should be adhered to for reasons hereinabove stated until the legislature shall change the law in question.

J. A. A. BURNQUIST,
Attorney General.

Austin City Attorney.
April 12, 1954. 802-A-15

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## 53

**Dance halls—Spiked drinks—May not be consumed in a public dance hall—Waitresses from adjacent beer tavern may not solicit orders for beer in public dance hall for consumption therein.**

### Facts

"The owner of a public dance hall or pavilion desires to have the County board grant both a public dance permit and license to sell 3.2 beer at off sale. The room in which the 3.2 beer would be sold and dispensed would be under the same roof and in the same building as the dance hall except that the only way of getting from the dance hall to the entrance of the room in which the beer is dispensed is by going out of the dance hall and walking outside for approximately 75 feet along the building and then into the door leading into the room in which the beer is sold or dispensed."

### Question 1

May a public dance hall permit be granted under the facts as above stated?

### Opinion

Since under the facts stated there is no connection between the place where the beer is sold and the dance hall, a public dance hall permit may be granted to the dance hall in question under M. S. 1949, Section 617.46.

### Question 2

Is it illegal to drink intoxicating liquor or so-called "spiked drinks" in a public dance hall?

**Opinion**

M. S. 1949, Section 617.46 provides that no application for a public dance hall permit shall be granted "for any place which has any direct or indirect communication with any room in which intoxicating liquor is sold, given away, or otherwise used." The drinking of intoxicating liquor or "spiked drinks" constitutes the use of the same within the meaning of the above statutory provision.

It is therefore our opinion that no public dance hall permit may be granted for any premises wherein intoxicating liquor or "spiked drinks" are consumed.

**Question 3**

"If the building in which the 3.2 beer is proposed to be sold is located in a separate building, not attached to the building in which the public dances are proposed to be held, may waitresses take orders at booths in the dance hall and bring the 3.2 beer from the building in which it is sold to the booths in the dance hall and there paid for and consumed by the patrons of the dance hall?"

**Opinion**

Under the facts stated, the taking of orders in the booths in the dance hall and bringing the beer from the building in which it is sold to the booths in the dance hall, would give the dance hall an indirect communication with the place where the beer is sold which otherwise would not exist. This would make the premises in question ineligible for a permit to conduct a public dance hall.

IRVING M. FRISCH,
Special Assistant Attorney General.

McLeod County Attorney.
November 24, 1953. 802-A-10

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## 54

**License—On-sale—May be issued only to proprietors of establishments where liquor is to be sold—Licenses may not be issued to joint owners with right of survivorship.**

**Facts**

A husband and wife desire to be licensed to run an "on sale" liquor establishment and they desire to have the license issued to them as joint owners with the right of survivorship. Only one of the parties has an interest in the business.

**Question**

May the "on sale" intoxicating liquor license be issued to them so that upon the death of one of them the license would be in the name of the survivor?

**Answer**

There is no statutory provision authorizing the issuance of a license for the sale of intoxicating liquor to anyone other than the owner of the establishment where the liquor is to be sold. Nor is there any statutory provision authorizing the issuance of licenses for the sale of intoxicating liquor with the right of survivorship.

The answer to your question is therefore in the negative.

IRVING M. FRISCH,
Special Assistant Attorney General.

Red Wing City Attorney.
April 15 1954. 218-G-6

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## 55

**Sale—Club—Guests—Club licenses issued under M. S. 1949, Section 340.11, Subd. 6, does not authorize sale of liquor to club guests.**

**Question**

May a club licensed for the "on sale" of intoxicating liquor under the provisions of M. S. 1949, Section 340.11, Subd. 6, sell liquor to guests?

**Answer**

M. S. 1949, Section 340.11, Subd. 6, reads:

> " 'On sale' licenses may be issued, except in cities of the first class, in addition to the limitations, as herein provided, to bona fide clubs in existence for 20 years which are duly incorporated and which licenses shall be for the sale of intoxicating liquors to members only for a license fee of $100."

This subdivision specifically provides that the license is for the sale of intoxicating liquor **to members only.** This precludes the sale of intoxicating liquor to its guests.

IRVING M. FRISCH,
Special Assistant Attorney General.

Shakopee City Attorney.
October 27, 1953. 218-J-1

NONINTOXICATING

## 56

**Beer—Gift—The giving away of nonintoxicating malt liquor by person not licensed for the sale thereof to purchasers of pop corn is in violation of law.**

**Facts**

"'A' operates a lake resort in this county, outside of any incorporated village. She has no license from the county to sell nonintoxicating malt liquors.

"She sells a bag of pop corn for 25 cents and gives away a bottle of 3.2 beer with each purchase of a bag of pop corn. She claims to have been advised by some employee of the liquor department that it is lawful for her to give away 3.2 beer with sales of pop corn. Her attorney also insists that she has a right to do this."

**Question**

Is "A" violating the law relating to the sale of nonintoxicating malt liquor?

**Answer**

M. S. 1953, Sections 340.01 to 340.06, which relate to the sale of nonintoxicating malt liquor, do not define the word "sale." We therefore must resort to the general definition of the word "sale" as contained in the uniform sales act, Section 512.01, as follows:

"(2) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price;". Under the facts stated, the seller has received a consideration for the beer. This consideration is the purchase of a bag of pop corn for the sale price of 25 cents by the buyer.

In this connection we also call attention to excerpts from 30 Am. Jur. "Intoxicating Liquors."

It is therefore our opinion, under the facts stated, that "A" is guilty of violating the law relating to the sale of nonintoxicating malt liquor.

IRVING M. FRISCH,
Special Assistant Attorney General.

Pope County Attorney.
July 14, 1954. 217

## 57

**License—Applicant—Applicant for license to sell need not be owner of premises and fixtures therein; he need merely be in lawful possession thereof.**

**Question**

"What showing must an applicant for an 'On and Off Sale' 3.2 beer license make to the Council in regard to ownership of either (a) the building, or (b) fixtures, booths, bar, etc.?"

**Answer**

There is no statutory provision requiring that an applicant for a license for the sale of nonintoxicating malt liquor be the owner of the premises in which the business of the sale of nonintoxicating malt liquor is to be conducted, nor of the fixtures and other personal property to be used in connection therewith. It is sufficient that the applicant be in lawful possession of the premises and such fixtures and other personal property. However, care should be taken to make certain that the applicant will be the owner of the business if licensed for the sale of nonintoxicating malt liquor instead of merely acting as the agent for others.

IRVING M. FRISCH,
Special Assistant Attorney General.

Glencoe City Attorney.
January 8, 1954. 217-B-5

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## 58

**License—Wholesale—Liquor control commissioner issues wholesale nonintoxicating malt liquor license—Municipalities no longer authorized to issue—L. 1953, Ch. 346.**

**Facts**

"The City of Detroit Lakes has previously been issuing licenses for the sale of nonintoxicating malt beverages at wholesale pursuant to ordinance."

**Question**

"Does Chapter 346, Session Laws of 1953, change that situation so that all that is necessary is that such wholesaler obtain the license referred to in that chapter from the Liquor Control Commissioner?"

**Opinion**

The authority of a municipality to license wholesale nonintoxicating malt liquor was derived from M. S. 1949, Section 340.01 and 340.02, Subd. 3, both of which provide in part material as follows:

340.01. "There is hereby conferred upon the governing body of each county, city, village, and borough in the state, the authority to license and regulate the business of vendors at retail or **wholesale** of nonintoxicating malt liquors within their respective jurisdictions, to impose a license fee therefor and to provide for the punishment of any violation of any such regulations according to the provisions of law; * * * ."

340.02. Subd. 3. "* * * Wholesale licenses shall permit the licensee to sell nonintoxicating malt beverages to holders of on or off sale retail licenses and the licensee fee therefor shall be $10 per annum."

However, under L. 1953, C. 346, the foregoing provision of Section 340.02, Subd. 3, was eliminated by Section 1 of said amendatory act. Section 340.02, Subd. 4 was amended by adding at the end thereof:

"* * * The commissioner may issue wholesale licenses upon application and payment of a license fee of $10 per annum, which license shall permit the licensee **to sell nonintoxicating malt beverages to holders of on or off-sale retail licenses.** The fee therefor shall be paid into the state treasury. Any person licensed under Minnesota Statutes 1949, Section 340.402 shall not be required to obtain any such license and may sell nonintoxicating malt beverages at wholesale without further license."

Thus the authority to license the wholesaling of nonintoxicating malt liquor was given to the liquor control commissioner. This constitutes a repeal by implication of the authority to license the business of vendor of wholesale nonintoxicating malt liquors previously granted to municipalities under Section 340.01.

It is therefore our opinion that commencing with July 1, 1953, the effective date of L. 1953, C. 346, the authority to issue licenses for the wholesaling of nonintoxicating malt liquors will rest exclusively with the liquor control commissioner and that beginning with said date municipalities may not issue such licenses.

IRVING M. FRISCH,
Special Assistant Attorney General.

Detroit Lakes City Attorney.
June 22, 1953. 217-H

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## 59

**Sale—Drive-in restaurant—Parking area—Premises licensed for on sale of nonintoxicating malt liquor may include parking area in which case nonintoxicating malt liquor may be sold therein.**

**Facts**

The premises in which a drive-in restaurant is located includes open parking space in which customers' automobiles are parked in designated parking areas and in which customers are normally served food while seated in their cars.

**Question**

In the event the premises occupied by the restaurant, including the parking area, are licensed for the "on sale" of nonintoxicating malt liquors, may nonintoxicating malt liquors be served to customers in the parking area?

**Answer**

M. S. 1953, Section 340.02, Subd. 2, provides in part herein material as follows:

> "Retail 'on sale' licenses shall permit the licensee to sell such nonintoxicating malt liquors for consumption on the licensed premises, * * * "

The same subdivision authorizes the issuance of "on sale" licenses to restaurants. There is no statutory prohibition against the issuance of "on sale" licenses to drive-in restaurants nor is there any statutory requirement that the premises licensed for the "on sale" of nonintoxicating malt liquors be entirely closed.

It is, therefore, our opinion that the premises licensed for the "on sale" of nonintoxicating malt liquors when issued to a restaurant may include the parking area, and that under such license nonintoxicating liquors may be served to customers within such parking area.

IRVING M. FRISCH,
Special Assistant Attorney General.

Ironton Village Attorney.
July 8, 1954. 217-F-2

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# MILITARY

CIVIL DEFENSE

## 60

**Equipment—Organizational equipment may not be used for any purpose other than civil defense. Liability discussed. Laws 1951, C. 694, Section 3, Subd. 5; Section 302.**

**Facts**

"A short time ago this City received from the Federal Civil Defense Administration, thru E. B. Miller, Director, Civil Defense, State of Minnesota, a large, specially constructed truck equipped with much equipment and to be used for Civil Defense purposes and for training Civil Defense personnel for Civil Defense. The City paid nothing for

the truck, either as rental or as purchase price, and as I understand it, the City owns no part of the truck or its equipment. The truck is housed in the Fire Department Building here. No City employees operate the truck or take part in any civil defense programs in which the truck may be involved, except in one instance: When the Fire Department receives a call to a fire, and if the Fire Department is required to bring the so-called 'ladder truck' to the fire, on that particular case, one of the City firemen will drive the Civil Defense truck outside of the Fire Department building in order to get out the ladder truck."

**Question**

"In case of an accident damaging the Civil Defense truck, or other property, or resulting in personal injury to any of the personnel operating the truck or training in connection with it, or to other persons, generally, in connection with the operation of the Civil Defense truck, or in connection with Civil Defense activities, in general, what would be the liability of the City, if any, for such injury or damages?"

**Opinion**

We assume that the fire truck referred to in your letter is civil defense organizational equipment within the definition in L. 1951, C. 694, Section 3, Subd. 5, and owned by the state. As such the truck was not acquired for the normal operations of the state but for use as civil defense equipment during a civil defense emergency proclaimed by the governor as provided by Section 302 of said act and during training as preparation for use in such emergency. The civil defense act, of course, contemplates that civil defense organizational equipment must be stored in strategic places in readiness for an emergency if one should occur. The providing of storage facilities for such equipment is acting within the scope of its powers in performing a governmental function.

Under the facts stated in your letter, it is our opinion that the city would not be liable for any injury or damages if a person or property should be injured or damaged. The extent of the liability of the person operating such equipment is difficult to determine. Unless such person is negligent, there can be no liability. The question of liability of such person must be determined upon the facts and law in each individual case.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Stillwater City Attorney.
May 15, 1953. 835-A

NATIONAL GUARD

## 61

**Leave of absence—Temporary city employee—Entitled to a leave of absence with pay for a period not exceeding 15 calendar days in any year while engaged in training with the National Guard, and to be paid for such leave at the same compensation which he received from city during the period immediately prior to being called for such duty. M. S. 1949, Section 192.26. Such temporary city employee is entitled to retain his military pay received while in training with National Guard, together with leave pay granted him from city by said Section 192.26.**

### Facts

R.S.H. was employed as a temporary employee of the City of Hastings on May 19, 1953, as a laborer in the street department, and thereafter worked 48 hours a week, and was paid therefor at the rate of $1.10 per hour. Between June 15, 1953, and June 27, 1953, R.S.H., as a member of the National Guard, was engaged in training at Camp Ripley, and for such period of time received military pay in the sum of $66.64. His training at Camp Ripley was ordered by proper authority. Upon completion of said training he resumed work with the city.

### Questions

"1. Is Mr. H. entitled to the full benefits of M. S. A., Section 192.26, even though he is only a temporary employee and has in all worked less than 2 months for the city?

"2. If the answer to question 1 is in the affirmative, is Mr. H. entitled to pay for a full 48 hour week at $1.10 per hour during the time he was absent at State Guard Camp at Camp Ripley even though perhaps the crew he was working with did not put in full time because of weather conditions?

"3. Should the amount he received as compensation for his time spent at Camp Ripley be deducted from the amount he is entitled to under M. S. A., Section 192.26, if question 1 is in the affirmative, or is he entitled to full pay for this time from the city without regard to what he received for his service at Camp Ripley?"

### Opinion

M. S. 1949, Section 192.26, in part grants to an employee of a city who is a member of the National Guard a leave of absence from his public employment without loss of pay while he is engaged with such organization in training or active service ordered or authorized by proper authority for a period not exceeding 15 days in any calendar year. The section makes no distinction as to whether the public employee at the time he is called for

service with the National Guard is employed by the city on a temporary or permanent basis. Your first inquiry is therefore answered in the affirmative.

The facts contained in your letter indicate that though R.S.H. was employed on a temporary basis, he nonetheless worked full time and not intermittently. If these facts are correct, he would be entitled to be paid during his military leave of absence with pay on the same basis for which he had been paid during the period of time immediately prior to his having been called for training with the National Guard.

The obvious purpose of Section 192.26 is to encourage public employees to join and actively participate in the National Guard and other military and naval organizations, and the statutory provision confers certain privileges and benefits upon such public employees who do so, including a leave of absence with pay for a period not exceeding 15 days in any calendar year.

In view thereof, it is our opinion that R.S.H. while engaged in training with the National Guard is entitled to retain the military pay which he received for such duty, and in addition his regular pay as a public employee of the city for the period of time while he was engaged with the National Guard, but not exceeding 15 days in any calendar year.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Hastings City Attorney.
August 4, 1953. 310-H-1-A

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# MUNICIPALITIES

## BIDS AND CONTRACTS

## 62

**Bids—Competitive—Identical Bids—Advertising on basis of estimated steel for culverts — Call for bids should specify quantity of commodity in reasonable terms—No authority to accept several bids for lowest responsible bidder and thereafter divide contract between such bidders—Opinions of Attorney General, July 5, 1940; Sept. 15, 1932, No. 131, 1932 Report, file 707-a modified.**

### Facts

In the past it has been the practice of the county board to call for bids based upon the estimated steel for culverts as might be necessary to meet the seasonal requirements of the county for road construction, repairs, or maintenance. Neither the exact amount of such steel nor the approximate

amount thereof was specified in the call for bids. Pursuant to this invitation, bids were received upon the basis of the estimated seasonal requirements. All bids so received were identical. The county board thereupon accepted all bids and the county engineer, with the approval of the county board and consent of said bidders, purchased the necessary steel from such bidders so as to apportion such purchases equally among them. When the validity of this practice was questioned the county board specified the amount of steel for culverts in its proposal inviting bids. All bids received in response to this invitation were again identical, and the county board thereupon rejected all bids.

**Questions**

1. May the county board advertise on the basis of estimated steel for culverts to meet the needs of the county without specifying exactly or approximately the quantity of such steel?

2. In the event that all bids received are identical, may the county board accept all bids as the lowest responsible bidder and thereafter, with the consent of such bidders, authorize the county agent to purchase the steel from any or all of said bidders?

**Opinion**

Both questions are answered in the negative.

The purpose of advertising for bids is to inform the bidders, among other things, of the quantity or amount of the supplies or materials, and the quality thereof, so as to enable the bidders to bid intelligently. Consequently, the proposal for bids should specify either the specific amount of steel or the approximate amount thereof. To merely state in the proposal for bids such an amount of steel as may be necessary to meet the seasonal requirements of the county, or language of similar import, would be too indefinite to enable bidders to bid intelligently. We believe that it would be permissible for the board to state in the invitation for bids the approximate amount of steel for culverts which it is estimated the county would need during the year or season, but providing that the actual amount might run more or less than that amount. A provision to meet such a contingency could be written into the contract. See opinion of attorney general, No. 112, 1930 Report.

Turning to the second question, we do not believe that the statute relating to competitive bidding contemplates, assuming no fraud is involved, that the county may accept several identical bids as the lowest responsible bidder. Such a course would not constitute awarding the bid to the lowest responsible bidder.

Furthermore, the acceptance of a valid bid results in and constitutes a binding contract. **Garfielde v. U. S.**, 93 U. S. 242; **U. S. v. Purcell Envelope Company**, 249 U. S. 313, 317, 318; 63 L. Ed. 620, 39 S. Ct. 300. Consequently, if the county board should accept several bids the resultant effect would be

the creation of a like number of contracts, each of which would create an obligation on the part of the bidder to fulfill the same in accord with the invitation and the bid.

The statute, M. S. 1953, Section 375.21, requires that the contract, upon competitive bidding, shall be awarded to the lowest responsible bidder. This statutory requirement must be observed in good faith in order to validate the award. It has been adjudged that the term "lowest responsible bidder" means not merely the lowest responsible bidder whose pecuniary ability to perform the contract is deemed the best, but the bidder who is most likely, in regard to skill, ability, and integrity, to do faithful, conscientious work and promptly fulfill the contract according to its letter and spirit. See **Otter Tail Power Company v. Village of Elbow Lake,** 234 Minn. 419, 49 N. W. (2d) 197; **Otter Tail Power Company v. Village of Wheaton,** 235 Minn. 123, 49 N. W. (2d) 804.

The determination of the question of who is the lowest responsible bidder is a matter for a governing body, charged with the authority of awarding contracts, to determine, which determination cannot be set aside unless it is arbitrary, oppressive, and fraudulent. Such governing body must act fairly and honestly, and when it has so acted in accepting a bid its decision is usually accepted by the court. See McQuillin Municipal Corporations, Third Edition, Vol. 10, Section 29.73.

Accepting several bidders, whose bids are identical, as the lowest responsible bidder, and thereafter, with the approval of the bidders, directing the county agent to purchase the necessary steel for culverts from any or all of such bidders, is unauthorized by law and violative of the letter as well as the spirit of competitive bidding.

Opinions of Attorney General dated July 5, 1940; September 15, 1932, printed as No. 131, 1932 Report, are modified in so far as the same are in conflict herewith.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Douglas County Attorney.
June 2, 1954. 707-A

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## 63

**Bids—Competitive—Must conform to advertisement therefor—Conditional bid which ties two or more jobs or projects contrary to advertisement is a departure therefrom and unfair to other bidders and destroys free competition—County Ditch Construction.**

**Facts**

Pursuant to published notice the board did on February 9, 1954, receive and open bids for the construction of County Ditches No. 27 and 33-A respectively. Eleven bids were submitted on ditch project No. 27, and nine

bids were submitted on ditch project No. 33-A. A separate printed notice for each job or project is attached to the affidavits of publication enclosed with your letter. A separate proposal bid upon each unit or project was prepared and made available for any interested party who might desire to bid on such unit or project. The basic data for use in submitting bids is set forth on such proposal for each unit or project as a separate project.

A and B Company, one of the bidders on each project, after inserting the amount for each item as provided for on the proposal and thereafter tabulating the same so as to obtain the total amount of the bid for ditch project No. 27 and ditch project No. 33-A, inserted the following: "Note: if awarded Ditch No. 33-A deduct 5% from the total" at the bottom of sheet one of the bid on project No. 27, and the following: "Note: if awarded Ditch No. 27 deduct 5% from the total" at the bottom of sheet one of the bid on ditch project No. 33-A. No other bid contained any condition such as above quoted. No provision was made in the advertisement for bids, nor in the form of the proposal which was made available for all interested bidders, authorizing a bidder to tie the bids together conditioned upon the bidder being awarded both jobs or projects. By disregarding the above quoted conditions contained in the bid of A and B Company, P corporation was the low bidder on ditch project No. 27, and A & L company was the low bidder on ditch project No. 33-A.

**Question**

In determining the amount of the bids may the board deduct a 5% discount from the bids of said A and B Company?

**Opinion**

Your question is answered in the negative.

In one of the earlier cases, **Nash v. The City of St. Paul**, 11 Minn. 174 (Gil. 110), where the contractor was denied recovery on the ground that the contract as awarded was different from the advertisement for bids, the court said:

> "No bids were asked for such a contract as the one made with the plaintiff, and the contract let not being the same that was advertised, the acts of the city or ward officers in making it, were void, and created no liability on the part of the defendant."

The general rule with respect to proposals and specifications calling for bids and awarding the contract to the lowest responsible bidder is stated by the court in **Diamond v. City of Mankato**, 89 Minn. 48, 53, 93 N. W. 911, as follows:

> "The law is well settled that where, as in this case, municipal authorities can only let a contract for public work to the lowest responsible bidder, the proposals and specifications therefor must be so framed as to permit free and full competition. Nor can they enter into a contract with the best bidder containing substantial provisions bene-

ficial to him, not included in or contemplated in the terms and specifications upon which bids were invited. The contract must be the contract offered to the lowest responsible bidder by advertisement. **Nash v. City of St. Paul,** 11 Minn. 110 (174); **Schiffman v. City of St. Paul,** 88 Minn. 43, 92 N. W. 503; **Wickwire v. City,** 144 Ind. 305, 43 N. E. 216; **Dickinson v. Poughkeepsie,** 75 N. Y. 65; 20 Am. & Eng. Enc. (2d Ed.) 1165-1169.

"This rule should be strictly enforced by the courts, for if the lowest bidder may by an arrangement with the municipal authorities have incorporated into his formal contract new provisions beneficial to him, or have onerous ones excluded therefrom which were in the specifications upon which bids were invited, it would emasculate the whole system of competitive bidding. It would also lead to abuses by opening wide the door of opportunity to award the contract to a favorite or generous contractor—generous at the cost of the taxpayer."

In following the rule stated in the above case the court, in **Le Tourneau v. Hugo,** 90 Minn. 420, 97 N. W. 115, on page 425 said:

"A substantial benefit also accrues to the contractor from the proposed change in respect to the trial test, and, within the Mankato case, is such a departure from the specifications as to render the contract, if entered into, void; and the public authorities may, at the suit of a taxpayer, be restrained and enjoined from entering into the same."

In **Bemidji v. Ervin,** 204 Minn. 90, 282 N. W. 683, the court concluded that the contract as awarded to the assumed low bidder was void for the reason that the bid as submitted and accepted by the city constituted a material departure from the advertisement of bids. On page 97 the court said:

"It seems perfectly obvious that here there was no opportunity for bidders to compete for a contract containing substantially the same terms and provisions, and that the proposal of Power Service Corporation, as accepted, departed very materially from what any other possible bidder could have expected to obtain. Perhaps the specifications and the proposed contract filed with them were sufficiently complete in themselves. No doubt certificates of indebtedness may be issued payable out of a special fund, and containing no more explicit language than in the city's original proposals. But if the opportunity to each bidder to name his own maturities, interest rates, and call prices, be disregarded, the privilege to include in his bid 'such other provisions as may be material to said bid,' at least as interpreted by Power Service Corporation, left the way open for as many and as varied additional provisions as were conceivable in the minds of those desiring to compete. The successful bidder, indeed, by specifying only that the indenture of the bonds must be 'acceptable' or 'satisfactory' to it, reserved to itself until after the awarding of the contract the privilege of determining what the provisions should be; and that the most optimistic possible competing bidder would have anticipated the elaborate clauses of the ordinance is exceedingly improbable."

It is not necessary to show that the variance between the bids submitted, and the advertisement therefor, was prejudicial to other bidders in order to render such bid invalid by reason of the applicable principle of law stated in the following decisions of our court, viz.: **Coller v. City of St. Paul,** 223 Minn. 376, 26 N. W. (2d) 835; **Sutton v. City of St. Paul,** 234 Minn. 263, 48 N. W. (2d) 436.

On page 384 of the **Coller** case the court said:

"Statutory and city charter provisions requiring competitive bidding in the letting of public contracts require, as necessary corollaries, that the public officials whose duty it is to let a contract should adopt definite plans and specifications with respect to the subject matter of the contract; that the plans and specifications be so framed as to permit free and open bidding by all interested parties; that a bid shall constitute a definite offer for the contract which can be accepted without further negotiations; and that the only function of the public authority with respect to bids after they have been received shall be to determine who is the lowest responsible bidder. **Diamond v. City of Mankato,** 69 Minn. 48, 93 N. W. 911 * * * . It necessarily follows also that a bid must conform substantially to the advertised plans and specifications, and that where there is a substantial variance between the bid and the plans and specifications it is the plain duty of the public authority to reject the bid. **City of Bemidji v. Ervin,** 204 Minn. 90, 282 N. W. 683; * * * The test of whether a variance is material is whether it gives a bidder a substantial advantage or benefit not enjoyed by other bidders. **City of Bemidji v. Ervin,** 204 Minn. 90, 282 N. W. 683, supra; **Le Tourneau v. Hugo,** 90 Minn. 420, 97 N. W. 115 * * * .

"While we do not think that it was necessary to show also that the variance was prejudicial to other bidders (under our rule it makes no difference whether there is only one or several bidders, **City of Bemidji v. Ervin,** 204 Minn. 90, 252 N. W. 683, and **Le Tourneau v. Hugo,** 90 Minn. 420, 97 N. W. 115, supra), such prejudice appears here as a fact. If Park-O-Meter had bid on the same basis as Dual—that is, if it had eliminated from its bid the amount of $22 it included for installation according to the city's method and included in lieu thereof for installation according to the same method as Dual **proposed $6.50** as the estimated cost thereof and if, in addition, it had eliminated from its bid, as Dual did, the cost of furnishing a serviceman which it estimated was $2 per meter—its bid would have been $59.50 per meter, or $5 less per meter than Dual's. The aggregate amount of the difference would have been $5,350. On that basis it would have been the low bidder. But it did not bid on that basis, and therefore its bid was not considered by the city on the same basis as Dual's."

In the **Sutton** case the court in construing the term "The test of whether a variance is material is whether it gives a bidder a substantial advantage or benefit not enjoyed by other bidders" on page 269 said:

"Plaintiff construes this language to mean that the only test of material variance is whether a substantial advantage is gained by the noncomplying bidder. This is an erroneous conclusion. Substantial ad-

vantage for such a bidder is not the sole test. As stated in 10 McQuillin, Municipal Corporations (3 ed.) Section 29.78: 'Unless the bid **responds** to the proposal in **all material respects** it is not a bid at all, but a new **proposition.**' (Boldface supplied.) So tested, we believe that Philco's bid did not offer the city what it desired to purchase, but, on the contrary, submitted a new proposition, and hence was properly rejected."

From the foregoing decisions we reach the conclusion that the insertion of the conditions above quoted in each of the bids submitted by A and B Company constituted a variance from and not responsive to the advertisement for bids, and by tying together ditch projects Nos. 27 and 33-A would give said A and B Company an advantage over the other competing bidders, thereby destroying free competition on bids for said projects, from which we conclude that the contract may not be awarded to said A and B Company as the lowest responsible bidder.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Nicollet County Attorney.
March 2, 1954. 707-A-7

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## 64

**Bids — Competitive — Transportation charges added to purchase price —** M. S. A. 412.311, as amended by L. 1953, C. 735, Section 5.

### Questions

"1. Is it a violation of Section 412.311 for a village to make a purchase, without competitive bidding, of a piece of equipment costing less than $500.00 on an f.o.b. shipping point basis when the necessary transportation charges added to the purchase price will result in a total cost of more than $500.00?

"2. On the foregoing state of facts, is the question affected by whether the item in question is one which is customarily purchased by private buyers on an f.o.b. shipping point basis?

"3. Is your opinion further affected by the question of whether the payment of the freight charges is made directly to the transportation company or is made by way of reimbursement to the seller of the equipment after having been advanced by the latter?"

### Opinion

1. So far as material to each of your questions, M. S. A. Section 412.311, as amended by L. 1953, C. 735, Section 5, reads as follows:

"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 notice has been published once in the official newspaper at least ten days in advance of the last day for the submission of bids."

Ordinarily, and in the absence of an agreement showing an intention to the contrary, a delivery of goods by the seller to a carrier for shipment to the buyer is a delivery to the buyer. Upon delivery of the merchandise to the carrier, the carrier becomes the agent or bailee of the buyer so that the seller is not liable for loss or injury to the goods while in transit. See C. J. S. "Sales", Section 164, page 887; Am. Jur. Vol. 46 "Sales", Sections 432, 433, pp. 601 and 602.

Whether transportation charges are to be added to the purchase price of the goods depends upon the terms and conditions of the contract of purchase. Assuming that the goods are purchased f.o.b. Chicago for the sum of $500 and the village, as purchaser, assumes the responsibility to pay the cost of transportation then such contract of purchase would not require an expenditure in excess of $500, and the competitive bidding requirements of the statute would not apply. In the circumstances related, the transportation costs should not be considered as a part of the purchase price. On the other hand, if it is assumed that the merchandise is purchased f.o.b. at the village and the cost of transportation is to be paid by the seller, then such transportation cost would be a part of the contract of purchase and should be so considered in determining whether the transaction involves an expenditure of $500.

2. The terms and conditions of the contract of purchase between the village and the seller is controlling in determining whether the same is subject to the competitive bidding requirements of the statute above referred to. The custom adopted by buyers on an f.o.b. shipping basis is not important nor material except as such provisions may be incorporated in the agreement between the village and the seller

3. This question cannot be categorically answered. What has been said in answer to the first question is applicable to this question. The village may not circumvent the requirements of the competitive bidding statute by agreeing to reimburse the transportation costs paid by the seller if the contract of purchase contemplates that such transportation costs are to be paid by the seller. In these circumstances the transportation costs must be considered as a part of the purchase price.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

St. Paul Park Village Attorney.
October 15, 1953. 707-A-15

# 65

**Bids—Trial—Rental Clause—Water treating equipment—Chlorinator—Certain lease containing optional purchase conditions considered—Same subject to competitive bidding statute—M. S. A., Section 412.311, as amended by L. 1953, Ch. 735, Section 5.**

Facts

W & T Company has submitted to the water department of the village of Edina a proposal dated October 22, 1953 which, so far as here material, reads as follows:

"W & T Co., Inc., (hereinafter called the Company) proposes to furnish F.O.B. Newark, N. J., the following apparatus, subject to the terms and conditions stated:

One (1) Automatic Start & Stop Chlorinator, Type SASVCM, with 25 pounds per 24 hours capacity.

One (1) Solenoid Valve & Strainer Assembly.

One (1) Syphon Breaker Assembly.

One Hundred & Fifty Feet (150') of ¾" Solution Hose.

One (1) Chlorine Testing Outfit.

Supervision of Installation by one of our Engineers.

Terms: SEE TRIAL-RENTAL AGREEMENT ON REVERSE SIDE

1. PRICE $1989.00 30 days net. If supervision of installation is to be provided by us, these terms may be considered as 80%, 30 days from date of invoice, 20% upon completion of installation, or if installation is delayed for reasons beyond Seller's control, full payment will be due within 90 days after date of invoice.

2. SHIPMENT to be made within 30 days after acceptance and approval of this contract and receipt of full information from the Purchaser at the Company's factory. Shipment to go forward via ..... addressed to Edina, Minnesota.

3. TITLE to apparatus shall not pass to Purchaser until full payment therefor(e) shall have been made in cash. On failure to pay, the Company may enter the premises without notice and remove the apparatus.

4. ACCEPTANCE. This proposal is subject to acceptance within thirty days by the Purchaser and when so accepted and thereafter approved by the Company shall constitute the entire contract between the parties made at Newark, N. J

5. WARRANTY & FORCE MAJEURE. The Company warrants for a period of one year after shipment that the apparatus shipped of its manufacture is free from defects in workmanship and materials and its liability is limited to the replacement f.o.b. Newark, N. J., of

such defective parts. The furnishing of the foregoing is subject to delay or cancellation caused by war, accidents, strikes, inability to secure labor and raw materials, fires, embargoes, car shortage, delays in transportation, governmental restraints of any kind and all other causes, whether of the same or of a different class, affecting the production or delivery of the whole or any constituent part thereof."
(REVERSE SIDE)

TRIAL-RENTAL CLAUSE

"W & T CO. agree to furnish this equipment under the following rental terms: $331.50 per month rental for Six (6) months with the understanding that if the City decides to purchase the equipment at any time during the trial period, we will apply the rental charges against the purchase price of the equipment. If the City decides to return the equipment at any time during the trial period, it shall be returned to our factory at Newark, New Jersey, freight prepaid."

**Comments**

" * * * the seller has suggested that because the equipment is being rented to the Village on a trial basis under an arrangement whereby the amount due at the end of the trial period, net after credit for rental, is less than $500.00, it will not be necessary to advertise for bids. Furthermore, the seller states that this practice has been approved in connection with sales to numerous other Minnesota municipalities."

**Question**

Is the foregoing proposal or agreement subject to the requirements of the competitive bidding statute, M. S. A. Section 412.311, as amended by L. 1953, C. 735, Section 5?

**Opinion**

M. S. A. Section 412.311, as amended by L. 1953, C. 735, Section 5, in part reads as follows:

"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, except a contract for a local improvement made under Section 412.421 or any other law having an inconsistent provision relating to contracts for local improvements, shall be let to the lowest responsible bidder, after notice has been published once in the official newspaper at least ten days in advance of the last day for the submission of bids."

The financial obligation of the village under the above proposal amounts to $1989, to be paid in six monthly payments of $331.50. In the event that all of these payments are made, then the title to the equipment will vest in the village. A yield of $331.50 per month as rental for a period of six months on equipment having a value of $1989 appears to be grossly excessive.

The above proposal on its face refers to the village as the purchaser. Paragraph numbered 1 thereof prescribes the purchase price of $1989 payable 30 days net. From the language appearing on the face of the instrument it is obvious that the same is a writing containing conditions for the purchase of equipment therein specified by the village. However, the "TRIAL-RENTAL CLAUSE" which has been typewritten on the reverse side purports to avoid the effect of a purchase and sale, as this clause implies. The clause itself specifically states that the Company "agree to furnish this equipment under the following rental terms" of $331.50 per month for six months with the proviso that the equipment may at any time be purchased and the rentals theretofore paid will be applied upon the purchase price.

Is this proposal, with the provisions contained on the reverse side thereof, a lease or a sale of the water processing equipment? Calling it a lease does not establish the fact. This is peculiarly a case where there is nothing in a name, as the contents of the paper must determine its true character. What then is the true construction of such proposal? The answer is not to be found in any name which either party thereto may have ascribed to it, nor in any particular provision contained therein disconnected from all others, but from the intention of the parties gathered from all of the language which they have used. It is the legal effect of the whole which is to be determined. Taking into consideration the amount of the monthly payments called rental payments, and that such payments may be applied on the purchase price of the equipment, and the further fact that after all of said monthly payments have been made the title to such equipment will thereupon vest in the village, we are of the opinion that the proposal is in legal effect a purchase by the village and not a lease of the equipment. See C. J. S. Vol. 63, Municipal Corporations, Section 955, p. 504.

Also pertinent is the language contained in the same text, Section 1149, p. 815, as follows:

> "Provisions requiring the letting of a municipal contract for a public improvement on competitive bidding are violated by any scheme or device which prevents, or tends to prevent, or restrict, or suppress, competition among persons who may desire to become bidders, or which is designed to promote favoritism, or which affords opportunity for competition in form only, and not in fact.
>
> "Where competitive bidding is required, it must not be destroyed or impaired, and the officer, board, or body charged with authority and duty in the premises must determine in each case what competition the nature of the case will admit, endeavor to secure the best competition possible in the circumstances of the particular case, pursue the best method possible to secure it, and accord the same treatment to all bidders. To this end, conditions necessary to secure fair and reasonable opportunity for competition are properly proposed."

Accordingly, we answer the question in the affirmative. A contrary conclusion would nullify the mandatory requirements of the competitive bidding statutes heretofore referred to.

As bearing upon the question considered, see Opinion of Attorney General No. 237, 1934 Report.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Attorney for Village of Edina.
November 9, 1953. 707-A-15

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## 66

**Contract—Employment—Street commissioner—Contract one for personal services; call for bids not required. Even if cited provisions be construed as illegal delegation of authority, remainder of contract, otherwise valid, stands. Contract not vulnerable simply because of change in personnel of council during its life.**

**Facts**

"The City of Litchfield is operating under a Home Rule Charter adopted June 28, 1943. Section 605 of our Charter and Ordinance No. 218, which I am enclosing herewith provide for the calling of bids where the amount involved exceeds $500.00.

"On November 3, 1952, the City of Litchfield entered into a contract with * * * the present Street Commissioner of the City of Litchfield, employing him again as Street Commissioner for a period of 14 months. Mr. Levi V. Lund, the newly elected Mayor of the City has requested that I submit this contract to you for your opinion as to whether this contract is binding upon the City.

"The street commissioner has been appointed each year for a number of years. It was not made an office under Section 603 of the charter. No ordinance has ever been passed creating this an office nor was any other office created under this section.

"On April 16, 1951, the City Council discussed a contract with * * * [the present street commissioner] in regard to appointing him as Street Commissioner. They arrived at an agreement and instructed the City Attorney to draw up an agreement according to those terms. [The present street commissioner was then appointed as such by motion of the council.] The contract was accordingly drawn up and signed by the mayor and the City Clerk the following day [April 17, 1951]. This contract was effective * * * April 17, 1951. [The contract was for a period of one year.] This contract expired in April of 1952 and was not renewed until November 3, 1952, at a regular council meeting. At this meeting the contract arrived at on April 16, 1951, was before the council. * * * [The council then on November 3, 1952, adopted a motion] that the agreement dated April 16, 1951, * * * be renewed to expire December 31, 1953. He was then given a contract for the re-

mainder of 1952 and for the year 1953. The present street commissioner has performed under the contract dated November 3, 1952, and still is functioning as street commissioner."

**Question**

Is it "necessary to call for bids where the City desires to employ a person for a particular job such as Street Commissioner?"

**Opinion**

Section 605 of the Litchfield City Charter,[1] so far as here pertinent, reads:

> "In all cases of work to be done by contract, either municipal or proprietary, or for the purchase of personal property of any kind, where the amount involved is more than five hundred dollars, * * * the council shall advertise for bids in such manner as may be designated by the council."

The material provision of Ordinance No. 218 is to the same effect.

The contract here considered is a contract of employment. It is one for personal services. Upon the authority of **Krohnberg v. Pass,** 187 Minn. 73, 244 N. W. 329, and authorities therein cited, we are of the view that the contract here involved is not one within the purview of the above quoted provision of Section 605 or the similar provision contained in Ordinance No. 218. Accordingly, your specific inquiry is answered in the negative.

**Additional Facts**

"Subsection 2 of Section 1 [of the employment contract submitted] gives the Street Commissioner power to hire an engineer and Subsection 4 gives him power to construct new streets."

**Question**

Do these provisions "void the Contract?"

**Opinion**

The provision of the contract empowering the street commissioner to hire an engineer may be invalid as constituting an unwarranted delegation of power by the city council. Cf. **Krohnberg v. Pass,** supra. However, if it be invalid, only that provision is invalid, and the remainder of the contract, if otherwise valid, stands.

Paragraph I of the contract enumerates the duties of the street commissioner. Among those duties is that contained in subsection:

> "4. Construct new streets according to grades established by the engineers."

[1]References to sections, unless otherwise expressly stated, are references to sections of the city charter of the City of Litchfield.

A reasonable interpretation of the duty so imposed upon the street commissioner is that he shall supervise the construction of such new streets as may be laid out and established by competent authority and according to such grades as may be established therefor by engineers. If this interpretation be given to the clause involved, I see no objection to the provision; if the provision be interpreted in a way so as to involve an illegal delegation of authority by the council, that provision falls, but the remainder of the contract, otherwise valid, stands.

**Additional Facts**

"Section 1 [of the employment contract] provides that this contract will run for a period of one year and two months. This binds the new Council and Mayor."

**Question**

"Is it possible for the old Council to bind the new council for a period of more than one year?"

**Opinion**

This question presents more difficulty. It is not entirely free from doubt.

The general powers of the city are set forth in Section 101. Generally, the powers so conferred are broad and comprehensive, and we entertain no doubt that the city council thereunder has the power to contract for the services of a street commissioner.

Section 200 provides:

> "The form of government established by this charter shall be known as the 'Mayor-Council Plan.' All discretionary powers of the city, both legislative and executive, shall vest in and be exercised by the City Council, subject to the initiative, referendum, and recall powers of the people. It shall have complete control over the city administration, either directly or through its appointed officers and heads of departments, except as delegated exclusively to the city clerk in Section 602 of this charter or to the mayor in Section 206 of this charter."

The council is composed of two councilmen from each of the three wards of the city. Section 202. The mayor is the presiding officer of the council, but he is "not * * * a voting member of the council except in case of a tie vote." Section 206.

The position of street commissioner is not an office created by the charter. Section 603 prescribes that there "shall be such other officers as the council may create by ordinance." No ordinance has ever been enacted creating an office of street commissioner. The street commissioner, therefore, is not an officer but an employee of the city. It is sometimes stated as a general rule that, in the exercise of its governmental or legislative powers, a board or council cannot, without statutory authorization, make a contract

extending beyond its own term; but, in the exercise of business or proprietary powers, the board or council may, unless restrained by statute or charter provision, contract as freely as if it were an individual. See 10 McQuillin Municipal Corporations, 3d Ed., Section 29.101. In an annotation appearing in 70 A. L. R. 794, at 799, supplemented in 149 A. L. R. 336, at 342, the conflict of authority on the question presented is treated.

In the case of **Manley v. Scott,** 108 Minn. 142, 121 N. W. 628, our Supreme Court held that the Board of County Commissioners of Hennepin County was a continuing body and its existence was not affected by the election of new members and that the board could legally hire a morgue keeper for a period extending beyond the term of those composing the board at the time the contract of employment was made. The city council, like the board of county commissioners, is a continuing body, and the election of new councilmen has no other legal effect than partially to change the personnel of the body. See **Ambrozich v. City of Eveleth,** 200 Minn. 473, 274 N. W. 635, 112 A. L. R. 269; **Van Cleve v. Wallace,** 216 Minn. 500, 13 N. W. 2d 467.

In the **Ambrozich** case, supra, the Supreme Court said:

> "The old city council had the power to make a new lease on the last day that the members thereof were in office. A municipality is continuous. While the personnel and membership of its council or governing board changes, the corporation continues unchanged, and a contract entered into by its council is the contract of the corporation. The city council may exercise its power throughout its term. It can make no difference, so far as the question of power is concerned, whether it be exercised on the first or the last day of the term. **Manley v. Scott,** 108 Minn. 142, 121 N. W. 628, 29 L. R. A. (N. S.) 652, and note. See **Town of Tempe v. Corbell,** 17 Ariz. 1, 147 P. 745, L. R. A. 1915E, 581; **Dubuque Female College v. Dist. Twp. of City of Dubuque,** 13 Iowa, 555."

The contract upheld in the **Scott** case, supra, was made on December 31, 1908, at midnight of which day the terms of two of the five members of the Board of County Commissioners of Hennepin County expired.

Attorney General's opinion No. 64, 1946 Report, dated May 7, 1945, involved the validity of a three-year contract of employment between a village and an employee in its municipal liquor store. The opinion is to the effect that the contract was not invalid only because the contract may have extended beyond the term of the members of the village council making the contract.

No question of fraud or collusion in the making of the contract here involved is suggested in your inquiry; nor is it suggested that the terms of the contract are unfair or unreasonable; nor is it indicated that the term of the contract is unreasonable. In these circumstances, and upon the authority of the **Scott** case, supra, and the authorities therein cited, I am

of the view that the contract here considered is not vulnerable simply because there has been a partial change in the personnel of the city council since the time of the execution of the contract and during its life.

LOWELL J. GRADY,
Assistant Attorney General.

Litchfield City Attorney.
January 23, 1953. 707-A-2

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CHARTER

## 67

**Amendments—Description of boundaries—Corporate limits**—M. S. A. 410.07, 410.18.

**Question**

Does the language of Chapter 1 of the proposed charter amendment offend the provision of M. S. A. Section 410.07, which provides for fixing the boundaries of the municipality?

**Opinion**

The boundaries of the city of Rochester are described in Chapter 1, Section 2, of the original charter. The footnote following this section indicates that additional territory has been annexed to the city since the charter was adopted.

The proposed amendment to the charter, Ch. 1 thereof, which relates to the corporate limits or the boundaries of the city, reads as follows:

> "The inhabitants of the City of Rochester, within the corporate limits as now established or as hereafter established in the manner provided by law, shall continue to be a municipal corporation in perpetuity, under the name of the 'City of Rochester'."

There is no constitutional requirement that a home rule charter, adopted pursuant to Minn. Const. Art. IV, Section 36, shall contain a geographical description of the corporate limits or boundaries of the municipality. Such a requirement is purely statutory. M. S. A., Section 410.07, so far as here material, provides:

> "Within six months after such appointment, the board of freeholders shall deliver to the chief executive of the city or village the draft of a proposed charter, signed by at least a majority of its members. Such draft shall fix the corporate name **and the boundaries of the proposed city**, and provide for a mayor, and for a council, consisting of either one or two branches; one in either case to be elected by the people." (Emphasis supplied.)

This statutory requirement was met when the original charter was proposed and thereafter adopted by the electors of the city. See Chapter 1, Section 2, original charter.

The corporate limits of the city of Rochester, as now established and as the same exist, are definite and ascertainable.

Neither the constitutional provision above referred to nor any statute requires that a proposed amendment to an existing charter shall define or fix the boundaries of the municipality. It is a matter of common knowledge that corporate limits or boundaries of a municipality may be changed from time to time by statutory annexation or detachment proceedings. Chapter 1 of the proposed charter amendment was apparently drafted so as to meet these recurring changes, and in anticipation of enlargement thereof by annexation proceedings.

Provisions similar to Chapter 1 of the proposed amendment here considered have been incorporated into charter amendments by the cities of Anoka, Bemidji, Madison, and Mankato. It is our opinion that Chapter 1 of the proposed amendment does not offend any constitutional or statutory provision. Accordingly, the question above stated is answered in the negative.

In addition to the foregoing you have directed attention to Chapter 4, Sections 4.06, 5.05, 5.06, 5.07, 5.08, 6.01, 6.02, 6.03, 6.04, 6.05, 6.06, 7.01, 7.02, 7.03, 8.07, and 10.01 of the proposed amendment to the city charter, and in connection therewith you submit these further

**Questions**

"Do the provisions therein looking toward the adoption of an 'Administrative Code' of ordinances to supply much of the detailed provisions for administration of city government, within the framework of and subject to the express provisions of the proposed amended Charter as contained in that draft, violate or fail to comply with any of the provisions of the Constitution of the State of Minnesota or any applicable and constitutionally valid legislation adopted pursuant thereto? In other words, the question seems to be whether it is a requirement of home rule charters that the administrative organization of local government be set forth in more detail than is present in the proposed amended charter? Is it a requirement of home rule charters that there be an element of stability or continuity more lasting than that provided by the provisions for administrative ordinances in the proposed amended charter?"

**Opinion**

Chapter 4, Section 406, of the proposed charter amendment authorizes the enactment of ordinances for the administrative organization of the city or any part or department thereof, and so far as here material reads as follows:

"Ordinances providing for the administrative organization of the City or any part thereof, establishing departments, divisions, boards, commissions, offices, or funds, establishing the jurisdiction, duties, responsibilities, powers, or procedures of any of the same, or modifying, altering, amending, repealing, or abolishing any of the same, shall be classified as administrative ordinances."

The other sections referred to in the paragraph preceding the questions here considered, except Section 10.01, deal with agencies, department and officers of the city. Section 10.01 concerns the funds of the city and makes provision for the establishment and maintenance of separate and distinct funds as the council may prescribe in addition to the funds enumerated and specifically provided for in this section.

M. S. A., Section 410.18, which deals with the questions here considered, reads as follows:

"Such board of freeholders may also provide that the administrative powers, authority, and duties in any such city shall be distributed into and among departments and may provide that the council may determine the powers and duties to be performed by and assign them to the appropriate department and determine who shall be the head of each department and prescribe the powers and duties of all officers and employees thereof, and may assign particular officers or employees to perform duties in two or more departments, and make such other rules and regulations as may be necessary or proper for the efficient and economical conduct of the business of the city."

The Constitution, Art. IV, Section 36, does not restrict or prohibit the inclusion of the provisions as set forth in the aforesaid sections of the proposed amendment. Section 410.18, supra, does not, in our opinion, require that either the original charter or any amendment thereto shall contain inflexible provisions prescribing the duties or responsibilities of any agency, department, or officers of the city. On the other hand, it would seem desirable and expedient that the charter provisions or amendments thereof in this respect should be flexible so that the council could, within the framework of the charter, adopt administrative ordinances from time to time so as to make provision for the efficient, orderly, and economical conduct of the business of the city.

In consequence of the foregoing we reach the conclusion that the sections of the proposed charter amendment here under consideration are permissible and are not in contravention of the provisions of Section 410.18, supra, or any other statutory or constitutional provision.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Rochester City Attorney
September 18, 1953. 58-C

# 68

**Amendments—Rejected by voters may be subsequently submitted—Constitutional provisions—Art. IV, Section 36.**
**Leighton v. Abell, 225 Minn. 565.**

### Facts

"On May 26, 1953, the board of freeholders of the city of Granite Falls submitted to the city council and to the mayor a proposed amendment to the city charter of said city. The city council on June 1st, 1953, ordered a special election by resolution, which was held July 7, 1953, but the amendment did not carry."

### Questions

1. "Can the same proposed amendment submitted May 26th, 1953, by the board of freeholders be again submitted to the voters of the city by the city council at a special election even though the board of freeholders does not submit such amendment to the city council a second time?

2. "Could such proposed amendment once defeated be submitted at the next regular municipal election, even though more than six months from the delivery of the draft on May 26, 1953, by the board of freeholders to the city council?"

### Opinion

These questions will be considered in the order above stated.

1. Any amendment to an existing home rule charter may be proposed and submitted as prescribed by and within the limitations of Minn. Const., Art. IV, Section 36, which in part reads as follows:

> "* * * The legislature may prescribe the duties of the commission relative to submitting amendments of charter to the vote of the people, and shall provide that upon application of five per cent of the legal voters of any city or village, by written petition, such commission shall submit to the vote of the people proposed amendments to such charter set forth in said petition * * * ."

See **Leighton v. Abell**, 225 Minn. 565, 31 N. W. (2d) 646.

No authority is found in the constitution granting the village council the right to submit the defeated proposed amendment to the voters for reconsideration. We therefore answer the first question in the negative.

2. The constitutional provision, Art. IV, Section 36, heretofore referred to, makes no distinction as to the manner and method of submitting an original proposed amendment or for the resubmission of a proposed amendment which has been rejected by the voters in the first instance. In **State ex rel. Andrews v. Beach**, 155 Minn. 33, on page 35 the court said:

"It is not within the province of the governing body of a city or of a court to pass judgment on the quality of the work done by a board of freeholders. Such boards may and sometimes do write charter provisions or amendments which are of doubtful meaning, or amendments which do not dovetail into charter provisions left untouched. In a word, although the work of the board may have been badly done, that is no reason why the electors should not be given an opportunity to approve or disapprove of it. In passing on the proposed amendments the people of Mankato 'have all the legislative power possessed by the legislature of the state save as such power is expressly or impliedly withheld.' **Park v. City of Duluth**, 134 Minn. 296, 159 N. W. 627. Neither the city council nor the courts have any supervisory or veto powers. The statute is mandatory and declares that upon the delivery of the draft of a charter the council, or other governing body of the city, **shall cause** the proposed charter to be submitted, etc. Section 1348, G. S. 1913. Proposed amendments **shall be submitted** as in the case of the original charter. Section 1350, G. S. 1913. There is no room for argument about the duty of the council in either case."

See also **State ex rel. Lowe v. Barlow**, 129 Minn. 181, 151 N. W. 970.

It is our opinion that a proposed amendment which has been once submitted to the voters and rejected may be subsequently submitted in conformity with the limitations contained in the constitutional provision as prescribed in said Art. IV, Section 36, and **Leighton v. Abell**, supra.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Granite Falls City Attorney.
September 14, 1953. 58-C

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CIVIL SERVICE

## 69

**Leave of absence—Payment for leave granted to employee after time of compensable injury cannot be used under M. S. 1949, Section 176.01, to supplement compensation payments.**

**Facts and Statement**

"The Civil Service Rules and Classification Ordinance of the City of St. Paul, Ordinance No. 3250½, which governs the classified Civil Service of the City of St. Paul, provides in Section 41 (f), (after setting out the method of determining cumulative sick-leave) as follows:

'Additional leave of absence for disability may be granted with pay for such periods of time, not exceeding ninety days in any one calendar year, as the Council may authorize.'

"This office has ruled that the above quoted Civil Service rule applies only to disability from sickness and not to disability from injury on the job where Workmen's Compensation is paid.

"The City Council now proposes to change the above rule to include disability resulting from a compensable injury.

"M. S. A. 1949, 176.01, provides in part as follows:

'* * * If employees of the state or a county, city, village or other political subdivision of the state who are entitled to the benefits of the workmen's compensation law have, at the time of compensable injury, accumulated credits under a vacation, sick leave or overtime plan or system maintained by the governmental agency by which they are employed, the appointing authority may provide for the payment of additional benefits to such employees from their accumulated vacation, sick leave or overtime credits. Such additional payments to an employee may not exceed the amount of the total sick leave, vacation or overtime credits accumulated by the employee and shall not result in the payment of a total weekly rate of compensation that exceeds the weekly wage of the employee. Such additional payments to any employee shall be charged against the sick leave, vacation and overtime credits accumulated by such employee.' "

**Question**

"Does M. S. A. 1949, 176.01, prohibit the adopting of the Civil Service rule providing for such additional leave of absence with pay in excess of accumulated sick leave, vacation, and overtime credits, when an employee of the City of Saint Paul is injured on the job and is receiving workmen's compensation benefits?"

**Opinion**

Statutes of the character of Minnesota Statutes 1949, Section 176.01, to which you refer, should be construed liberally in favor of the employees. However, we cannot do violence to the specific language of the statute. Section 176.01 specifically refers to "accumulated credits under a vacation, sick leave or overtime plan or system maintained by the governmental agency" by which the employee in question is employed. We assume that the council did not, prior to the time of the employee's compensable injury, grant to the employee any additional leave of absence which was to his credit at the time of such injury. The employee, then, had no vested right at the time of his compensable injury to additional leave which the council was authorized to grant under the above quoted provision of the civil service ordinance. This provision is permissive only and the council may or may not grant additional leave to the employee. Payment for additional leave granted under authority of the provision of the ordinance set forth above,

after the time of the employee's compensable injury, cannot be used to supplement compensation payments as provided by Section 176.01. This answers your question.

GEO. B. SJOSELIUS,
Deputy Attorney General.

City of Saint Paul Corporation Counsel.
May 8, 1953. 120

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## 70

**Physical disability—Where a police civil service commission has adopted a rule providing for the removal of an employee after a hearing on stated charges by reason of physical disability, a fact question is presented as to whether the disability is of such a nature as to prevent him from performing his duties in a reasonable manner—M. S. A. 419.06, 419.07, 419.11, 419.12.**

### Facts

The City of St. James, a city of the fourth class, operates under a home rule charter and has a police civil service commission created and established under and pursuant to M. S. A., C. 419. The police force of the city consists of four full-time men, including the chief of police. Recently the chief of police was injured in a nonservice-connected accident resulting in the loss of a portion of his left arm below the elbow.

### Question

Do the statutes of the state or rules of the police civil service commission require that charges be brought against the chief of police of St. James by reason of the injury which he has sustained?

### Opinion

M. S. A., Section 419.06, authorizes and directs the police civil service commission to promulgate rules and regulations to promote efficiency in the police department. M. S. A., Section 419.07, reads in part as follows:

> "No officer or employee after six months continuous employment shall be removed or discharged except for cause upon written charges and after an opportunity to be heard in his own defense as in this chapter hereinafter provided. Such charges shall be investigated by or before such civil service commission. The finding and decision of such commission shall be forthwith certified to the chief or other appointed or superior officer, and will be forthwith enforced by such officer."

M. S. A., Section 419.11, reads in part as follows:

"Charges of inefficiency or misconduct may be filed with the secretary of the commission by a superior officer or by any member of the commission of his own motion, and thereupon the commission shall try the charges after no less than ten days' written notice to the accused. Such notice shall set forth the charges as filed. In the event that the charges are filed by a member of the commission the complaining commissioner shall not sit. The trial of these charges shall be open to the public and each commissioner shall have the power to issue subpoenas and to administer oaths and to compel the attendance and testimony of witnesses and the production of books and papers relevant to the investigation."

M. S. A., Section 419.12, reads in part as follows:

"If, after investigation and trial by civil service commission, as herein provided, an employee is found guilty of inefficiency, breach of duty, or misconduct, he may be removed, reduced, or suspended and his name may be stricken from the service register. If the board shall determine that the charges are not sustained, the accused, if he has been suspended pending investigation, shall be immediately reinstated and shall be paid all back pay due for the period of suspension."

In conformity with M. S. A., Section 419.06, above cited, it is my understanding that Rule 30 of the police civil service commission of your city has been promulgated to promote efficiency in the police department. That rule provides for the removal of a civil service employee for cause upon written charges and after a hearing. One of the authorized grounds under said Rule 30 for the removal of an employee is a chronic physical ailment or defect which incapacitates an employee from the proper performance of his duties.

Whether the physical ailment or defect here involved is of such a nature as to incapacitate the chief of police from the proper performance of his duties presents a question of fact which, if charges are filed, must be determined by the police civil service commission in a proper proceeding instituted for such purpose.

There is, however, nothing in the rule of the police civil service commission quoted in your letter or in any of the state statutory provisions that makes the filing of charges against the injured chief of police of your city mandatory. Such filing is a matter for the exercise of discretion on the part of those authorized by our state statutes to make charges against employees of your police department. The only officials who, under the state law, may file such charges with the secretary of the police commission are a superior officer or a member of that commission. If the latter should do so, he may not sit as a board member at the hearing thereon.

It is my opinion that, if neither such superior officer nor any member of the police commission has sufficient cause for believing that the loss sustained by the chief of police renders him unable to perform the duties

of his office in a reasonable manner, there is no justification for the filing by them, or either of them, of charges against him by reason of the injury here considered.

J. A. A. BURNQUIST,
Attorney General.

St. James City Attorney
May 15, 1954. 120

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## 71

**Police chief—Temporary appointment—Person receiving a temporary appointment as chief of police under police civil service commission rule in conformity with M. S. A., Section 419.06 (8) obtains no permanent rights; However, see Johnson v. Pugh, 152 Minn. 437, 189 N. W. 257. Police civil service commission without authority to provide by rule for temporary appointments in case of emergency beyond 30 days under M. S. A. 419.06 (8).**

**Facts**

The Village of Hibbing is a municipal corporation operating under the new village code, M. S. A. 412, and having a police civil service commission established and existing pursuant to M. S. A., C. 419.

At the present time there exists a vacancy in the office of chief of police.

L. 1953, C. 594, authorizes the Village of Hibbing to fill a vacancy in the office of the chief of police by appointment of the police civil service commission and two members of the governing body of the village appointed for that purpose, the appointment to be made without examination of applicants for a two year term from among members of at least ten years standing in the police department. However, this 1953 enactment does not become effective until approved by the voters of the village at the next general election or any earlier special election called for that purpose. A special election will not be held and the question to be determined at an election as set forth in the 1953 enactment will not be determined until the general election on December 8, 1953.

There is a desire in the village to temporarily fill the vacancy in the office of the chief of police until such a time as the voters of the village may vote on the question as provided for in L. 1953, C. 594, and the method of selecting a chief of police is finally determined.

**Questions**

"1. Under the Police Civil Service Rules for the Village of Hibbing where temporary appointment is made of the Chief of Police and the appointee continues in this position for a period of time longer than

thirty days, which position is an advance one from its present position of the appointee, do any permanent rights accrue to the appointee to the position he was temporarily appointed to?

"2. Can the Police Civil Service Commission amend the existing Rules so as to provide for the temporary appointment of an acting Chief of Police pending the next General Election of the Village to be held on December 8, 1953, which election will determine, by special ballot, the method of electing a new Chief of Police?"

**Opinion**

M. S. A., C. 419, requires that vacancies in the police department, including the office of chief of police, be filled permanently by persons who have passed a competitive examination and whose names appear on an appropriate eligible register. Temporary appointment of a person to the police department as chief of police without examination and not from a register is permitted by the act under rules enacted by the police civil service commission in conformity with Section 419.06 and for a period not exceeding 30 days. Rule 25 of your police civil service commission authorizing a temporary employment without examination in cases of an emergency for not to exceed 30 days and prohibiting successive temporary employments is in conformity with M. S. 1949, Section 419.06 (8).

A person temporarily appointed as chief of police for a period of 30 days under Rule 25 who is permitted to remain in such temporary employment for more than 30 days in violation of the express provisions of the statute and the civil service rule, under ordinary circumstances does not acquire any permanent rights. See **State ex rel. Raines v. Seattle,** 134 Washington 360, 235 Pac. 968, as discussed in the opinion of the Attorney General to the Minneapolis city attorney of March 24, 1949, printed in the 1950 Reports as No. 134. However, if the temporary appointee is a veteran and is permitted to hold his employment for more than 30 days, depending upon the facts and circumstances, he may have a right to a hearing before discharge. See **Johnson v. Pugh,** 152 Minn. 437, 189 N. W. 257.

L. 1953, C. 594, in providing for a method for the appointment of chief of police in your city different from that provided in M. S. A., C. 419, makes no provision for temporarily filling a vacancy in the office of chief of police until such a time as the new method of appointment can be determined and exercised. The only authority for promulgating a rule pertaining to temporary employment is that previously discussed herein as authorized by Section 419.06 (8). Therefore, the police civil service commission of your city is without authority to amend any rule so as to provide for the temporary appointment of a chief of police to hold office beyond 30 days and contrary to Section 419.06 (8).

JOSEPH J. BRIGHT,
Assistant Attorney General.

Hibbing Village Attorney.
June 15, 1953. 120

# 72

**Veterans' preference—Police Captain Examination—Passing mark—Veteran who attains a passing mark in a promotional civil service examination is entitled to promotion over other applicants for such position who are non-veterans.**

**Facts**

A police civil service commission is established in the City of Austin under and pursuant to M. S. A., C. 419. This commission proposes to hold a promotional examination for the position of captain in the police department. Undoubtedly, war veterans within the police department will apply to take this promotional examination.

**Question**

Does a war veteran under Section 197.45, Subd. 2, have preference over nonveterans on promotional examinations within the police department of Austin?

**Opinion**

You will note by M. S. A., Section 197.45, Subd. 2, that honorably discharged veterans, as defined in the Veterans Preference Law, are entitled "to preference in appointments, employment and **promotion** over other applicants therefor." See **State ex rel. Boyd v. Matson**, 155 Minn. 137, 193 N. W. 30 and **State ex rel. Kangas v. McDonald**, 188 Minn. 157, 246 N. W. 900.

When a veteran, as defined in Section 197.45, takes a promotional civil service examination and passes the examination, his attainment of a passing mark establishes his qualifications and fitness for the position applied for. Having so passed the examination, the veteran is entitled to preference in the promotion over other applicants for the position who are nonveterans. See **State ex rel. Kangas v. McDonald**, supra.

Your inquiry is therefore answered in the affirmative.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Austin City Attorney.
February 27, 1954. 120

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# 73

**Veterans' preference—Police—Chief—Term "Veteran"—The position of chief of police in a village having a police civil service commission under L. 1949, C. 419, is subject to veterans' preference provided by M. S. 1949, Section 197.45 et seq. under the facts submitted; there is no distinction in the veterans' preference law between a veteran of World War I and World War II.**

**Facts**

The Village of Hibbing is a municipal corporation operating under the new village code (M. S. 1949, C. 412, and acts amendatory thereof). The village has a police civil service commission established and existing pursuant to the requirements of M. S. 1949, C. 419.

On April 1, 1953, there will exist in the Hibbing police department a vacancy in the office of chief of police, it being contemplated that that vacancy will be filled from a list of eligibles qualifying for the position in conformity with said M. S. 1949, C. 419.

The office of chief of police has been classified by the civil service commission and the duties and qualifications of the office are set forth in the rules of the commission. However, no ordinance has ever been enacted in the Village of Hibbing establishing a police department with a chief of police as its head.

**Questions**

"1. Does Soldiers' Preference, as provided for in M. S. 197.45, apply to the position of Chief of Police of the Village of Hibbing?

"2. Insofar as equal preference is concerned, is there any distinction between veterans of World War I and World War II; in other words, are World War I veterans entitled to more or less benefits than World War II veterans?"

**Opinion**

M. S. 1949, Section 412.111, as amended by L. 1951, C. 375, authorizes the village council, among other matters, to appoint and remove appointive village officers subject to the laws relating to veterans' preference and a police civil service commission as set forth therein. The duties of village police officers as prescribed in M. S. 1949, Section 412.161 are as follows:

"The village constables shall be governed by the same laws as town constables. They shall obey all orders of the council or the mayor and enforce all laws and ordinances for the preservation of the peace. They shall have all the powers of a peace officer."

The veterans' preference laws are M. S. 1949, Sections 197.45 et seq. Section 197.46 reads in part as follows:

"* * * Nothing in Sections 197.45 and 197.46 shall be construed to apply to * * * head of a department, * * * "

The authority for having a chief of police and police officers in your village is that contained in the portions of the new village code to which reference has hereinbefore been made. There is nothing therein which creates a department of the village headed by a chief of police. The chief of police under the law has no right to appoint or remove subordinate officers, does not have a fixed term, and is a mere employee of the village council, selected, of course, in conformity with M. S. 1949, C. 419.

Therefore, in our opinion, he is not the head of a department within the rules laid down by **State ex rel. Michie v. Walleen**, 185 Minn. 329, 241 N. W. 318; **State ex rel. McOsker v. City Council of Minneapolis**, 167 Minn. 240, 208 N. W. 1005, so as to be exempt from the provisions of the soldiers' preference act. See also **State ex rel. Trevarthen v. City of Eveleth**, 179 Minn. 99, 228 N. W. 447 and opinion of the Attorney General 1934 No. 697, P. 1005.

The term "veteran" as used in the veterans' preference act is defined in M. S. 1949, Section 197.45. A reading of that statutory provision discloses that there is no distinction in the veterans' preference law as between veterans of World War I and World War II. The application of the veterans' preference law as applied to a veteran taking a civil service examination is discussed in **State ex rel. Kangas v. McDonald**, 188 Minn. 157, 246 N. W. 900.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Hibbing Village Attorney.
March 9, 1953. 120

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**EMINENT DOMAIN**

## 74

**Proceedings—Abandonment thereof—Initiative and referendum—Interest on awards—Emergency ordinance adopted—Off street parking—M. S. 1953, Ch. 117, considered.**

**Facts**

"Pursuant to Sections 78 and 79 of the Charter and pursuant to Section 117.01 and following Sections, M. S. A., the City of Albert Lea started condemnation proceedings for the acquisition of certain lots on Newton Avenue for off-street parking. All preliminary proceedings were had through the filing of the awards made by the Commissioners which occurred on December 14, 1953. Appeals were taken by owners of three of the parcels but on their own motion, these appeals were dismissed in open court on March 9, 1954.

"No further action was taken until at last night's council meeting when an emergency ordinance was adopted appropriating funds for the payment of the lots and ordering the City Manager and City Officials to proceed to the completion of the condemnation proceedings.

"Last Saturday morning, March 20, 1954, a so called 'initiative' set of petitions was filed with the clerk under Section 34 and following Sections of the Charter. The purpose of the petition is to have the council adopt an ordinance abandoning the condemnation proceedings in its entirety and as the proposed resolution states, to do so 'within the period of time described by the Charter of the City of Albert Lea, Chapter 9, Section 81.'

"You will note the procedure to be followed under Section 36 of the Charter upon the filing of an Initiative Petition. The clerk has five days in which to check the signatures and then under Section 37, if the signatures are sufficient, the clerk so certifies to the council at its next meeting which in our case will be April 12, 1954. Then follows the appointment of a committee, public hearings and some action within 65 days."

**Comments**

"I took the position at last night's council meeting that if the council were to abandon the condemnation proceedings, it would have to be done within 30 days after the dismissal of the appeals which was on March 9 last. Accordingly I felt that the Initiative Proceedings was too late and that it could not affect the proceedings which have reached the present place in the District Court. It is my thought that because of the ordinance passed last night, payment of the awards should be made to the Clerk of Court and that thereafter the City Attorney must make a certificate pursuant to Chapter 164, Laws 1953, and proceed to complete the matter."

**Questions**

"1. May the City Manager and City Officials proceed pursuant to the emergency ordinance adopted last night and complete the condemnation proceedings?

"2. Is the 'Initiative Petition' which has been filed of any effect and must the city proceed to form a committee and have hearings?

"3. In the event that your opinion is that the city may safely proceed pursuant to the emergency ordinance, from what date must the city pay interest on the awards?"

**Opinion**

These questions will be considered in the order above stated.

1. Chapter IX, Section 78, of the city charter of Albert Lea, adopted May 10, 1927, empowers the city to acquire property either within or without the corporate boundaries for any public use or purpose. Section 79 thereof reads as follows:

"The necessity for the taking of any property by the city shall be determined by the council and shall be declared by a resolution which shall describe such property as nearly as may be and state the use to which it is to be devoted. The acquisition of such property may be accomplished by proceedings at law, as in taking land for public use by right of eminent domain according to the laws of this state, except as otherwise provided in this charter."

In the instant case it appears that condemnation proceedings were instituted by the city to acquire certain premises for off-street parking pursuant to M. S. 1953, Ch. 117; that commissioners appointed therein did,

on December 14, 1953, file their report and awards of damages from which awards appeals were taken to the district court by three of the landowners. These appeals were dismissed voluntarily by the appellant landowners in open court on March 9, 1954.

Upon dismissal of such appeals the landowners became entitled to receive the amount of their respective awards, together with interest thereon, and the city became obligated to pay such amounts. Payment of such awards may be compelled in a mandamus proceeding. See **State ex rel. McFarland v. Erskine,** 165 Minn. 303, 206 N. W. 447, subject, however, to the right of the city to abandon such proceedings, as will be hereinafter noted.

A condemnation proceeding, as here considered, is in rem and not in personam, and the award of damages as made becomes a fund standing in place of the land taken and condemned. **Oronoco School District v. Town of Oronoco,** 170 Minn. 49, 212 N. W. 8.

The right of the city to abandon the proceedings is found in Section 81 of the charter, which reads as follows:

> "The city may, by resolution of the council at any stage of the condemnation proceedings, or at any time within thirty days after any commissioners appointed by the court hereunder shall have filed their report with the clerk of court, or in case of an appeal to the district or supreme court at any time within thirty days after final determination thereof, abandon such proceedings as to all or any parcel of the property sought to be acquired and shall pay all costs thereof."

In the case here considered the city, under said Section 81, can at any time within 30 days after March 9, 1954, when said appeals were dismissed, abandon said proceedings and thereupon shall pay all of the costs. See **McRostie v. City of Owatonna,** 152 Minn. 63, 188 N. W. 52. As controlling upon the right of the condemner to abandon proceedings in whole or in part by virtue of the statutory provisions, Ch. 117, supra, see **State by Benson v. Leslie,** et al., 195 Minn. 408, 263 N. W. 295.

When the rights of the city and the property owners were determined by the dismissal of the three appeals, we believe that the only problem which remains undisposed of, unless the council dismisses the proceedings, is the payment of the awards with interest and then proceed to file a final certificate as provided in M. S. 1953, Section 117.20 (4).

Payment of such awards may be made pursuant to the emergency ordinance adopted by the council and referred to in the statement of facts above. We do not find any charter provision which requires the adoption of an emergency ordinance to pay an emergency award made in a condemnation proceeding. Such payment could have been authorized by a mere resolution or other affirmative action taken by the council. See Section 55, city charter.

The foregoing disposes of your first question.

Before passing on to the next question, we point out that there is grave doubt as to whether a condemnation proceeding instituted by authority of Ch. 117, supra, which is quasi judicial in character, and where the sovereign power is asserted, is subject to the initiative and referendum provisions of your city charter. See McQuillin Municipal Corporations, 3rd Ed., Vol. 5, Sections 16.52 through 16.59; **Oakman v. City of Eveleth**, 163 Minn. 100, 203 N. W. 514.

2. Our answer to question 1 renders unnecessary an answer to your second question.

3. Section 80 of the city charter provides:

> "Whenever an award of damages shall be confirmed in any proceeding for the taking of property under this chapter, or whenever the court shall render final judgment in any appeal from any such award, and the time for abandoning such proceedings by the city shall have expired, the city shall be bound to, and shall, within sixty days of such final determination, pay the amount of the award with interest thereon at the rate of six per cent per annum from the date of the confirmation of the award or judgment of the court, as the case may be; and if not so paid, judgment therefor may be had against the city."

It has been held that when a city charter contains a provision for the payment of interest on an award of damages for the taking of lands by the exercise of eminent domain, such charter provision controls. See **Realty Co. v. City of St. Paul**, 183 Minn. 499, 237 N. W. 192; **Ford Motor Company v. City of Minneapolis**, 143 Minn. 392, 173 N. W. 713.

Section 81, supra, which provides for the payment of interest at six per cent from the confirmation of the award or judgment by the court would be difficult to apply in the instant case for the reason that no confirmation of the award made by the commissioners will be made by the court, nor will any judgment be entered except the final certificate pursuant to Section 117.20 (4) which is in the nature of a final judgment. See **State by Youngquist v. Hall**, 195 Minn. 79, 261 N. W. 874.

In view of the ambiguity of said Section 81, supra, with respect to the time from which interest begins to run on an award, we believe that interest should be computed thereon at six per cent from the date of the filing of the commissioners' report in accord with the provisions of M. S. 1953, Section 117.16.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Albert Lea City Attorney.
March 26, 1954. 59-A-14

FINANCES

# 75

**Appropriations—County—County board may appropriate funds to provide separate detention facilities for juveniles—M. S. A. 375.18, 641.35, 641.14, 260.125, Subd. 15.**

**Question**

Whether county boards, under existing law, may appropriate money for separate detention facilities for juveniles.

**Opinion**

M. S. 1949, Section 375.18, as amended by L. 1951, C. 82, Section 1, in Subd. 3 thereof empowers the county board to erect, furnish, and maintain a suitable jail. M. S. A. 373.05 imposes upon each county the duty to provide at the county seat a suitable and sufficient jail. What is a suitable and sufficient jail is a question of fact to be determined in the light of all the circumstances. The duty to furnish it is positive.

M. S. A. 641.35 reads:

> "Where any county jail is equipped with juvenile quarters, rooms for sick and insane persons, school rooms, hospital ward, and rooms other than the cells for any other purpose, the sheriff shall not use any of these rooms for any other purpose than the ones for which they were provided, except on the written order of a judge of the district court of the county."

M. S. A. 641.14 provides that:

> "* * * no minor under 16 years shall be kept in the same room with other prisoners * * * ."

The Youth Conservation Act, M. S. A. 260.125, Subd. 15, forbids imprisonment of the youthful offenders therein designated in a jail disapproved by the Youth Conservation Commission.

In the light of this modern trend of legislation, I have no doubt that the county board, which is the manager of the county's business, may appropriate money to provide proper facilities in the execution of public policies as disclosed by above cited statutes, to the end that juveniles shall not be detained in a county jail with adult prisoners, but that they shall be detained in such quarters as the county board shall deem appropriate in view of existing law.

J. A. A. BURNQUIST,
Attorney General.

Governor of Minnesota.
May 1, 1953. 125-B

# 76

**Appropriation—Town may sue in its corporate name—May employ attorney—Airport expansion—A town may not contribute town funds to assist a private committee engaged in opposing the expansion of an airport. A town may sue in its corporate name and employ legal counsel and expend funds therefor. Any suit instituted by a town must be for a public purpose and not for the benefit of private individuals—M. S. A. 365.02, 365.10.**

## Facts

The Minneapolis-St. Paul Metropolitan Airports Commission intends to expand its Anoka County airport. The airport, as expanded, will be adjacent to, but not within, the Township of Mounds View.

On March 9, 1954, the annual meeting of the Town of Mounds View adopted the following resolution:

> "NOW THEREFORE, be it firmly resolved that the government of Mounds View Township, by the direction of the residents and voters therein, make strong and forceful protest to the Metropolitan Airport Commission, advising them of the undesirabliity of any change in the character or use of the Anoka County Airport as now constituted and forwarding a copy of this resolution to them, certified by the Town Clerk, and,
>
> "FURTHER, that the Township supervisors take immediate and effective steps to protect the interests of the Township regarding public lands which may be affected by the proposed Anoka County Airport expansion including the institution of civil suits for damages to property rights and seeking injunctive and other suitable relief against interference with or damage to public properties."

An Anoka County Airport protest committee, composed of private individuals, representatives of private groups and interested governmental subdivisions has been formed to oppose the expansion of the Anoka County airport. This committee contemplates legal action to attempt to reverse the decision of the Minneapolis-St. Paul Metropolitan Airports Commission to expanding the Anoka County airport.

## Questions

1. Is the town board of supervisors of the Town of Mounds View authorized to contribute financial assistance to the Anoka County airport protest committee?

2. Is the town board of supervisors of the Town of Mounds View authorized to institute and finance litigation for the purposes set forth in the resolution, either

(a) in the name of the town, or

(b) in the name of a private individual?

**Opinion**

The powers of a town are limited. M. S. A., Section 365.03, reads as follows:

> "No towns shall possess or exercise any corporate powers except such as are expressly given by law, or are necessary to the exercise of the powers so given."

We are unaware of any statutory provision authorizing the town of Mounds View to contribute its funds to assist a private organization in opposing the expansion of an airport. Such proposed contribution also appears to be for a private purpose and is therefore unauthorized by law. See **Castner v. City of Minneapolis**, 92 Minn. 84, 99 N. W. 361. Your first inquiry is therefore answered in the negative.

The authority of a town to sue and be sued is contained in M. S. A., Sections 365.02 and 365.10. The first of such sections reads in part as follows:

> "Each town is and shall be a body corporate, and empowered:
>
> "(1) To sue and be sued by its corporate name; * * * "

The second of such sections reads in part as follows:

> "The electors of each town have power, at their annual town meeting:
>
> " * * *
>
> "(3) To direct the institution and defense of all actions in which the town is a party or interested; to employ necessary agents and attorneys for the prosecution or defense of the same, and to raise such sums of money for that purpose as they deem necessary; * * * "

Though the Town of Mounds View has the authority to sue pursuant to the quoted statutory provisions, neither your letter nor the resolution of the town meeting discloses that any cause or causes of action exist in favor of the town and against the Minneapolis-St. Paul Metropolitan Airports Commission by reason of a proposed plan to expand an existing airport. If the town has a cause of action against any one, either in law or in equity, it may take steps to protect its rights as authorized by the referred to statutory provisions. It cannot, however, institute litigation in the name of a private individual.

Because your letter does not furnish facts that will enable us to determine whether the Town of Mounds View has a cause or causes of action against the St. Paul-Minneapolis Metropolitan Airports Commission or anyone else, your second inquiry cannot be answered.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Attorney for Town of Mounds View.
April 29, 1954. 442-A-20

# 77

**Assets—Distribution upon separation of town and village—Ownership in proceeds of sale of real and personal property is in equal shares—M. S. A. 412.081, Subd. 3.**

**Facts**

"Certain territory formerly a part of Lynd Township in Lyon County was incorporated into the Village of Lynd. The incorporation proceedings have all been completed and the Village of Lynd is now a municipality incorporated under the provisions of Section 412.011 of Minnesota Statutes Annotated. Prior to the incorporation the Township of Lynd owned a lot and the building thereon and also certain items of personal property constituting fire department equipment. This lot and building and this personal property is now in that area included in the incorporated Village of Lynd.

"I have read Section 412.081, M. S. A., and particularly subdivision 3 thereof, but we are not just clear on who actually now owns the lot and building and the other personal property. The last quoted statute states that this real estate and personal property should remain the joint property of the Village and Township, and we are wondering whether the property should now be considered being owned by the Village and Township in equal shares or whether it is owned by them in the proportion based upon the assessed valuation of the real estate and personal property as previously stated in the last quoted subdivision."

**Question**

"If the Township and the Village now decide to sell the real estate or personal property, how would the proceeds of the sale be divided between the Township and the Village?"

**Opinion**

I fail to find that the Attorney General has ever passed upon this precise question. It is my view that the village and the town own the real and personal property involved in equal shares, and not in the proportion that the taxable property of the village bears to the taxable property of the town, and that, in the event of sale, the proceeds thereof should be divided equally between the town and the village.

The Village of Lynd was incorporated since the enactment of L. 1949, C. 119. Upon its incorporation it became "an election and assessment district separate from the town" of Lynd. See M. S. A. 412.081, Subd. 1.

Subd. 3 of Section 412.081 deals generally with the distribution of assets between the town and village upon separation of the village from the town. The last cited subdivision consists of six sentences, and we consider it advisable for the purposes of this opinion to number these separate sentences consecutively by the numerals appearing in the brackets in the following quotation of M. S. A. 412.081, Subd. 3, in its entirety:

"[1] Upon separation of an existing village from the township or upon incorporation of a village hereafter, if there is any money in the town treasury in excess of its then floating indebtedness, such proportion of the excess as the total assessed valuation of the real and personal property within the village bears to the entire valuation of the town, including the village, shall belong to the village and shall be paid to the village treasurer by the town treasurer. [2] All town taxes levied upon property within the village before separation and not yet collected or not yet distributed by the county treasurer shall be paid to the village when so distributed. [3] If the town has any bonded debt, the property within the village shall continue to be taxed to retire the bonds and to pay the interest thereon until the bonds are fully paid. [4] If there is within the village at the time of separation any real estate purchased or improved by the town, it shall remain the joint property of the village and town; but the village may purchase the interest of the town in the real estate and become its sole owner, **or the town may purchase the interest of the village in the real estate and become its sole owner.**[1] [5] Personal property belonging to the town at the time of separation shall remain the joint property of the village and town. [6] Meetings and elections of the town may be held in the village and any town officer may maintain his offices in the village notwithstanding such separation."

Only in sentence [1], dealing with the division of money in the town treasury at the time of separation, does the statute use the "proportion * * * as the total assessed valuation of the real and personal property within the village bears to the entire valuation of the town" as the basis or criterion of division or distribution. That basis or criterion is not used by the statute in respect of sentences [4] and [5], or either of them.

In his opinion dated August 11, 1952 (440b), the Attorney General, in referring to M. S. 1949, Section 412.081, Subd. 3, said this:

"* * * Under this section the town hall and the personal property belonging to the town at the time of separation became the joint property of the town and the village, **the nature of the title of the town and village being that of tenants in common. See White v. City of Chatfield,** 116 Minn. 371."

The mere fact that the statute involved uses the phrase "joint property" does not justify an inference that the legislature intended thereby an estate in joint tenancy with all the legal incidents of such estate. We are of the view that the town and the village own not only the real property, but also the personal property, see **Russell v. Minnesota Outfit,** 1 Minn. 162 (Gil. 136), as tenants in common. Absent legislative provision that these tenants in common hold otherwise than in equal shares, their interest in the property involved is not only common but equal.

Prior to the enactment of L. 1949, C. 119, M. S. 1945, Sections 413.071 and 413.072 made provision for the division, or, if not divided, for ownership, by the town and village after separation, of property of the kind here

[1]The matter underscored is added by L. 1953, C. 7.

involved "in the proportion the taxable property of the village bears to the taxable property of the town according to the last assessment thereof preceding the separation." The last cited statutes, however, were expressly repealed by L. 1949, C. 119, Section 110. Some effect must be given to that repeal. For the formula thus repealed, the legislature has not expressly substituted any other basis or criterion for division or distribution. Accordingly, I must conclude that the ownership or division intended by sentences [4] and [5] of Section 412.081, Subd. 3, is upon a basis of equal shares.

LOWELL J. GRADY,
Assistant Attorney General.

Lynd Village Attorney.
March 3, 1954. 440-B

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## 78

**Bond issue—County roads—Improvements**—Under M. S. 1949, Sections 475.51 to 475.75, debt limit of a county is 20 per cent.

**Facts**

"The County Board of Todd County has for consideration a proposal to call a special election to vote on the question of issuing bonds for the surfacing and otherwise permanently improving county roads."

**Question**

What is the maximum bonded indebtedness that the county may incur for this purpose?

**Opinion**

The provisions of Minnesota statutes relating to public indebtedness are contained in M. S. 1949, Sections 475.51 to 475.75.

Section 475.51, Subd. 2, provides

"'Municipality' means a city of any class, village, borough, county, town, or school district."

Therefore a county is a "municipality" within the meaning of the public indebtedness statute.

Section 475.53, Subd. 1, provides as follows:

"Except as otherwise provided in Sections 475.51 to 475.76, no municipality, except a school district or a city of the first class, shall incur or be subject to a net debt in excess of 20 per cent of the assessed value."

Since counties are municipalities, as defined hereinabove, the limit of the net debt of a county is 20 per cent of the assessed value of the property therein.

Section 475.52, Subd. 3, provides as follows:

"Any county may issue bonds for the acquisition or betterment of courthouses, jails, poor farms, morgues, and hospitals, for **roads and bridges** within the county or bordering thereon and for road equipment and machinery."

Thus, under the above quoted subdivision, your county has the authority to issue bonds for the acquisition and betterment of the roads which you are contemplating under the facts stated.

**Question**

"Does the phrase '20 per cent of the assessed value' as used in Section 475.53 include real and personal property?"

**Answer**

Section 475.51, Subd. 5, provides as follows:

" 'Assessed value' means the latest valuation for purposes of taxation, as finally equalized of all property taxable within the municipality."

Therefore, in accordance with the above definition, "assessed value" includes both real and personal property.

IRVING M. FRISCH,
Special Assistant Attorney General.

Todd County Attorney.
August 10, 1953. 37-B-7

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## 79

**Budget—Appropriation—Ordinance as required by M. S. A. Section 412.711 has been eliminated by L. 1953, C. 735, Section 8, which amends Section 412.711.**

**Statement**

"Prior to Ch. 735, Section 8, Laws 1953, the above statute required: 'At the beginning of the fiscal year, the sums fixed in the budget shall be appropriated by ordinance for the several purposes named in the budget and no other.'

"The amended section now reads: 'At the beginning of the fiscal year, the sums fixed in the budget resolution shall be and become appropriated for the several purposes named in the budget resolution and no other'."

**Comment**

"It appears to us that the amended section is self executing and that no resolution appropriating the sums named in the budget is now required."

**Question**

Is our position as stated in the above quoted comment correct?

**Opinion**

Prior to the amendment of M. S. A. Section 412.711 by L. 1953, C. 735, Section 8, it was necessary for the council to adopt an appropriation ordinance for the purposes as specified in the budget. This requirement was eliminated by the 1953 amendment, C. 735, Section 8, and it is not necessary for the council to now adopt an appropriation ordinance. Accordingly, we agree with the conclusions as expressed in your comment, above quoted.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Mound Village Attorneys.
August 19, 1953. 476-A

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HIGHWAYS

## 80

**Bridge—Repairing—Damaged as result of tornado—Cost of building or improving—Duty of county board—Word "improve" defined—M. S. A. 162.02.**

**Facts**

"During a recent tornado a steel bridge over the Whitewater River within the Village of Elba was twisted and partly dropped from the abutment. The Village Council contemplates raising the bridge, straightening the iron part, and replacing it so that it may again be used for travel. They believe that at the same time the abutment and approaches should be raised about three feet in order to make it more secure against flood damage."

**Question**

"* * * does the provision of the statute (M. S. A. 162.02) in respect to building or improving a bridge exclude any part of the cost because it might be considered as repair?"

**Opinion**

This question involves not only the village, but also the financial duties of the county of Winona.

M. S. A. 162.02 in part provides:

"When the council of any village, borough, or city of the third or fourth class, may determine that it is necessary to build or improve any bridge or bridges, including approaches thereto, and any dam or retaining works connected therewith, upon or forming a part of streets or highways either wholly or partly within its limits, the county board shall appropriate such money as may be necessary therefor from the county road and bridge fund, not exceeding during any year the amount of taxes paid into the county road and bridge fund during the preceding year, on property within the corporate limits of such village or city."

We are here primarily concerned with the meaning that should be given to the term "build or improve any bridge or bridges, including approaches thereto" as used in the above quotation.

The work of raising the existing abutment and approaches as indicated in the above statement of facts would, in our opinion, come within the scope of the above statute and require an appropriation therefor by the county board.

A more difficult problem arises by reason of the work made necessary to restore the bridge to usefulness as the result of the tornado damage. Will such work constitute building or improving the bridge within the intent of the statute? In construing L. 1925, C. 232, which is the origin of the statute now involved, this office held that replanking the floor of an existing bridge came within the purview of the law and authorized an appropriation therefor by the county. See opinion of attorney general dated June 28, 1928, No. 52, 1928 Report.

The words "improve" and "improvement" were defined by our court in **State ex rel. County of Ramsey v. Babcock**, 186 Minn. 132, 242 N. W. 474, and on page 135 the court said:

"The words 'improve' and 'improvement' are frequently used in connection with land. They are used as denoting some betterment, such as by cultivation, clearing, drainage, irrigation, erecting buildings, or otherwise enhancing the value or usefulness of the land. As far as we know, it has never been claimed that the purchasing of the title to the land or the acquiring of an easement or other right therein is an improvement of the land. The word 'improve' has several meanings: To make better; to increase the value or good qualities of; to ameliorate by care or cultivation are some of the common definitions. But in every instance, before you can improve a thing or subject, there must be in existence a thing or subject to improve. There was no road in existence before the right of way was acquired, and the purchase of the right of way was the purchase of the title to or easement in the land to be thereafter improved by the construction of the road.

"The word 'improve' is a common word in everyday use. Its meaning is well understood. As commonly used, the word means to make better or to enhance the quality or value of some existing thing or subject. In speaking of improving a highway, we have reference to bettering a highway already in existence."

We believe that the opinion of the attorney general above referred to, and the meaning ascribed by the court to the words "improve" and "improvement", in the broadest sense justifies the conclusion that the work which will be necessary to restore the bridge in question so that it will serve a public purpose will justify an appropriation by the county to the village for the cost thereof as provided for in Section 162.02, supra.

We assume that the assessed valuation of the village of St. Charles does not exceed $500 per capita of its population.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

St. Charles Village Attorney.
June 18, 1953. 642-A-12

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## 81

**Construction—Cost—Bonds—Warrants—Issuance thereof for road construction or betterment—Public subscription—Submission to electors for approval necessary—M. S. A., Sections 475.52, Subd. 3, 475.58, and 475.60, Subd. 4.**

**Facts**

"The county board is faced with the following problem:

"About 3 miles of state aid road in Pope County leads to a village in an adjoining county. It bears a very heavy traffic to this village and is in very poor condition.

"The county board is of the opinion that the road should be rebuilt and surfaced with tarvia, but at the present time cannot allot funds for this purpose.

"Business men of the village in the adjoining county, and some interested farmers, have raised $30,000.00, the estimated cost of rebuilding and surfacing required to be paid by the county, and have offered to furnish this money to the county without interest if the road is built. The remaining ½ of the cost will come from federal funds which will be lost to the county if it cannot take advantage of this offer.

"The money is to be repaid $3,000 per year over a period of 10 years, without interest. The parties making the loan agree to accept warrants or bonds payable without interest, or will agree that if warrants are issued to the contractor, they will promptly purchase them at face value from the contractor and will not present more than an aggregate of $3,000.00 of these warrants annually for payment over a period of 10 years after the contract is let."

You refer to M. S. A., Sections 162.09, 162.39, 475.52 (3), and 475.58, and submit in substance the following

**Question**

May the county issue the aforesaid warrants or other obligations for said proposed road improvements without a vote of the people authorizing the same?

**Opinion**

Section 162.09 authorizes the county board to issue bonds for the purposes therein stated when authorized by the voters. The plan for financing the cost of the road improvement in question, as above proposed, would not be authorized under this statute.

Inasmuch as the proposed improvement is of a permanent nature the provisions of Section 162.39 are not applicable. See opinion of attorney general No. 109, 1946 Report, dated August 27, 1946.

Section 475.52, Subd. 3, provides:

> "Any county may issue bonds for the acquisition or betterment of courthouses, jails, poor farms, morgues, and hospitals, for roads and bridges within the county or bordering thereon and for road equipment and machinery."

By authority of this section the county may issue its bonds or obligations for the purpose of financing the cost of the improvement of the state aid road in question. According to the above recited facts the cost of such improvement will not be paid in whole or in part from assessments levied against benefited property. In these circumstances, and as a prerequisite to the issuance of any bonds or obligations by the county for financing the cost of such improvement, approval must be first obtained from the voters as provided in Section 475.58. Consequently, and by virtue of the requirements of this statute, the county may not issue its obligations, either warrants or bonds, for the purpose of financing the road improvement in question, and in the manner as recited in the above statement of facts, without first obtaining approval of the electors in accordance with the requirements of this statute. When such authority has been obtained from the voters the county may sell its obligations for the aforesaid purposes on public subscription in the manner provided in Section 475.60, Subd. 4.

Attention is directed to Section 471.69 which authorizes the issuance of county warrants in anticipation of taxes levied or to be levied as provided in this statute.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Pope County Attorney.
December 23, 1953. 107-A-1

# 82

**Eminent domain—Awards—Counties—Mutual error—Inadequate award resulting therefrom may be corrected by proper stipulation.**

**Facts**

"In February, 1899, a petition was received by the County Board of Ramsey County for establishment of a County road 33 feet on each side of the section line now forming the centerline of the new Larpenteur Avenue, formerly Minneapolis Avenue. The petition was duly referred to a committee consisting of the whole Board of County Commissioners for examination and report. The committee duly met and examined the proposed road. The minutes of the County Board meeting of May 1, 1899, recite the following:

'A report was received from a committee consisting of the whole Board appointed at the last meeting to view Minneapolis Avenue, recommending the acceptance and approval of the petition of BK and others for the opening and widening of said avenue, as there had been no objections made at the hearing held at the residence of BK Friday afternoon, April 28, 1899, at 3 o'clock P.M. Also that the County Surveyor be instructed to make the necessary survey. Report adopted by full vote of members present.'

"The County Auditor informs us that his records do not show any further proceedings with reference to the petition. Further, until 1952 no roadway was ever actually constructed or used along the segment of Larpenteur Avenue in question."

**Question**

"Was a County road legally established by the proceedings described (below) above?"

**Opinion**

As bearing upon the validity of the proceedings taken by the county board in 1899 for the establishment of that portion of such road then designated as Minneapolis Avenue, and pertinent to the question now considered, you make these

**Comments**

"Our own investigation indicates that, in the several circumstances outlined above:

"1. The 1899 proceedings before the County Board did not accomplish establishment of a County road over the segment of the present Larpenteur Avenue mentioned in our first inquiry * * * ."

We do not have the facts obtained as the result of the investigation made by your office. It is apparent from the facts submitted that the action taken by the county board in 1899 was not sufficient nor of such finality

so as to result in the legal establishment of the county road petitioned for. Consequently, we shall adopt your conclusion that the 1899 proceedings did not accomplish establishment of a county road over that portion of Larpenteur Avenue involved in the instant case, which necessarily disposes of the first question.

**Facts**

"An appeal was taken by a land owner from the 1952 award by the Commissioners appointed by the District Court in right-of-way condemnation proceedings for establishment of a roadway over a 100-foot strip of appellant's property. The maps and data furnished to the Commissioners and discussed between them and the land owners showed that the South 33-foot strip of the 100-foot strip condemned was a County road. Damages were therefore awarded for the taking of only 67 feet of the appellant's property.

"The County of Ramsey also appealed from the award. Subsequently, the appellant decided to accept the award and was paid the exact amount awarded by the Commissioners. Thereupon the appellant executed a notice of dismissal of the appeal with prejudice, reciting that the matter had been fully compromised and settled."

**Question**

"In the circumstances related (below) above, may the County properly stipulate with a land owner for payment of, and lawfully pay, an additional sum as and for damages for a 33-foot strip of land taken in condemnation but omitted from consideration in the award of damages by reason of the erroneous belief by all parties concerned that a public roadway had already been established over that 33-foot strip?"

**Opinion**

Our disposition of this question is upon the assumption that the 1899 proceedings taken by the county board did not result in a legal establishment of that portion of Larpenteur Avenue now involved.

It is apparent from the recited facts that the commissioners in assessing damages assumed from the maps and data submitted to them that the county had acquired and was the owner of the southerly 33 feet of the 100-foot parcel sought to be condemned by the county. In reliance upon these facts the commissioners awarded no compensation for the 33-foot strip and limited their award of damages to the northerly 67-foot portion of the 100-foot strip which the county sought to condemn. It further appears that both the county and the land owner were of the opinion, at the time when the commissioners were considering damages as well as when the commissioners award was filed, that the county owned an easement for highway purposes upon said southerly 33-foot strip. In these circumstances, and as the result of this error on the part of both the county and the land owner, the county has taken possession of said 33-foot strip without the

payment of any compensation therefor. The land owner is entitled to receive just compensation, as provided for in Minn. Const., Art. I, Section 13, for all of the lands taken or condemned by the county.

Furthermore, where it is conceded by all of the interested parties that the error, as above pointed out, has occurred, it is not only proper but there necessarily arises by reason thereof a legal right to take appropriate action to the end that the error may be corrected and the land owner compensated for the 33-foot tract which was omitted, and for which no compensation has been awarded or paid. See **State, by Attorney General, v. Riley, et al,** 208 Minn. 6, 293 N. W. 95, 213 Minn. 448, 7 N. W. (2d) 770. Having reached this conclusion the question arises as to the procedure which may be taken so that the error may be corrected and just compensation paid to the land owner.

The condemnation proceedings are still pending so the court has jurisdiction over the subject matter. The land owner has appeared in the proceedings and has therefore submitted to the jurisdiction of the court. M. S. A., 117.05. The appeal taken by the land owner has been settled and dismissed with prejudice. However, the appeal taken by the county is still pending. Whether the dismissal by the land owner of his appeal disposes of all of the claims which could be asserted by the county in its appeal does not, in our opinion, preclude the parties from entering into a stipulation so as to provide for the inclusion of said 33-foot tract and agree as to the amount of compensation to be paid therefor. It would be proper to include in such stipulation the circumstances which resulted in the mutual error with respect to said 33-foot strip, and also that the commissioners, when assessing damages, acted upon the assumption that the county was possessed of an easement in said tract and therefore no award was made as to such parcel of land. Provision should be made in the stipulation so that upon payment of the compensation as agreed upon the county would be entitled to include the 33-foot parcel in the final certificate or final judgment with the same effect as the other parcels which were condemned and for which compensation has been paid.

It is our opinion that it would be proper for the county and the land owner to adopt the procedure which we have suggested and, if carried out, would result in vesting an easement in the county in the omitted 33-foot parcel of land.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Ramsey County Attorney.
April 27, 1953. 817-A

# 83

**Power lines—Where power lines are situated on private property and are required to be moved for highway widening the county is liable to the owners of the power lines for damages.**

### Facts

The REA in Jackson and some of the surrounding counties has constructed power lines upon pole line easements which have been acquired from the owners of the land upon which such power lines are situated. The easements have not been recorded.

Jackson County is engaged in widening certain roads. In many instances it is necessary that the REA's power lines be moved in order that the additional width of the road be accommodated. REA has requested that the county pay for the cost of moving these power lines.

### Question

Is the county obligated to pay for the cost of removing power lines in order to widen a highway where the power lines are not situated upon highway right-of-way and are situated upon privately owned nonrecorded easements?

### Opinion

The pole line easements of the REA upon which its power lines are situated are private property and they cannot be taken for public use unless the owner is compensated therefor. See **In re Petition for Establishment of County Ditch No. 78**, 233 Minn. 274, 47 N. W. (2d) 106. REA is in possession of the lands actually occupied by its power lines. The County of Jackson in dealing with the lands upon which the power lines are actually situated is chargeable with notice and knowledge that REA claims an interest therein. If the power lines must be moved to permit the county to proceed with its road widening, it must arrange to pay the owners of the power lines the compensation guaranteed them by law.

On the basis of the meagre information contained in your letter we express no opinion as to the measure of damages to be applied for the taking of a pole line easement upon which is situated a power line. Such measure of damages may be the cost of removing the power line.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Jackson County Attorney.
September 8, 1953. 377-A-13

## 84

**Survey—Cost—County engineer—Authority to make survey at county expense in cooperation with highway commission**—L. 1953, C. 692.

### Facts

"Under Chapter 692, Laws of Minnesota, for year 1953, the Highway Study Commission has been created.

"The commission has made an agreement with the officers of the county highway engineers that the county highway engineers of each county should make a survey and report to the commission. The survey would include not only county roads, but township roads and village streets.

"The survey is quite complicated and extensive and will take a great deal of time and will run into considerable cost to the county.

"I have been asked by the County Board to ask for this opinion and on consulting with the County Engineer I find that he would have most of the data on the county roads available in his office, but a personal survey would have to be made on each and every township road in order to properly report on the conditions of the county.

"The expense has been estimated between One Thousand Dollars ($1,000.00) and Fifteen Hundred ($1,500.00) and that would be spent in surveying the township roads and village streets."

### Question

May the County of Pine legally spend money for a survey of the township system of roads and, if so, out of which fund may the cost thereof be paid?

### Opinion

Your letter refers to an agreement made by the commission created by L. 1953, C. 692, with the officers of the county highway engineers relating to a survey to be made by the county highway engineers of each county, and to report thereon to said commission. The agreement referred to has not been submitted, and we are not advised as to the terms and conditions thereof. No question has been asked with respect to the effect of such agreement, nor any other matter pertaining thereto, and we express no opinion in connection therewith.

We limit our opinion to the authority of the county board to direct its county highway engineer to make a survey of all township roads and the particular fund from which the cost of such survey should be paid.

Pursuant to M. S. A., Section 162.11, Subd. 1, the county board of each county is empowered to appoint and employ a county highway engineer, as therein provided, who shall make and prepare all surveys, estimates,

plans and specifications. Subdivision 2 provides that the salary of the county highway engineer shall be fixed by the county board and be payable the same as other county officers are paid. Salaries of county officers are paid out of the general revenue fund of the county.

Laws 1953, C. 692, creates a commission to investigate and study all matters relating to highways. Section 2 of this act is broad and comprehensive, and grants general powers to the commission to investigate and study all factors contributing to a sound highway policy, including trunk highways, state aid roads, county roads, county aid roads, town roads, and streets and roads within municipalities. Sections 1 and 2 of said act.

Section 5 of said act reads as follows:

> "Every state, county, town and municipal officer is hereby authorized and directed to cooperate with the Commission on Highways and to make available to the commission, upon request by it, all records and information which is under his control relating to the subject matter of this act."

Neither this section nor any other provision of the act specifically requires a county highway engineer or a county board to require its engineer to make a detailed survey of all township roads and village streets within the county. Section 5 does require every state, county, town and municipal officer to cooperate with the commission, and to make available to the commission, when requested, all records and information relating to the subject matter of the act under the control of the officer or agency mentioned in the act.

Notwithstanding the fact that said C. 692 does not specifically require a survey to be made by the county highway engineer of all town roads within the county, it is apparent from the statutory provisions hereinafter referred to that the county board may appropriate to any town, village, borough or city of the second, third, or fourth class, such sums of money as are available and which it deems advisable to aid the aforesaid governmental units in the construction and maintenance of roads, streets, and bridges therein. Section 162.01, Subd. 2, as amended by L. 1953, C. 707.

Roads which are subject to the direct control and jurisdiction of a county board are set forth in Section 160.01, Subd. 4.

Section 160.09 authorizes the county board to aid in the construction, repair, and maintenance of town roads.

Under Section 296.36 (L. 1951, C. 589), the county board is, as therein prescribed, authorized to designate as a county aid road any county or town road, or any city, village, or borough street.

Section 296.40 provides for the distribution and allocation of a portion of the gasoline tax by the county board to the several towns within the county, basing such allocation upon the mileage of the county and town roads, the traffic needs and conditions, and the cost of construction and maintenance of town roads in the county. This statute contains the following specific language:

"Such moneys allotted to towns shall be expended for construction and maintenance of the town roads within the respective towns under the supervision of the town board, or an appointee of the town board, or may be expended under the supervision and according to plans and specifications of the county highway engineer, if requested by the town board, who, in such case, shall act in a supervisory capacity as directed by the town board in the construction or maintenance of such roads within such town as shall be specified by such town board; provided, that none of the moneys so allotted shall be expended for the purchase of road equipment or machinery.

The aforesaid statutes contain directive, permissive and mandatory provisions with respect to the duties of the county board in connection with roads under the direct supervision of the county board, and giving financial aid to towns and villages for the construction and maintenance of roads and streets therein.

From these statutory provisions it seems reasonable to conclude that in order for a county board to exercise the power and authority conferred upon the board by the aforesaid statutes it would be necessary for the board to have information concerning traffic conditions, the mileage and other conditions from which the board might determine whether county aid should be given to a town or a village for the construction or maintenance of roads or streets therein, and to determine the amount which should be allocated to towns under the provisions of Section 296.40, supra.

Consequently, it is our opinion that the county board may direct its county engineer to make a survey of all township roads and village streets under their respective supervision and control within the county, and to pay the costs and expenses incurred in connection therewith in the same manner and out of the same fund from which the salary of the county engineer and other county officers are paid. The facts and data obtained as the result of such survey should be made available to the commission created by authority of L. 1953, C. 692.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Pine County Attorney.
December 18, 1953. 107-B-16

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## 85

**Town line roads—Establishment—Prerequisite for**—M. S. A., 163.17 and 163.13—**Section line roads—Action of town board in 1880 declaring certain section lines shall constitute public highway considered**—G. S. 1878, C. 13, Sections 64-73.

**Facts**

"A one mile road between section 32 in Browns Creek and section 5 in Red Lake Falls was started. After ½ of the road had been built the owner of the land in section 5 along the remaining ½ mile refused to allow the contractors to proceed.

"* * *

"The minutes of the town board of a meeting in 1880 declare all section lines within Red Lake Falls township public highways excepting a few that are specified but do not affect this road. No other evidence can be located.

"Then in July, 1936, a petition signed by 13 qualified petitioners asked that a road be established from section 2/35 to 5/32 inclusive along the town line. The petition was proper and the proper notices were served and posted. At a joint meeting of the town boards according to the notices the following was endorsed on the petition:

'The within petition has been acted upon and the proposed road was inspected by the town boards whose signatures appear below, and said petition has been granted, and said road declared established on condition that the County of Red Lake assumes the expense of building and taking care of said road.'

This was endorsed on the petition on July 25, 1936, at the hearing. Subsequently a final order (a form printed for that purpose) was filed with the county auditor on July 29, 1936. This order made no mention of damages and also made no mention of the above condition. It declared the road established. It was signed by all the members of the two town boards. There is some evidence that in 1936 and before and after landowners never requested damages and all donated their land for road purposes. Only the final order has been filed with the county auditor."

**Questions**

"1. What legal effect if any did the declaration of the town board in 1880 have?

"2. Assuming all jurisdictional requirements satisfied what was the effect of the condition in the above quoted notation on the petition? Was the road established?

"3. What was the effect of the final order as filed without embodying the conditions?

"4. Note the final order was not withheld for 30 days. Does this failure to allow 30 days to appeal make the order invalid?

"5. Is it possible to show that landowners agreed not to request damages and donated their land by parole evidence or it is necessary that strict compliance with the statute be shown and written agreements recorded?"

**Opinion**

These questions will be considered in the order hereinafter indicated.

1. We are to determine the validity of the action taken by the town board in 1880 declaring that certain section lines within the township shall constitute public highways. The pertinent provisions of the law at that time, whereby section line roads could be established, are found in G. S. 1878, C. XIII, Section 73, which reads as follows:

> "In all townships in this state in which no public roads have been laid out, or which have not been organized, the congressional section lines shall be considered public roads, to be opened to the width of two rods on each side of such section lines, upon the order of the board of supervisors, without any survey being had except where it may be necessary on account of variations caused by natural obstacles, subject, however, to all the provisions of this chapter in relation to assessment of damages."

This law traces its origin to L. 1873, C. 5, Section 73. It has continued as the statutory law of this state, with slight modifications, as authority for the establishment of public highways along section or congressional lines in unorganized towns, or in organized towns where no public roads were laid out. See M. S. 1894, Section 1875; L. 1921, C. 323, Section 46; G. S. 1923, Section 2586; M. S. 1927, Section 2586; and M. S. A., Section 106.15.

Under the provisions of Section 73, above cited, section lines are considered public roads in

(a) all townships in which no public roads have been laid out, or

(b) in townships which have not been organized.

The township of Red Lake Falls had a board of supervisors in 1880, and must have been organized. Consequently, the provisions of Section 73, (a) above, were applicable to this town if no public road had been laid out therein. The facts as presented do not disclose any circumstances relative to the existence of any public roads in this town in 1880. Irrespective of the absence of these facts, it will be observed that said Section 73 contains this further condition, namely:

> "subject, however, to all the provisions of this chapter in relation to assessment of damages."

Provision is made in the law, of which Section 73 is a part, for the determination of damages either by agreement or by assessment. Section 39. The right of appeal and the prerequisites therefor are found in Sections 59 to 63.

In the instant case it does not appear from the minutes of the town board that any agreement was entered into for the resulting damages, if any, or that any award of damages was made as provided for in said Section 39. The fragmentary records of the town board designating certain section lines as public highways, as disclosed by the minutes of the board in 1880, are not sufficient, in our opinion, so as to justify a conclusion that the action

so taken by the town board resulted in the legal establishment of public highways upon the section lines as specifically shown in the minutes of the town board.

2, 3, 4, and 5. There is included in question 2 the following statement:

"Assuming all jurisdictional requirements satisfied"

which we shall adopt as being a correct assumption.

The proceedings for the establishment of a town line road are governed by the provisions of Section 163.17; subdivision 1 thereof in part reads as follows:

> "They shall be governed, as to notice, survey, hearing, award of damages, filing and recording papers, and in all other matters pertaining to their duties, by the regulations in chapters 160 to 164 provided for the government of town boards in establishing, altering, or vacating town roads. A copy of the proceedings shall be filed in the town clerk's office in each town."

The statutory requirement with respect to such notice, hearing, award of damages, and filing and recording papers is prescribed in Section 163.13, Subd. 5 thereof, which reads as follows:

> **"The damages sustained by reason of establishing, altering, or vacating any road may be ascertained by the agreement of the owners and the town board; and unless such agreement is made, or the owners release in writing all claims to damages, the same shall be assessed and awarded before such road is opened, worked, or used.** Every agreement and release shall be filed with the town clerk and be final as to the matters therein contained. The town board shall assess the damages of each claimant with whom it cannot agree, or who is unknown, specifying the amount awarded to each and briefly describing each parcel of land. In ascertaining the damages which will be sustained by any owner the town board shall determine the money value of the benefits which the establishment, alteration, or vacation, as the case may be, will confer, and deduct the benefits, if any, from the damages, if any, and award the difference, if any, as damages." (Emphasis supplied.)

No agreement was entered into with the owners of the property affected by the proposed road, nor was any release of damages obtained from such owners as required by the subdivision above cited. No award of damages was ever made as therein provided for. The town boards having failed to comply with these mandatory provisions it necessarily follows that the road in question could not be opened, worked, or used even though the other statutory requirements for the establishment of the road had been complied with.

When the petition for the establishment of the town road from sections 2/35 to 5/32 along the town line was presented to the town boards for consideration, such boards acted jointly and were authorized and empowered, under Section 163.17, Subd. 1, to either grant or to deny the petition, subject to the provisions of subdivisions 2, 3, and 4, which read as follows:

"Subdivision 2. Before making an order establishing a road under the provisions of this section, the two town boards shall divide the length of the proposed road into two parts, which parts may be of unequal length. Such division shall be so made as to divide, as nearly equal as possible, the cost and expense of constructing and maintaining the entire road to be established, and assigning to each of such parts one-half of such cost and expense.

"Subdivision 3. After such division shall have been made the town boards shall thereupon by agreement determine which of such parts shall thereafter be opened, constructed, and maintained by each. If the town boards cannot so agree, the matter shall be determined by lot.

"Subdivision 4. It shall be the duty of the town boards of the respective towns, parties to the laying out of a road under the provisions of this section, to proceed forthwith to open and construct its share of such road and thereafter maintain the same."

The town boards instead of complying with the requirements of the above cited subdivisions granted the petition and the establishment of the road upon the condition "that the County of Red Lake assumes the expense of building and taking care of said road." The town board had no authority to impose upon the county of Red Lake the financial obligation of assuming the expense of building and taking care of said road. This duty and the financial obligation resulting therefrom should have been determined by the town boards as provided for in said subdivisions 2, 3, and 4 above cited.

The failure of the town boards to comply with the statute relative to the determination of damages by agreement, and to procure releases from the interested landowners, or to proceed to assess damages, together with the condition that the county should assume the expense of building and taking care of such road, nullify the action taken by the town board in attempting to establish the town line road in question. In other words, the action taken by the town boards granting the petition and declaring the road to be established, and the subsequent filing of the order, did not result in a legal establishment of the road in question. This conclusion necessarily disposes of questions 2, 3, 4, and 5.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Red Lake Falls Town Attorney.
May 29, 1953. 379-C-8-b

## 86

**Town line roads—Maintenance—Where town line road is established by two towns under G. S. 1894, Sections 1824-1827, when each town agrees to maintain a portion thereof, each has the burden of maintaining the part agreed upon. Where, subsequently, a portion of such town line road on one side of the center line is included within the incorporated limits of a village, the responsibility for thereafter maintaining the part of the road on one side of the center line is in the village and the remaining portion is in the town which originally agreed to maintain the road in question.**

### Facts

The Towns of Denver and Mound lie in Rock County adjacent to each other, Denver adjoining Mound on the north. In 1889 these towns entered into an agreement dividing the town road on the common line between the towns for maintenance purposes. The maintenance agreement provided that, beginning on the east, Denver was to have the first one and one-half miles to the west; Mound was to have the next one and one-half miles to the west; then Denver was to have the next one and one-half miles to the west, and Mound was to then have the remaining one and one-half miles to the west.

In 1898 the Village of Hardwick was incorporated and included four sections of the Town of Denver. The south boundary of the village was the south line of the Town of Denver, which was also the center line of the town road on the line between the two towns. On some date unknown a bridge was built on the town line road and within the section thereof which the Town of Denver had agreed to maintain in 1889. In 1918, the corporate limits of the Village of Hardwick were changed but the south boundary of a part of the village was still the town line road between the Towns of Denver and Mound, including the portion thereof which the Town of Denver had agreed to maintain in 1889 upon which the bridge was located.

The south boundary of the Village of Hardwick as changed in 1918 is the line lying between the east half of section 35 of the Town of Denver and the east half of section 2 of the Town of Mound.

The bridge referred to is in serious need of repair. The Town of Mound claims that it is not under any obligation to make any repairs on the bridge by reason of the original agreement between it and the Town of Denver in 1889. The Town of Denver feels that it is not under any obligation to make the repairs on the bridge because the Village of Hardwick extends to the south line of the town and shares the boundary with the Town of Mound, and the duty to make repairs on the bridge is upon the Village of Hardwick. The Village of Hardwick claims that it has never assumed any obligation to maintain this town line road and that the Town of Denver and the Town of Mound have the joint duty and that the duty is upon one or the other of said towns, or upon both of them.

**Questions**

1. Who has the duty of maintaining the road lying between the east half of section 35 of the Town of Denver and the east half of section 2 of the Town of Mound? This is the portion of the road on the common line between the Village of Hardwick and the Town of Mound.

2. Who has the duty of maintaining the bridge situated on the road between the Village of Hardwick and the Town of Mound?

**Opinion**

The bridge is a part of the road referred to in your letter. M. S. A., Section 160.01, Subd. 6. Therefore, your two inquiries will be considered together.

On the basis of the facts submitted, we think that the agreement entered into in 1889 between the Towns of Denver and Mound was valid. See **Town of Mt. Pleasant v. Town of Florence,** 138 Minn. 359, 165 N. W. 126. At the time the road was established the law in force governing the burden of maintenance was L. 1873, C. 5, incorporated in G. S. 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 in which it had been allotted for the purpose of keeping it in repair. Opinion to the County Attorney of Benton County, dated May 24, 1945, (file 379-c-8(c)), and cases cited therein. As a result of such agreement the Town of Mound was wholly relieved from any obligation whatsoever to thereafter maintain the portion of the town line road lying between the east half of section 35 of the Town of Denver and the east half of section 2 of the Town of Mound, including the bridge or other structures thereon. Attorney General's opinion of September 18, 1951, to the County Attorney of Wilkin County, printed as No. 118 in the 1952 Report.

Having eliminated the Town of Mound from any responsibility over the portion of the road in question, we next consider the relationship of the Town of Denver and the Village of Hardwick to said portion of the road.

We are not familiar with the laws under which the Village of Hardwick was incorporated. It is presently governed pursuant to the authority of the new village code, M. S. A., C. 412. See M. S. A., Section 412.901. M. S. A., Section 412.221, Subd. 6, authorizes the village to maintain streets within its boundaries. The portion of the road under consideration and lying northerly of the center line of the road comprising the boundary between the Town of Mound and the Village of Hardwick is within the Village of Hardwick, and the village is authorized to maintain the same. One-half of the bridge, on the basis of the facts in your letter, is also within the Village of Hardwick. The remaining portion of the road under consideration, including one-half of the bridge, though within the Town of Mound, is nevertheless within the portion of the original town line road which the Town of Denver agreed to forever maintain in 1889.

Accordingly it is our opinion, on the basis of the facts contained in your letter, that the maintenance of the portion of the road including the bridge within the boundaries of the Village of Hardwick is the responsibility of such village, and the maintenance of the remaining portion of the road including the bridge and southerly of the center line of said road and bridge is the responsibility of the Town of Denver. In expressing this view, we necessarily must assume that the bridge was built after 1889 by the Town of Denver which, under the agreement of 1889, was charged with the responsibility for the portion of the road upon which the bridge is located. We also must necessarily assume that the bridge was not built as a part of any drainage project. In the latter event, before any opinion can be expressed with reference to the responsibility for repair of the bridge, it would be necessary to examine the drainage laws germane to the subject.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Rock County Attorney.
June 22, 1954. 379-C-8-c

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## 87

**Town Roads—Closing—Statutory requirements must be followed—M. S. A. 163.13.**

**Facts**

"The minutes of the Town Board of the Township of Lamberton, Redwood County, Minnesota, dated October 7, 1935, and signed by the Township Clerk, read as follows: 'Meeting of Supervisors of Lamberton Township called to order by Chairman Carl O. Wog. Meeting called for the purpose of hearing any complaints or making any objections to the notice of closing of the road running east and west between the North Half and the South Half of Section 19, Township 109, west of the Fifth Principal Meridian, in Lamberton Township, Redwood County, Minnesota. Motion made, seconded, and carried that this road be closed. There being no further business, the meeting on the motion adjourned.'

"Since that time, apparently through some misunderstanding and at some undetermined time, this Board commenced to maintain the east forty rods of the road described in the above minutes. The rest of the mile remained closed and was not maintained any further. No further papers, resolutions, or notices in the minutes or records of the town clerk have been found. However, one of the occupants of the land along this road had in his possession a Notice of Town Meeting for hearing on petition to vacate this road. There are no members of the town board living who have any independent recollection of the proceedings that took place at that time, except that it appears that

no one appeared in opposition to the road closing. It appears that none of the land owners along this road were paid any damages for the vacation of the road."

**Questions**

"1. Is the situation described above sufficient to constitute a valid closing of this mile road?

"2. Does the fact that the Board maintained the east forty rods of this road for several years have any bearing on the validity of the closing?

"3. Would the landowners of the contiguous lands have any right to compensation for this closing under the circumstances as set out above?"

**Opinion**

M. S. A., Section 163.13, Subd. 1, reads as follows:

"Any town board may alter or vacate a town road or establish a new road in its town upon a petition of not less than eight voters of the town, who own real estate, or occupy real estate under the homestead or preemption laws or under contract with the state, within three miles of the road proposed to be established, altered, or vacated; provided, that in any town not having eight voters who own real estate or occupy real estate under the homestead or preemption laws or under contract with the state, within three miles of any proposed road, the town board of such town may alter or vacate a town road, or establish a new road in the town upon a petition signed by a less number of voters of such town, who own real estate or occupy real estate under the homestead or preemption laws or under contract with the state, in such town. Such petition shall contain a description of the road, and what part thereof is to be altered or vacated, and, if a new road, the names of the owners of the land, if known, over which such road is to pass, its point of beginning, general course, and termination."

The jurisdiction of the town board to vacate a town road is dependent upon a petition which conforms to these statutory requirements. In the instant case it does not appear that any petition for the vacation of the road in question was ever presented to the board or filed with the clerk. No petition having been presented to the board or filed with the clerk as required by the above statute, we are of the opinion that the action taken by the town board to close or vacate such road is invalid.

In **Miller v. Town of Corinna**, 42 Minn. 391, 44 N. W. 127, on page 393 the court said:

"The land in question having become a legal highway, there was only one mode—that prescribed by the statute—for vacating it. The supervisors, whether acting singly or as a board, could not discontinue it, or affect the right of the public in it, in any other way."

Again, in pointing out that the statutory provisions relative to the establishment or vacation of a town road must be followed by the town board, the court in **Sheehan v. Board of Supervisors of Town of Bath,** 80 Minn. 355, 83 N. W. 352, on page 356 said:

> "G. S. 1894, Section 1806, requires the same formalities as to a petition for the vacation or alteration of a highway (town) as is required in a petition for the laying out and establishment of a new highway."

The conclusions which we have above stated dispose of each of the questions presented.

**Additional Facts**

> "Actually in above proceedings we have some evidence that there was a petition filed; however, the petition has been lost and we are unable to locate it. One of the owners of land contiguous to the vacated road states that he signed a petition and one of the board members who is still living states that there was a petition which was signed by the proper number of landowners. However, since we have been unable to find the petition, we do not know whether it followed the statute. It further appears from the minutes that a hearing was held pursuant to notice and that the road was declared vacated and that there were no objections made at the hearing."

**Questions**

> "1. Under the circumstances and with the minutes showing a closing of the road, would this board be justified in now maintaining the said road as a township road?
>
> "2. Does the above described set of facts constitute a valid closing of this mile road?
>
> "3. Does the fact that the board maintained the east forty rods for several years have any bearing on the validity of the closing?
>
> "4. Would the landowners of the contiguous land have any right to compensation, for this closing, assuming that they did not object at the time of the hearing and assuming that no order allowing or disallowing damages was made?
>
> "5. Can we assume from the lack of supporting records to the minutes that a proper hearing was not had or that the statute was not followed?"

**Opinion**

Due to the absence of essential facts, as will be hereinafter noted, these questions cannot be answered categorically.

The records of the town board relative to the vacation proceedings of the town road involved disclose

(a) "Meeting of Supervisors of Lamberton Township called to order by Chairman Carl O. Wog. Meeting called for the purpose of hearing any complaints or making any objections to the notice of closing of the road running east and west between the North Half and the South Half of Section 19, Township 109, west of the Fifth Principal Meridian, in Lamberton Township, Redwood County, Minnesota. Motion made, seconded, and carried that this road be closed. There being no further business, the meeting on the motion adjourned. (Clerk's minutes dated October 7, 1935.)

(b) "NOTICE OF TOWN MEETING FOR HEARING ON PETITION TO VACATE A TOWN ROAD

"You are hereby notified of the order made by the Town Board of the Town of Lamberton, Redwood County, Minnesota, for hearing on a Petition to Vacate a Certain Town Road, described as:

That road running East and West between the North ½ and the South ½ of Section 19, Township 109, Range 37, West of the 5th P. M. in Lamberton Township, Redwood County, Minnesota.

"And time for hearing said Petition is set at 8 o'clock P.M. on Monday, October 7th, 1935, to be held at the Farmers Elevator in the Village of Lamberton, Minnesota.

By order of the Town Board,
ED ANDERSON

Ed Anderson, Clerk."

The petition for vacating the road involved is not on file with the town clerk. From your letter of June 26 it appears that there is "some evidence that there was a petition (for vacation) filed; however, the petition has been lost and we are unable to locate it." Also that "one of the board members who is still living states that there was a petition which was signed by the proper number of landowners. However, since we have been unable to find the petition, we do not know whether it followed the statute."

The recollection of the member of the town board as to the contents of the lost petition, as well as the persons who signed the same, involves a factual matter. We do not pass upon the questions of fact. The conclusions as expressed by such board member might be competent evidence in a judicial proceeding. In **Banse v. Town of Clark**, 69 Minn. 53, 71 N. W. 819, the court on page 56 said:

"It was the duty of the supervisors to determine, before taking action upon the petition, whether it was signed by the necessary number of qualified petitioners. The statute did not prescribe how or by what evidence such jurisdictional fact should be determined, nor require the evidence to be preserved, or any record thereof to be made; hence, if the order had recited that the petition was signed by the necessary number of qualified petitioners, the order itself would, in a collateral proceeding, be prima facie evidence of such fact. In this case, however,

neither the petition nor the order recites such fact; but inasmuch as it was the fact that the petition was signed by the necessary number of qualified petitioners, which conferred jurisdiction, and not the proof of the fact, it was competent to prove such fact in this case by oral evidence in aid of the petition and order. Besides, proof of such fact and the petition were received in evidence without objection."

And, on page 57 as follows:

"The road order in this case, in connection with proof that the petition therein referred to was signed by the requisite number of qualified petitioners, establishes prima facie a valid highway at the locus in quo (the question of damages for the taking of the land aside), for it recites, in the form of legal conclusions, all other jurisdictional facts. Cassidy v. Smith, 13 Minn. 122 (129); Bruggerman v. True, 25 Minn. 123."

In the instant case neither the records of the town clerk, relative to the meeting of the town board which was held on October 7, 1935, nor the notice of the meeting signed by the clerk, quoted under (b) above, state that a petition for vacation was signed by the requisite number of qualified petitioners. The record of the town clerk, as above noted, makes no mention as to the number of landowners who signed the petition for vacation if, in fact, such a petition was signed, and, consequently, cannot be considered as being prima facie evidence of the fact that a petition was signed and filed so as to come within the rule stated by the court in the **Banse** case, supra.

The petition for a vacation is jurisdictional. **Cassidy v. Smith**, supra. Dunnell's Minn. Digest, Vol. 4, Section 8459. The statute requires the petition to be filed with the town clerk. M. S. A., Section 163.13, Subd. 2. **Miller v. Layne**, 84 Minn. 221, 87 N. W. 605.

Another legal obstacle which affects the validity of the vacation proceeding under consideration is the total absence of proof that any landowners affected thereby were ever served with notice or order in connection therewith. It is a fundamental requirement of the law that the owner of land abutting upon a road sought to be vacated is entitled to a notice thereof and an opportunity to be heard. **Underwood v. Town Board of Empire**, 217 Minn. 385, 14 N. W. (2) 459.

In the case of **Town of Tyrone v. Burns**, 102 Minn. 318, 113 N. W. 695, the court on pages 320 and 321 said:

"It is true that notice to the property owners is essential in proceedings of this kind to confer jurisdiction upon the board to hear and determine the petition, and, if no notice was given at all, the whole proceedings would be coram non judice and void. 'It is not, however,' says Elliott on Roads & Streets, Section 318, 'to be understood that where there is jurisdiction of the subject-matter and there are many persons interested as owners of different parcels of land, failure to give notice to some of the property owners will vitiate the entire proceeding. In

such cases the better opinion is that the proceeding is void only as to those who have not been notified, but valid as to those who have had notice. A different rule would often work injustice to the public, as well as to the citizens; for it might happen that a highway would affect many persons, and all of them, except one, be duly notified, and it would, under a rule different from that stated, be in his power to overturn the whole proceedings'—Citing State v. Richmond, 26 N. H. 232; State v. Easton R. Co., 36 N. J. L. 181; Kidder v. Jennison, 21 Vt. 108; Nichols v. Salem, 14 Gray (Mass.) 490.

"* * * The logic of which is that the proceedings are valid as to all persons properly served, and to those also, upon whom notice is not served, who appear and take part therein."

**In Town of Lyle v. Chicago, Milwaukee & St. Paul Ry. Co.**, 55 Minn. 223, 56 N. W. 820, it is stated in the syllabus as follows:

"In proceedings to lay out a highway the notice of the time and place of the hearing on the petition is jurisdictional, and must be given in strict conformity to statute, especially where it is only served on a party by posting."

The landowner who is affected by a proceeding to vacate or establish a road, and who has not been served with a notice may, by appearing therein, waive service of a notice as well as defects in the proceedings. **Kieckenapp v. Supervisors of the Town of Wheeling**, 64 Minn. 547, 67 N. W. 662.

From the facts submitted, and above referred to, it does not appear that any landowners appeared at any time in connection with the vacation proceedings here considered.

The town board can vacate a road only in the way prescribed by statute. Dunnell's Minn. Digest, Vol. 5, Section 8457. **Miller v. Corinna**, 42 Minn. 391, 42 N. W. 127; **Sheehan v. Board of Supervisors of Town of Bath**, 80 Minn. 355, 83 N. W. 352. The last two cases were referred to in part one of this opinion.

Upon the facts as disclosed by the records of the town clerk, as above quoted, it seems reasonably clear that the attempted vacation of the road involved does not satisfy the statutory requirements therefor, and such failure, together with the law as stated by the court in the foregoing decisions, requires our adherence to the conclusions stated in part one of this opinion.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Lamberton Town Attorney.
June 22, 1953.
July 21, 1953. 377-A-15

# 88

**Town roads—Establishment by user—Prior to 1899 not subject to M. S. A., Section 160.19—Establishment by statutory proceedings, of road, and never opened, may be lost by adverse possession prior to L. 1899, C. 65.**

### Facts

According to a road order book in possession of the town clerk for the town of Madelia, Watonwan County, Minnesota, it appears that a written road order was signed by three supervisors on March 29, 1870. Such record further discloses that a petition for such road was filed, notices were posted, a hearing was held on the petition, and that a survey was made. The order recites that a road be laid out as established according to the survey and the plat thereto annexed, which road was declared to be a public highway four rods wide, the line of the survey being the center line of such road. The road order also recites that the survey discloses that such road should commence at the southeast corner of section 18 in the town of Madelia, and then east on the section line to the south quarter corner of section 17, thence 12° west of south 182 rods to the Madelia and New Ulm road. The road from the point of beginning to the south quarter corner of section 17 has never been opened or traveled. There is a north and south road near the location of the road extending 182 rods south from said quarter corner, which road is a curving road located almost entirely west of the actual location of the road extending southerly 182 rods from the south quarter corner of said section 17. This curving road, which has never been established by statutory proceedings, has been used and maintained, as far back as anyone can remember, as a two rod cartway. The town has assumed that this was a cartway and not a town road. That portion of the road established by the action of the town board on March 29, 1870, extending southerly from the south quarter corner of section 17, has been and now is used and occupied by farm buildings. Request has been made that the town board open and grade that part of the road established by statutory proceedings extending southerly from the south quarter corner of section 17. If such road should now be opened along the course as designated in the order of the town board of March 29, 1870, such road would run through farm buildings and farm property which has been occupied and used as such.

### Questions

"1. Can the town board take possession of a four rod right-of-way for purposes of improving a town road with the center line of said right-of-way being the center line of the two rod road as now located?

"2. May the town board take over the four rod right-of-way of the road as originally located by the order of 1870 even though adjoining owners have placed valuable improvements on the right-of-way?"

### Opinion

These questions will be considered in the order above stated.

1. The facts submitted disclose that the road in question, which is described as a curving road, has never been established as the result of

statutory proceedings. This road has been maintained and used as a highway as far back as anyone can remember. It is assumed that this road was in existence and had been used for many years prior to 1899.

M. S. A., Section 160.19, provides in substance that whenever any road or portion thereof shall have been used and kept in repair and worked for at least six years continuously as a public highway the same shall be deemed dedicated to the public to the width of two 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. By virtue of this statute there may be a statutory dedication of a highway by user.

Provisions similar to those contained in Section 160.19, supra, are also contained in L. 1899, Ch. 152. The court in construing the last mentioned statute in **Gilbert v. Village of White Bear,** 107 Minn. 239, 119 N. W. 1063, on page 241, quotes from L. 1899, Ch. 152, and continues with the decision as follows:

> "Whatever may be the effect of this statute upon roads having their inception by user after the act went into effect, concerning which we express no opinion, it is evident that it does not apply to a road which had become an established highway at the time the act took effect. The trial court found that long prior to 1899 a road not exceeding twenty two feet in width had been established by usage. The limits of this road are therefore as well defined as a road which is laid out upon petition by the public authorities, or which has been dedicated to the public by the execution and filing of a plat, and it was beyond the power of the legislature to appropriate private property for that purpose without making provision for just compensation."

A similar conclusion was reached by the court in **State v. Hager,** 119 Minn. 512, 138 N. W. 935. In the course of this decision the court on page 516, in considering L. 1899, Ch. 152, said:

> "The statute referred to can have no retroactive operation, and cannot be held to apply to the highway in question, for it became established long prior to the passage of the statute." Citing **Gilbert v. Village of White Bear,** supra.

And, continuing, the court said:

> "The highway in question, conceding it to have been established by user, must then be limited to the character and extent of the public use."

In light of the conclusions reached by our court in the cases just referred to, it necessarily follows that the road which was in existence and used and traveled as a highway prior to 1899 is not subject to the provisions of Section 160.19. Such highway is a public highway only to the extent and character which the same has been traveled and used.

The foregoing requires that the first question be answered in the negative.

2. The second question is not susceptible of a categorical answer.

It appears from the facts submitted that there was established and laid out by an order of the supervisors on March 29, 1870, a four rod road which commenced at the southeast corner of section 18. That portion of the road so established, and which is now under consideration, extends from the south quarter corner of section 17 and then extends southerly a distance of 182 rods to the Madelia and New Ulm road. The exact location of this road, according to the town order, is 12° west of south so that this road does not follow the center quarter line of the section which adjoins section 17 on the south. This section of the road has never been opened, improved, or used for public travel. It further appears from the facts submitted that at least a part of this road is now occupied by farm buildings. We are not advised as to the length of time that this section of the road, either in whole or in part, has been so occupied.

Whether there has been an abandonment of this section of the road by reason of nonuser is a question which can only be determined after all of the facts have been obtained. This office does not pass upon facts. The general rule of law with respect to abandonment by reason of the nonuser of a road is stated in 5 Dunnell's Minn. Digest (Supp.), Section 8449, as follows:

> "It may be safely laid down as sound, both upon reason and upon 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 cases cited.

Another legal problem which arises in connection with that portion of the road here under consideration is whether title thereto has been acquired by adverse possession. If the road or any part thereof has been adversely used and possessed for more than 15 years prior to 1899 title thereto might be acquired by adverse possession. Prior to the enactment of L. 1899, Ch. 65, title to a public street or highway could be acquired by adverse possession.

In **Haramon v. Krause**, 93 Minn. 455, 101 N. W. 791, on page 457 the court said:

> "Prior to the adoption of chapter 65, p. 65, Laws 1899, it was repeatedly held by this court that the public easement in and to streets and highways might be lost by adverse possession, and title thereto be acquired by a person occupying and possessing the same for a period of fifteen years. City of Hastings v. Gillitt, 85 Minn. 331, 88 N. W. 987; Village of Wayzata v. Great Northern Ry. Co., 50 Minn. 438, 52 N. W. 913; Village of Glencoe v. Wadsworth, 48 Minn. 402, 51 N. W. 377."

The foregoing principles of law should be applied to the facts as they may be found to exist in determining whether the road in question has been abandoned by the town or whether title to said road or any part thereof has been acquired by adverse possession.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Madelia City Attorney.
September 22, 1953. 377-A-4

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## 89

**Town road— Impassable—Authority of county board to order repair thereof and limitation of expenditures for such purpose—M. S. A., 162.24.**

### Facts

"Seven freeholders of Hantho Township, Lac qui Parle County, being more than the required five freeholders, signed a petition and requested the County Board to order the Town Board of that township to make reasonably passable a stretch of township road allegedly impassable. This was brought under Minnesota Statutes 162.24. A hearing was held on the petition pursuant to the required statutory notice.

"The township road in question is a road that goes through a deep ravine and there is a bridge to be crossed. The evidence was definite that the road is in very poor condition and that the bridge is in an unsafe condition. The road grade washes badly when there are heavy rains. The County Board found that this township road is not reasonably passable at the present time.

"This road in question had been established, opened and constructed as a township road many years ago, but is often in bad shape after heavy rains because of erosion.

"The evidence indicated it might cost up to $1,800.00 to put in reasonably passable condition this ¾ mile stretch of road, including the repair of the bridge. Testimony indicated a minimum amount of $500 for grading and a minimum of $1,200 or $1,300 for replacing the bridge."

The taxable valuation of Hantho township is $334,448.

### Questions

1. "In determining whether the County Board shall order the Hantho Town Board to repair the road, does the requirement in 162.24 that the cost shall not exceed $1,000.00 a mile apply in this situation here, or does that just apply to township roads actually never before constructed and opened?

2. "If the County Board orders the Town Board to put this road in a reasonably passable condition and the Hantho Town Board refuses to do so and it has indicated it would refuse, what is the maximum amount that can be spent by the County Board to make the township road reasonably passable?

3. "If the maximum expenditure is not so limited, can the County do, for example, an $1,800 job on this township road (after calling for bids), if it believes it requires that expenditure to make it reasonably passable, and then spread the cost against Hantho Township over a period of three years on the basis of 2 mills to the dollar each year?

4. "Is the County Board limited to a total expenditure of an amount equal to a two mill levy on the assessed valuation of the township, or does the two mills refer only to the amount that can be collected in any one year from the township?"

**Opinion**

These questions will be considered in the order above stated.

1. M. S. A., Section 162.24, Subd. 2, is controlling upon this question and so far as here material reads as follows:

"The amount annually spent by any county board in any town under the provisions of chapters 160 to 164 shall not exceed two mills on the dollar of the taxable valuation of that town."

Under this proviso the amount which the town may spend annually is limited to an amount not exceeding two mills on the taxable valuation of the town. The taxable valuation of the town of Hantho being $334,448 the annual amount which may be spent by the county upon the town road in question would be $668.90.

2. Our answer to your first question disposes of your second question.

3. The maximum expenditure is limited to two mills on the dollar of the taxable valuation of the town. The county board is not authorized to spend more than two mills on the dollar of the taxable valuation in any one year, and the board may not exceed such an amount in one year and spread the cost thereof against the town over a period of years on a basis of two mills as provided for in said statute. We therefore answer the third question in the negative.

4. Our answer to the preceding questions render unnecessary a specific answer to question 4.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Lac qui Parle County Attorney.
July 13, 1953. 377-B-10-h

# 90

**Town road—Improvement—Cost—Agreement with County—A town having the powers of a village under M. S. 1949, Section 368.01, as amended, which has undertaken an improvement project under M. S. 1949, Sections 412.401 et seq., may proceed to complete the same notwithstanding L. 1953, C. 398. Such an improvement project to be financed in part from town funds and in part from special assessments may not be carried out under a contract between the town and a county if the amount of the project is in excess of $2,500.**—Laws 1953, C. 244.

## Facts

The Town of Mounds View in Ramsey County possesses the same powers and the same authority as is possessed by villages to the extent provided for by M. S. 1949, Section 368.01, as amended by L. 1953, C. 462.

A proceeding was commenced in said town for the improvement of a town road pursuant to M. S. 1949, Sections 412.401 et seq., prior to April 17, 1953, and prior to the enactment of L. 1953, C. 398, which repealed Sections 412.401 to 412.481. The estimated cost for said improvement is $4,850. It is the plan of the town to pay approximately one-third of the cost thereof from the town road and bridge fund and the remainder from special assessments levied against the benefited property.

## Questions

1. May the town enter into a contract with the county for the improvement of a town road when a portion of the cost of the improvement will be paid from the town road and bridge fund and the remainder from a special improvement fund composed of moneys derived from special assessments?

2. If the first question is answered in the affirmative, may the town first advertise for bids, and if it determines that the bids are not acceptable, reject the bids and then enter into an agreement with the county?

3. Is a contract between the town and the county whereby the county agrees to perform certain improvement work upon town roads, the cost of which is to be paid for by the town and by benefited property a cooperative agreement within the meaning of M. S. 1949, Section 412.421?

## Opinion

L. 1953, C. 398, repealed M. S. 1949, Sections 412.401 to 412.481. Section 12 thereof, however, authorizes the completion of any proceeding commenced under the repealed laws prior to the repeal thereof. Under the facts contained in your letter, we think that the town of Mounds View may proceed to complete the town road improvement proceeding commenced prior to the enactment of L. 1953, C. 398.

M. S. 1949, Section 412.421, as applied to the facts contained in your letter relates to the procedure of conducting local improvements. Subd. 4 thereof permits a waiver of the statutory provisions pertaining to the calling for bids when the work to be done is performed by another political subdivision under cooperative agreement.

We are unaware of any statutory provision that would enable your town to enter into an agreement with Ramsey County under the facts being considered. L. 1953, C. 244, would apply if the cost of the project was less than $2,500. M. S. 1949, Section 163.01, as amended by L. 1953, C. 279, referred to in your letter, relates to the town appropriating moneys from the town road and bridge fund to the county for certain roads. This statute likewise has no application for the facts contemplate that part of the cost of the improvement be paid from moneys other than in the town road and bridge fund.

In the absence of statutory authority, the town and the County of Ramsey are without authority to enter into an agreement for the improvement of a town road, the cost of which is in excess of $2,500 where the proposed improvement is to be financed in part from the town road and bridge fund and in part from a special improvement fund derived from special assessments on benefited property.

Your first question is therefore answered in the negative.

Because of our answer to the first question, we do not believe your second and third questions require our views.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Attorney for Mounds View Township.
June 22, 1953. 379-C-13-d

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## 91

**Traffic Regulations—Authorized emergency vehicle—Lights and sirens—Construction of Section 169.01, Subd. 5. Red lights and siren equipment on "authorized emergency vehicles."**

**This opinion supersedes any previous opinion in so far as it may appear inconsistent herewith.**

**Question**

"Under provisions of M. S. A., Section 169.01, Subd. 5, is the term 'police vehicles' to be construed to include privately owned vehicles of sheriffs, their deputies, law enforcement officers of state agencies, and police officers during such times as such vehicles are being used in performance of their official duties?"

**Opinion**

Unless otherwise noted, the sections hereinafter cited are those of Minnesota Statutes Annotated.

Section 169.01, Subd. 5, last amended by L. 1951, C. 331, to which you refer in your communication, reads as follows:

> " 'Authorized emergency vehicle' means vehicles of the fire department, police vehicles, and such ambulances and emergency vehicles of municipal departments or public service corporations or such privately owned and operated ambulances 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."

Your question involves a construction of what constitutes a police vehicle. The above quoted Subd. 5 does not specify any particular kind of police vehicle. The term "police vehicles" is broad enough to include any vehicle equipped and used by a police officer or a municipality **while driven in the performance of police duties.** The term may also be construed to include a vehicle designated as a police vehicle by the municipality which owns, leases, or uses such vehicle for police purposes, or a vehicle owned by a police officer authorized expressly or by the inherent powers of his office to use the same in the enforcement of traffic and other statutes. Such authorization may be definitely expressed or may be implied from paying him mileage or salary for the use of such vehicle, from the furnishing to him of equipment usually placed on police vehicles, or from other actions by a municipality or its police department or some duly authorized officer showing that the vehicle in question is to be used in the performance of police duties.

As reference is made in a considerable number of sections of our statutes to "authorized emergency vehicles" as defined in Section 169.01, Subd. 5, as amended, and as herein construed, it is, I believe, advisable to discuss briefly the status under present statutes of a police vehicle which is included in the definition of "authorized emergency vehicles" by that subdivision.

From reading the above cited chapter relating to highway traffic regulation it is apparent that, in enacting the same, it was the legislative intent that, whether a police vehicle is owned, leased, or used by a municipality or privately owned by a police officer and driven by him, no front red light or siren equipment thereon should be used except when such vehicle is being operated in the performance of police duties and then only as authorized by the statutes to which reference is hereinafter made. Of course, the police vehicle equipment need not be removed when the driver of a police vehicle is not operating it officially, and it must be assumed that, at the time when he is operating it unofficially, he will not violate the law by then using the front red lights or sirens thereon.

Section 169.64, Subd. 2, contains the following provision:

"Unless otherwise authorized by the commissioner, no vehicle shall be equipped, nor shall any person drive or move any vehicle or equipment upon any highway with any lamp or device displaying a red light or any colored light **other than those required or permitted in this chapter.**" (Emphasis supplied.)

Several sections of the chapter referred to in the above quotation require or permit the use of front red lights by an "authorized emergency vehicle" as defined in Section 169.01, Subd. 5, as amended. Among such sections are the following: 169.03, 169.17, 169.20, Subd. 5, and 169.64, Subd. 2. Section 169.03 recognizes the right of a driver of any authorized emergency vehicle to sound a siren and display red lights when proceeding past a red or stop sign in responding to an emergency call. Section 169.17 provides that the statutory speed limitations set forth in Sections 169.14 to 169.17 shall not apply under conditions therein stated to "authorized emergency vehicles" whose drivers are required in such circumstances to sound audible signal by siren and display at least one lighted red light to the front. Section 169.20, Subd. 5, refers to an "authorized emergency vehicle" equipped with at least one lighted lamp exhibiting red light and provides that the driver of other vehicles, when signal is given by a siren on the "authorized emergency vehicle," shall yield the right of way to such "authorized emergency vehicle." Section 169.64, Subd. 3, permits an "authorized emergency vehicle" to use flashing lights as in that subdivision provided.

In the matter of equipping a police vehicle with a siren and the use thereof, your attention is called to Section 169.68 which contains the following provision:

"* * * All authorized emergency vehicles shall be equipped with a siren capable of emitting sound audible under normal conditions from a distance of not less than 500 feet and of a type approved by the department, but such siren shall not be used except when such vehicle is operated in response to an emergency call or in the immediate pursuit of an actual or suspected violator of the law, in which latter events the driver of such vehicle shall sound the siren when necessary to warn pedestrians and other drivers of the approach thereof."

For many years a variety of questions pertaining to the use of red front lights and sirens on vehicles have been submitted to the office of the attorney general. Answers thereto have been written and based on certain submitted facts and on statutory provisions then existing. The statutes have from time to time been changed, requiring modification of our opinions in accordance with new enactments. The opinion herein rendered in response to your request is based on the laws now in effect and supersedes any previous opinion in so far as it may appear inconsistent herewith.

J. A. A. BURNQUIST,
Attorney General.

Governor of Minnesota.
November 4, 1953.

989-A-18

# 92

**Traffic regulations—Load restrictions—State aid and county aid roads—Load restriction on state aid and county aid roads within the boundaries of a village may be imposed by the county and not the village pursuant to M. S., 1953, Section 169.87, Subd. 1.**

**Question**

What local authority, the village or the county, is authorized to impose seasonal load restrictions on a state aid road and on a county aid road lying within the boundaries of a village?

**Opinion**

M. S. 1953, Section 169.87, Subd. 1, in so far as pertinent to your inquiry, reads as follows:

> "Local authorities, with respect to highways under their jurisdiction, may prohibit the operation of vehicles upon any such highway or impose restrictions as to the weight of vehicles to be operated upon any such highway, whenever any such highway, by reason of deterioration, rain, snow, or other climatic conditions, will be seriously damaged or destroyed unless the use of vehicles thereon is prohibited or the permissible weights thereof reduced."

It is the duty and responsibility of the county to construct, improve and maintain state aid roads under rules and regulations to be made and promulgated by the commissioner of highways. M. S. 1953, Section 160.07. See also Sections 160.43, 160.431,160.46, 160.50 and 160.51.

It is the duty and responsibility of the county to construct, improve and maintain county aid roads. M. S. 1953, Section 295.36. See also Sections 296.37 and 160.433.

In view of the foregoing statutory provisions, it is our opinion that the county and not the village is authorized to impose seasonal load restrictions on state aid and county aid roads lying within the boundaries of a village under and pursuant to M. S. 1953, Section 169.87, Subd. 1.

For a general discussion of the jurisdiction of a county over state aid roads, see opinion dated February 18, 1952, No. 115, Attorney General's 1952 Report.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Nobles County Attorney.
March 31, 1954.

989-A-12

# 93

**Weeds—Destruction of**—M. S. 1949, Section 366.015.

**Question**

When there has been an affirmative vote under M. S. 1949, Section 366.015, requiring persons owning or occupying real estate adjoining a township road to cut and remove all weeds and grass thereon adjacent to their land, is it necessary to submit such question at every annual township meeting to make it binding upon such landowners and occupants?

**Opinion**

M. S., 1949, Section 366.015, Subd. 1, provides:

> "Subdivision 1. The town board at the annual town meeting may submit to a vote by ballot the following question: 'Shall persons owning or occupying real estate adjoining a town road and not a part of any incorporated municipality be required to cut or remove all weeds and grass growing upon the town road adjacent to their land? Yes..... No.....'"

The language of the foregoing subdivision does not contain a categorical answer to your question. We must resort to construction of the subdivision to obtain the answer. In these circumstances, we will apply the following rule of statutory construction.

> "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;
>
> "* * *
>
> "(3) The mischief to be remedied;
>
> "(4) The object to be attained;
>
> "* * * ."

M. S., 1949, Section 645.16.

It appears to us that in enacting Section 366.015 the legislature intended to adopt a plan whereby the electors of a town, if they desired to do so, could cut or eradicate all weeds and grass growing upon a town road which is not a part of any incorporated municipality. Obviously the need for the law arose from the spreading of weeds from the road to neighboring lands and the dangers in the use of the road arising from weeds and grass thereon. These conditions, the presence of weeds and grass, would, it is a matter of common knowledge, continue year after year unless controlled or eradicated, and would not exist for one year only. The object of the law was the control and eradication of the weeds until they no longer existed. It is our conclusion that the very nature of the problem to be dealt

with indicates that the action of the electors of the town in requiring the cutting and removal of all weeds and grass upon the town roads was a continuing action.

We are confirmed in this conclusion by the fact that there is no language which indicates that action by the town electors should be had each year, or that there was to be any time limitation upon the effectiveness of the action of the town electors when once taken.

It is our opinion that when a majority of the electors voting upon the question set forth above have voted yes, such question need not be resubmitted to the electors at each annual town meeting, and that the obligation to cut and remove all weeds and grass upon the town road not a part of any incorporated municipality is a continuing obligation.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Renville County Attorney.
October 13, 1953. 322-G

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LIBRARIES

## 94

**Librarian—Appointment—Member of county library board may not be appointed**—M. S. A. 375.33, Subd. 1, 134.09, 134.11 to 134.15.

**Facts**

"Watonwan County established a County Library under Section 375.33, Minnesota Statutes. A vacancy exists in the position of librarian and it is proposed that a member of the County Library Board act as librarian and receive compensation and mileage pending the appointment of a regular librarian. It is anticipated that a period of several months will probably elapse before a librarian is appointed."

**Question**

"Can the County compensate a member of the County Library Board for services as librarian and pay for necessary mileage?"

**Opinion**

M. S. A. 375.33, Subd. 1, authorizes the county board of any county to establish and maintain a public library for the free use of the residents of the county, and to levy an annual tax for such purposes. Subd. 4 thereof provides for the appointment of a library board, and prescribes the term of office of the directors of such board. This section contains this further provision:

"This board of directors shall have the powers and duties of a board of directors of any free public library in a city or village and shall be governed by the provisions of Sections 134.09, 134.11 to 134.15."

The powers of the library board appointed under the provisions of this statute are prescribed in Sections 134.09, 134.11 to 134.15. So far as material to the question considered, Section 134.11 in part reads as follows:

"Immediately after appointment, such board shall organize by electing one of its number as president and one as secretary, and from time to time it may appoint such other officers and employees as it deems necessary. The secretary, before entering upon his duties, shall give bond to the municipality in an amount fixed by the directors, conditioned for the faithful discharge of his official duties. The board shall adopt such by-laws and regulations for the government of the library and reading-room and for the conduct of its business as may be expedient and comformable to law. It shall have exclusive control of the expenditure of all moneys collected for or placed to the credit of the library fund, of the construction of library buildings, and of the grounds, rooms, and buildings provided for library purposes."

Under this statute the library board is vested with the power to appoint such other officers and employees as it may deem necessary. The board is also given exclusive control of the expenditure of money collected for or placed to the credit of the library fund. It would not only be improper but contrary to public policy for a member of the library board vested with the powers enumerated in the statutes above referred to, to serve as a librarian. Such a situation would place the member of the library board in a position of passing upon and approving expenditures made by the board as salary for the librarian.

The foregoing not only justifies, but compels a negative answer to the above question.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Watonwan County Attorney.
June 5, 1953. 285-C

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## 95

**Librarian—Salary—In county where county library exists and village maintains a reading room in connection therewith, village may employ and pay librarian—M. S. A. 412.221, Subd. 32, 412.251 (10), L. 1951, C. 104, Section 1 (10), 134.07.**

**Facts**

Waseca County maintains a county library. Library "service" is furnished except in the village of Janesville and the city of Waseca. The village of New Richland is provided library service by the county. I understand

this to mean that library books are delivered by the county in New Richland for the use of the residents and returned to the county library by the county. The village of New Richland is provided library service by the Waseca County library through library funds received as a result of the county levy. For the past several years, the Waseca County library has maintained a branch library located in the village hall in the village of New Richland. The village provides the quarters used for the branch library and at no expense to the library board, and the county library board has paid one half of the salary of the librarian on duty at New Richland.

The Waseca County library board desires to rent a larger space for the New Richland library branch and is willing to pay the rental cost amounting to $480, providing the village of New Richland will pay the entire salary of the librarian, amounting to $600 per annum.

At a recent meeting of the council of the village of New Richland, the question was raised in regard to the legality of the village paying the librarian's salary under the proposed new arrangement. The village of New Richland does not have a library board and the librarian's salary would have to be paid out of the general fund. One thought expressed was that it might be illegal to pay the librarian's salary out of the general fund considering the fact that the residents of the village of New Richland pay the regular two mill county library tax.

**Question**

"May the Village Council of the Village of New Richland, Minnesota pay the salary of a librarian employed to operate the New Richland branch of the Waseca County Library, either out of the General Fund or out of cigarette and liquor tax refund moneys paid to the Village of New Richland?"

**Opinion**

The village council has power to provide for the government and good order of the village, the suppression of vice and immorality, the prevention of crime, the promotion of safety, order and the general welfare by such ordinances not inconsistent with the constitution and laws as it deems expedient. M. S. A. 412.221, Subd. 32. Providing library facilities for the people should tend to promote these objects. If the village council is of that opinion, it may enact an ordinance under this authority. The services of a librarian are essential to the efficient operation of a modern library. It is the business and function of a librarian to make known to library patrons what the library contains, to assist in research, to find the material available and to render many services which make library facilities valuable to persons interested and to create interest in many who may be indifferent but who will be interested when they know of opportunities which are theirs. Under this power, it is my opinion that the village may employ such librarian and pay the salary from the general fund.

Under authority of M. S. A. 412.251 (10), L. 1951, C. 104, Section 1 (10), the council may levy a tax for the support of a public library as authorized

by Section 134.07. Under authority of the last mentioned section, the council may establish a public library and reading room, or either. It may enact an ordinance to that end. This indicates a policy not inconsistent with what is said herein.

CHARLES E. HOUSTON,
Assistant Attorney General.

New Richland Village Attorney.
May 1, 1953. 285-C

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LOCAL IMPROVEMENTS

## 96

**Alley—Vacation—The word "street" as used in M. S. A. 440.135 does not include "alley".**

**Facts**

The City of Owatonna is a city of the Third Class, governed by Home Rule Charter. Some years ago Colquhoun's Addition was platted in the city of Owatonna, and an alley 16½ feet in width was dedicated on the east and south side of the lots of such addition, each end of the alley connecting with existing streets in the city. The distance is not longer than the distance intervening between any two adjacent intersection streets.

The Special School District of the City of Owatonna, owner of land adjacent to such alley, has petitioned the City Council to vacate such alley.

**Question**

"May the City Council vacate such alley under the provisions of Minnesota Statutes, Section 440.135 (Laws 1945, C. 224)?"

**Opinion**

M. S. A., Section 440.135, applies to every city of the third class however organized. Subdivision 2 thereof reads as follows:

> "In addition to any other method provided by law, the council of such city, upon the presentation and filing of a verified petition signed by or on behalf of any owner, natural or corporate, of any real estate abutting thereon, may vacate any street or segment of street or any portion of the width thereof within its geographical limits, provided only that the street, segment, or portion thereof so vacated pursuant to such petition shall not be longer than the distance intervening between any two adjacent intersecting streets."

The answer to the question here considered depends upon whether the word "street" as used in this statute includes an alley. Our attention has been directed to several authorities wherein a street has been construed

to mean an alley, and vice versa. McQuillin Municipal Corporations, 3rd Edition, Vol. 10, Section 30.10, pp. 541, 542. The author states that in ascertaining the meaning of a particular word as used in a statute consideration must be given to the intent of the legislature. This conclusion is in accord with our own statute relating to statutory construction. See M. S. A. Sections 645.08 and 645.16.

The proper uses of alleys are quite as familiar as those of streets so that the word "alley" may be said to have acquired a definite meaning. Our legislature has clearly distinguished between streets and alleys. By Section 462.25 the word "street" as used in Sections 462.24 to 462.35 is defined to include street, avenue, boulevard, road, lane, alley, viaduct, and other ways. In Section 412.401, which was a part of the village code pertaining to local improvements, both the words alley and street appear therein. This statute, among others, was repealed by L. 1953, C. 398. Subdivision 7 of Section 1 of this act defines the word street to mean any street, alley, or other public way, or any part thereof.

From the language used in these statutes the legislature clearly observed a distinction between a street and an alley, and recognized that these words have acquired definite and distinguishable meanings. Accordingly, we are of the opinion that the word street as used in Section 440.135, supra, does not include an alley, which necessitates a negative answer to your question.

It appears that the alley involved may be vacated upon compliance with the provisions of Chap. VI, Sections 1 and 10 of the city charter.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Owatonna City Attorney.
November 23, 1953. 396-C-1

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## 97

**Sewer—Assessment—Must be based upon actual benefits.**

**Facts**

Pursuant to the provisions of Chapter XXII of the charter of the city of Faribault a petition for the extension of the sanitary sewer system was presented to the council. This petition was granted by the council subject to the approval of the Water Pollution Control Commission of this state (hereinafter called commission). Upon application by the city to the commission for approval of the proposed improvement the commission, by its order, approved the extension, restricting the right to connect onto and use the sewer extension to a limited number of abutting property owners. The commission, by its order, provided that the remaining abutting prop-

erty owners would not be permitted to utilize and to connect with such sewer extension until the city had constructed a sewer disposal plant as previously directed by the commission.

**Question**

If the city constructs the sanitary sewer extension as petitioned for, may it assess benefits against property fronting on the sewer extension where the owners thereof did not petition therefor, and who are not permitted under the order of the commission to connect with and utilize the facilities of such proposed sewer extension until the city has constructed a sewage disposal plant?

**Opinion**

In connection with your question you comment:

> "This assumes that such owners are benefited by the improvement except for the fact they cannot connect until the City constructs a disposal plant."

The State Water Pollution Control Commission was created by L. 1945, C. 395. See M. S. A., Section 144.372, Subd. 1. The powers and the duties of the commission are prescribed in Section 144.373. Section 144.377, Subd. 3, reads as follows:

> "It shall be unlawful for any person to make any change in, addition to or extension of any existing disposal system or part thereof that would materially alter the method or the effect of treating or disposing of the sewage, industrial waste or other wastes, or to operate such system, or part thereof as so changed, added to, or extended until plans therefor shall have been submitted to the commission unless the commission shall have waived the submission thereof to it and a written permit therefor shall have been granted by the commission."

The word "person" as used in the state Water Pollution Control Act is defined in Section 144.371, Subd. 10, as follows:

> " 'Person' means any municipality, governmental subdivision, public or private corporation, individual, partnership, or other entity."

A municipality is subject to the provisions of said Water Pollution Control Act. By this law the legislature has subjected the authority of a municipality to construct sewage disposal plants, improvements and extensions thereof, to the requirement that a permit therefor shall first be obtained from the commission. The authority of the legislature over a municipal corporation is supreme, subject, however, to such limitations as may be prescribed by the state constitution. **Shirk v. City of Lancaster** (Pa.), 169 Atl. 557; **Martin v. Juneau** (Wis.), 300 N. W. 187; **Madison Metropolitan Sew. District v. Committee on W. P.**, 50 N. W. (2d) 424.

In the case last cited a statute similar to our own Water Pollution Control Act was involved. The authorities above referred to justify the

conclusion that the authority of a city to construct a sewage disposal plant or any extensions or improvements thereof is subject to approval by the commission.

The petition for the proposed improvement here considered was filed and presented to the council under ch. XXII of the city charter. We assume that such petition was in proper form, signed by a majority of the owners of the property abutting on the proposed improvement, and that all of the charter requirements leading up to and including the action of the council in granting the same were observed and complied with.

Section 199 of the city charter in part provides:

> "After said estimate is made, the Council shall proceed at once to assess the estimate cost thereof, except that portion to be paid out of the appropriate or general fund, on the property to be benefited thereby, in proportion to the benefits resulting thereto, but in no case in excess of such benefits."

Section 204 of the charter in substance provides that when the assessment has been confirmed the same shall be final and conclusive upon all parties not appealing therefrom.

The council when determining the amount which property shall be assessed for benefits resulting from a local improvement, acts in a legislative capacity. The legal principle underlying an assessment for a local improvement is that the property shall be directly benefited and enhanced in value to the extent of the assessment. In theory no assessment can lawfully be made on property not actually benefited by the improvement. The law contemplates that the property assessed will be benefited to the extent of the improvement.

This underlying and fundamental principle is cited by our court in the case of **In re Improvement of Superior Street Duluth,** 172 Minn. 554, 216 N. W. 318, on page 560 as follows:

> "In reviewing that question, where an assessment is expressly authorized by law and is regularly made, we start with the foundation that it is prima facie valid, and the burden rests upon the objector to show its invalidity. The evidence not being here for review, and the assessment coming before us with the presumption that it is valid, we cannot say, as a matter of law, that the trial court was not justified in finding and concluding that this property was specially benefited by the improvement, although the court also found that the property received no special benefit for railroad uses and purposes, as shown by the findings hereinbefore set out.
>
> "The general rule for measuring special benefits in this state is to take into consideration the market value of the property assessed, or of which that property is a part, and determine what increase, if any, in such market value is specially caused to the property assessed by the improvement; and the present use of the property, even if used exclusively for railroad purposes, while it may be taken into consideration, is not controlling or decisive."

In McQuillin Municipal Corporations (3rd Edition), Section 38.24, the author states as follows:

> "* * * The discretion of municipal authorities, empowered to construct sewers and assess the cost thereof against specially benefited property, relative to the size and kind of the sewer, is very broad. The grant of power to construct sewers and assess therefor vests the municipal council with authority, within its discretion, to cause it to be constructed with any and all appurtenances essential to its usefulness or completion as a whole, such as manholes, subsoil drains, flushing tanks, outlets, connections, and service pipes; in brief, all that necessarily conduce to and render it serviceable, beneficial, and lasting for the purpose for which it is constructed. Lots may be assessed for the construction of a sewer with which they have no immediate connection, and subsequently assessed for sewers forming a connection with the former.
>
> "Sewer assessments must be made to correspond with the benefits accruing to the property. An assessment to pay the cost of a sewer is valid, it has been held, although made before land or the right of way therefor has been acquired. Hence, such an assessment cannot be resisted on the ground that at the time of the passage of the ordinance authorizing the improvement and of the making of the assessment, no right was had to construct the sewer on or through the lands of other corporate bodies, for such right may be obtained afterwards."

In **Qvale v. City of Willmar**, 223 Minn. 51, 25 N. W. (2d) 699, on page 55 the court said:

> "The apportionment of taxes and assessments is a legislative function. If the question of benefits is a matter upon which reasonable men may differ, the determination by the taxing officers must be sustained."

And on page 57 the court quotes from 48 Am. Jur., Special or Local Assessments, Section 23 as follows:

> "In determining whether an improvement does or does not benefit property within the assessment district, the land should be considered simply in its general relations and apart from its particular use at the time; and an assessment, otherwise legal, is not void because the lot is not benefited by the improvement, owing to its present particular use. The benefit is presumed to inure not to the present use, but to the property itself."

It is for the council, in the exercise of its legislative power, to determine whether the property which abuts the proposed sewer extension will be benefited as the result of such improvement, and to assess the property accordingly, guided by the principles of law as contained in the authorities and cases above cited.

The fact that some of the owners of the property abutting upon the proposed improvement will not be permitted to utilize such improvement or to connect therewith is not conclusive, as a matter of law, that such property will not be benefited by the construction of the proposed sewer extension.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Faribault City Attorney.
September 30, 1953. 387-B-1

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## 98

**Sewer—Bond issue—General obligations—Election therefor—M. S. A. 444.075, as amended by L. 1953, C. 195, 398; M. S. A. 475.58.**

### Facts

The Village of Kasson owns a sanitary sewer system which has a single outlet. This outlet is considered inadequate and the village desires to reconstruct the outlet by replacing it with a larger tile so as to provide larger outlet capacity. It proposes to issue general obligations of the village to pay for the costs of the improvement. No part of such costs is to be paid by assessing benefited property or by imposing sewer rates or charges for the use of sewer facilities.

Attention is directed to M. S. A. Section 475.58, Subd. 1 (6) and Section 444.075, as amended by L. 1953, C. 195.

### Questions

1. May the Village reconstruct the sewer outlet without first holding an election?

2. May the Village issue obligations for the cost of the sewer reconstruction without first holding an election?

### Opinion

The first question is answered in the affirmative. See M. S. A. Section 444.075, as amended by L. 1953, C. 195; also, L. 1953, C. 398.

The second question is answered in the negative. The obligation proposed to be issued is a general obligation of the village to be paid by the proceeds from a general tax levy. Such obligations may not be issued without first obtaining the approval of the electors voting upon the question of issuing the proposed obligation. See M. S. A. Section 475.58; also, **Struble v. Nelson**, 217 Minn. 610, 613; 15 N. W. (2d) 101.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Kasson Village Attorney.
September 1, 1953. 387-G-8

## 99

**Sidewalk—Improvements may be made upon petition therefor or upon action of village council—Requisites of petition therefor considered—M. S. A. 429.21, State v. Bury, 101 Minn. 424, 112 N. W. 534.**

### Facts

"The Village of Graceville is contemplating the construction or rebuilding of a sidewalk under the provisions of M. S. A. Section 429.21, which provides that a majority of the owners fronting the street must sign a petition for the construction of said sidewalk. A surviving spouse and several children are the owners of one lot fronting the street by a decree of the probate court."

### Questions

"(a) If they do not sign the petition are all of their names counted against it in determining a majority of the signatures to the petition?

"(b) If, in the case of a homestead, where the surviving spouse has a life estate and the remainder to the children, and they all refuse to sign the petition shall all of their names be counted against it in determining a majority of signatures to the petition?

"(c) Where the owner of a lot fronting the street is deceased and an administrator of his estate is appointed, may the administrator sign the petition and shall his signature be counted for it in determining a majority of owners for the petition?"

### Opinion

M. S. A., Section 429.21, reads as follows:

"When the council of any village, incorporated under the general laws of this state, or the council of any city of the fourth class incorporated under the general laws of this state shall deem it necessary and expedient to construct, or rebuild, any sidewalk or sewer in the village or the city, it may, acting on its own motion, and, if a majority of the owners of the property fronting on the street or streets where it is proposed to construct, or rebuild, the walk or sewer shall petition the village council or the council of the city therefor, shall adopt a resolution to that effect, which resolution shall specify the place or places where such sidewalk or sewer shall be constructed or rebuilt, the kind and quality of materials to be used therein, the width, the size and manner of construction thereof, and the time within which the same shall be completed, which shall not be less than 40 days after the service of the resolution.

"This resolution shall contain the name of the owner of each lot, part of lot, or parcel of ground fronting the street or streets where such walk or sewer is to be constructed or rebuilt."

Under this statute the council may proceed upon a petition signed by a majority of the owners of the property fronting on the street where it is proposed to construct or rebuild a sidewalk. You will note that the statute prescribes that the petition must be signed by a majority of the owners of the property fronting on the street or streets. It must be determined from the facts whether or not the signatures upon the petition are a majority of the owners of the property affected. The statute in this respect is clear. There is no need for construction. When all of the land owners fronting upon the street where the improvement is proposed to be made have been ascertained, then a majority thereof must sign the petition so as to vest jurisdiction in the council if its action is premised on the petition. The foregoing disposes of questions (a) and (b).

An administrator of an estate is an officer of the court. He is entitled to possession of the real estate, except the homestead of the decedent. His powers and duties are prescribed by statute. An administrator is not possessed of the legal title to real estate constituting a part of the assets of an estate. On the death of a person the title to his realty immediately vests in his heirs or devisees. Dunnell's Minn. Digest, Vol. 3, Sections 3565c and 3567. Accordingly, we answer question (c) in the negative.

The council is empowered to initiate the proceedings for the proposed sidewalk improvement without any petition. If there is doubt with respect to the sufficiency of the petition, the council may disregard the petition and proceed upon its own motion. See **State v. Bury**, 101 Minn. 424, 112 N. W. 534.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Graceville Village Attorney.
May 11, 1953. 480-B

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# 100

**Streets—Establishment—Outside of corporate limits; in the absence of charter or statutory authority, a city is unauthorized to establish a street outside of the corporate limits notwithstanding that it may condemn lands outside of the city limits for other municipal purposes—** M. S. A. 465.01.

**Facts**

The City of Austin desires to extend a street westerly from the city limits for a distance of two blocks into an area that is not within the corporate limits of Austin. The land outside of the city limits through which such extended street will pass will eventually be annexed by the city.

**Question**

Does the City of Austin have the power to condemn land for a public street outside of the city limits?

**Opinion**

M. S. A., Section 465.01, empowers cities and villages to condemn private property within or without the corporate limits thereof for any purpose for which it is authorized by law to take or hold the same by purchase or gift. Chapter 1, Section 1, of the Austin city charter empowers the city to acquire real estate as the purposes of the city may require, or the exigencies of the city may render convenient within or without the corporate limits of the city. However, we are unable to find any provision in either the Austin city charter or the Minnesota Statutes which authorizes the establishment of a street outside of the city limits. Chapter 7, Section 7, of the city charter relates to the opening of new streets. It reads in part as follows:

> "Whenever the common council shall determine by a vote of two-thirds of all its members to lay out or open any new streets, highways or alleys **in said city,** * * * " (Emphasis supplied.)

There is no language therein in any way empowering the city council to lay out a street outside of said city.

The city may only exercise its power to acquire lands outside of the city for such city activities which lawfully may be carried on beyond the city limits. The establishment of streets beyond the city limits is not a lawful activity of your city unless it is authorized by the charter or state law. In the absence of charter or statutory authority, the city of Austin is not authorized to establish a street outside of the corporate limits. If the city is without authority to establish such a street, it necessarily follows that it cannot condemn land for such purposes.

If you will point out to us either a provision in the Austin city charter or the Minnesota Statutes conferring authority on the city to establish a street outside of the city limits, we shall be happy to reconsider the subject of this opinion.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Austin City Attorney.
February 15, 1954. 396-C

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# 101

**Streets—Curbs—Gutters—Preliminary expenses—Payment—Must be paid by city and cannot be passed on to petitioners—Council has no authority to compel petitioners to file cost bonds**—M. S. 1953, Section 429.031, Subd. 1.

**Facts**

> "A petition was filed with the Village Council signed by the required number of property owners, asking for a local improvement consisting of installation of curb and gutter and sidewalks. The Council, proceeding

under the provisions of Section 429.011 to 429.111, referred the matter to an engineer who made a survey and reported to the Council with a drawing of the proposed improvement and an estimate of the cost. Notice was duly given of a hearing to be held in connection with the proposed improvement. At that hearing, several of the persons who signed the original petition appeared with a petition in opposition to granting the original petition.

"It appears now that the original petition will not be granted and the proposed improvement will not be made."

**Question**

"Who is liable for the expenses incurred by the Council in retaining the engineer who made the survey and prepared the estimate of the costs. The same question arises as to expenses of publication, attorney's fees, etc. Must the Council pay this out of the general fund or are the original petitioners liable for the payment of these expenses?"

**Opinion**

M. S. 1953, Section 429.031, Subd. 1, under which a public hearing is required upon the filing of a petition for improvement, contains the following provision:

"At any time prior to the adoption of the resolution providing for the hearing, the council shall secure from the city or village engineer or some competent person of its selection a report advising it in a preliminary way as to whether the proposed improvement is feasible and as to whether it should best be made as proposed or in connection with some other improvement and the estimated cost of the improvement as recommended."

The duty of obtaining this report is mandatory upon the village council. The statute does not require the petitioners to obtain the report.

Said subdivision also provides as follows:

"The council may also take such other steps prior to the hearing, including, among other things, the preparation of plans and specifications and the advertisement for bids thereon, as will in its judgment provide helpful information in determining the desirability and feasibility of the improvement."

The foregoing provision confers authority upon the council to act. No such authority is conferred upon the petitioners.

Likewise, the duty of publishing notice of the hearing is imposed upon the village council and not upon the petitioners. The costs incurred by the village council under Section 429.031, Subd. 1, are part of the necessary costs of the government of the village. There is no authority for passing this cost on to the petitioners.

It is therefore our opinion that the village is liable for the expenses incurred by the council in retaining the engineer who made the survey and prepared the estimates of the costs, and also for all the other expenses incurred by the council in these proceedings. The council should pay this out of the general fund if there are no other funds available for this purpose. The original petitioners are not liable for the payment of these expenses.

**Facts**

"Several other petitions are being filed at this time with the Council asking for local improvements. In the event you hold that the Council must pay for the preliminary expenses out of the general fund, it is the opinion of the Council that the petitioners should be required to file a cost bond in the event that another improvement petitioned for is abandoned."

**Question**

"Does the Council have the right to require the petitioners to file a cost bond?"

**Answer**

There is no statutory authorization for a requirement by the council that the petitioners file a cost bond. The answer to your question is therefore in the negative.

IRVING M. FRISCH,
Special Assistant Attorney General.

Janesville Village Attorney.
April 26, 1954. 480-B

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## 102

**Streets—Rights—Abutting owner rights to mineral and soil—Lateral support—Rule stated in Town of Glencoe v. Reed, 93 Minn. 518 followed.**

**Facts**

"First Avenue South, which lies between Block 20 and Block 22 in Lorraine Park Addition is a regular platted street on which no grade has been established and the City has not graded the street. Eighth Street South, which runs into Villaume Avenue, has an established grade and is graded. All of the streets shaded in blue have been vacated. Lots 3 and 18 in Block 22 and Lot 3 in Block 20 of Lorraine Park Addition are owned by the Northern States Power Company. Hillcrest Place, between Second Avenue South and First Avenue South, has no established grade and the same has not been vacated."

The "U" shaped portion of Hillcrest Pl. easterly of First Avenue South, and which abuts Blocks 22 and 23, Lorraine Park Addition, has been vacated.

**Questions**

1. "What are the rights of the adjoining land owners and the City of South St. Paul to the minerals and soil within the limits of that portion of First Avenue South lying between said Blocks 20 and 22?"

2. "What are the rights of the City insofar as lateral support is concerned to the same portion of First Avenue South?"

**Opinion**

1. From the above facts it appears that First Avenue South is a regularly platted street; that portion thereof which lies between Blocks 20 and 22 of Lorraine Park Addition has never been graded nor improved for public travel. No grade upon this section has ever been established. The rights of abutting property owners and the city in and to the minerals and soil within the limits of that section of the street here considered cannot be categorically stated until the grade for this section has been established by the city.

The city charter, Section 5, paragraphs Thirty-seventh and Thirty-eighth, page 18, empowers the city council to establish, lay out, and maintain streets, and to establish and record with the city recorder grades of streets, alleys and sidewalks. From these charter provisions it is clear that the general power to establish, improve, grade and maintain streets is reposed in the city council.

The rights of an abutting property owner and the city with respect to minerals and material within the right of way of the ungraded street involved do not become a specific legal problem until the city has established a grade therefor. In these circumstances our answer to the question here considered will be limited to the general principles of law by which these rights should be determined.

The rights of a fee owner of property which abuts a street and the municipality as the owner of an easement for highway purposes are stated in the syllabus in the case of **Town of Glencoe v. Reed**, 93 Minn. 518, 101 N. W. 956, as follows:

> "The fee owner of abutting property removed gravel from a gravel bed within the limits of a country highway, which did not cause any injury to the roadway, and the gravel was not required for the purposes of grading or improving the same. Held, he was lawfully in the exercise of his rights as an abutting owner, within the rule that the only limitation upon the right of the owner of the fee to control and use the soil and other natural deposits within the limits of a highway is that such use shall be consistent with the full enjoyment of the public easement."

We believe that the foregoing is the basic principle of law in our state. Opinion No. 136, 1940 Attorney Generals' Report.

2. Inasmuch as no grade has been established by the city for the ungraded part of the street involved, it is not possible to give a specific answer to your second question. Attention will be directed to the applicable rule of law from which the rights of the city with respect to lateral support are to be determined.

In **Haverstraw v. Eckerson,** 192 N. Y. 54, 84 N. E. 578, 20 L. R. A. (N.S.) 287, the court said:

> "As to the other question in this case, the proposition of the appellants is that 'the doctrine of lateral support does not apply to the conditions which arise between an owner along a public street and the public interested in the highways.' I do not think the proposition is quite correct. As between the proprietors of adjacent lands, neither proprietor may excavate his own soil so as to cause that of his neighbor to loosen and fall into the excavation. The right to lateral support is not so much an easement as it is a right incident to the ownership of the respective lands. It is true that the application of the doctrine in the case of a public street or highway will be somewhat broader. In the case of adjacent landowners the right is only to the support of the land in its natural state, while in the case of the street or highway the improvement of the land, to fit it for its intended use as a public highway, may tend to add to the lateral pressure. But that would be the permanent and natural condition of the land acquired for the public travel. It is further true that the municipality is not under a similar obligation to the abutting owner, and for the reason that, with respect to the construction and maintenance of the public highway, it exercises a governmental function and can come under no liability in its reasonable performance thereof. It constitutes an exception to the general rule of lateral support. See 2 Dill. Mun. Corp. 4th ed., Section 991, and **Moore v. Albany,** 98 N. Y. 396, page 407. I think that the preservation of lateral support to a highway as constructed and prepared for the public use is an obligation to the community which rests upon the adjacent landowner. It is an absolute right of the public, in the maintenance of which the members of the community are concerned. It is of no materiality whether the fee of the street or highway is in the municipality, or whether it holds and controls it by lesser title. The municipality is the incorporation of the inhabitants of the village district, and it is their representative, and the trustee of their equitable rights. In its board of trustees is vested, by the statute, the exclusive control and supervision of the streets and public grounds, and it is but a just result that, whatever the rights, legal or equitable, of the public therein, they should be enforceable at the suit of the municipality. It would be a vain grant of power by the statute if the interests of the public in a street or highway could not be prevented from destruction or impairment and protected by resort to the courts. In my opinion no legitimate consideration militates against the restriction of the adjacent owner's property rights to such acts upon his land as will not injuriously

affect the public rights in the highway. Our attention is not called to any case in this court which presents this precise question, and I have not been able to find any; * * * ."

See also 68 L. R. A. (O.S.) 707; 9 A. L. R. 1333; **Viliski v. Minneapolis, 40 Minn. 304; New York Steam Co. v. Foundation Co., 87 N. E. 765.**

From the foregoing we believe the general rule is that an abutting property owner who, as such, has special rights in an existing highway must exercise such rights in a manner so that there will be no interference with the public use and enjoyment of the highway easement. Where the municipality has graded a street and the abutting property owners have been compensated for their property by reason thereof, then it necessarily follows that the abutting property owners may not destroy the lateral support to the existing street without subjecting themselves to liability for resulting damages.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

South St. Paul City Attorney.
October 23, 1953. 396-c

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# 103

**Streets—Vacation—Abutting property owners own to center of street—Rights of abutting property owners upon vacation of streets inures to village or school district if the title owned by each is unrestricted and in fee simple.**

**Facts**

"Along one block of streets within the Village, the Village owns property used for park purposes abutting that street on one side and the School District owns property used for school purposes abutting that street on the other side. There are no other abutting owners within that particular block.

"This street was created by the original plat of the Village and it was provided that 'streets and alleys as on said plat shown are dedicated to public use as such forever' in an accompanying instrument executed by the then owner of the platted land."

**Question**

"If the Village Council duly adopts an ordinance vacating the aforementioned block of street, do the Village and the School District as owners in fee of the abutting property each acquire good title to the midline of the street on their respective sides of that street, or does the title to the street revert to the owner at the time of the dedication, its successors and assigns?"

**Opinion**

We are not advised as to the nature of the title to the premises owned by the village and the school district which abut the street proposed to be vacated. In the absence of these facts we cannot express a definite answer to the question presented.

The general rule will be stated with respect to the rights of an abutting fee owner upon a street.

Where a deed conveys land bounded on a street, alley, or highway the grantee presumptively takes to the center line thereof unless a different intent is clearly manifested. There is a presumption that the owner of land abutting on a street is the owner of the fee in the street to the center line thereof, subject only to the public easement. See Dunnell's Minn. Digest, Section 1065, and Vol. 3, Section 4183.

When the street or highway has been vacated the burden of the public easement has been discharged. Thereupon the abutting property owners, unless a contrary intention is shown, take to the center line of the vacated street or highway free from the highway easement. This principle of law is, in our opinion, applicable to a village or school district as the unrestricted fee owner of property which abuts a street or highway upon vacation thereof.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Bricelyn Village Attorney.
June 12, 1953. 396-G-16

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# 104

**Streets—Vacation—Petition therefor must be signed by the owners of land abutting thereon—Village as owner of highway easement in street which intersects and forms boundary of street to be vacated is not an owner within meaning of M. S. A. 412.851, as amended by L. 1953, C. 735, Section 12.**

**Facts**

A petition has been filed for vacation of a part of a village street lying immediately westerly of and adjoining Cypress Street. The portion of the street sought to be vacated is 54 feet wide and 139.96 feet long.

The abutting owners are as follows:

E. O. is the fee owner of the abutting 139.96 feet on the north;

R. D. is the fee owner of the abutting 54 feet on the east;

L. P. G. is the fee owner of the abutting 139.96 feet on the south.

The section of the street sought to be vacated is bounded on the west by Cypress Street, and the village owns a highway easement therein.

**Questions**

1. "* * * Does this mean the majority of abutting owners by number, regardless of the amount of property owned by them, or does it mean the majority of lineal feet abutting the street? In other words, are E. O. and L. P. G., who own the north and south 139.96 feet of this abutting property, a 'majority' under this section? If not, then * * * are one-half of the individuals, regardless of property amount owned, a 'majority' under this section?"

2. Is the village, which owns an easement in the street adjoining the section of the street proposed to be vacated an "abutting owner" within the meaning of M. S. A., Section 412.851, as amended by L. 1953, C. 735, Section 12?

**Opinion**

1. M. S. A., Section 412.851, as amended by L. 1953, C. 735, Section 12, reads as follows:

> "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. After a resolution of vacation is adopted, the clerk shall prepare and present to the proper county officers a notice of completion of the proceedings in accordance with Section 117.19."

The term "majority of the owners of land abutting on the street," as used in this statute, means a majority of the abutting owners of the lineal feet or area of property owned by them which abuts upon the street proposed to be vacated.

In the instant case the property is owned by three abutting fee owners; therefore it would be necessary for at least two of such owners to join in the petition for the proposed vacation in order to comply with the requirements of the statute above referred to. See **State ex rel. Rossman v. Common Council of City of St. Paul,** 98 Minn. 232, 107 N. W. 1129; also **Tiedt v. Village of Argyle and others,** 129 Minn. 259, 152 N. W. 412.

2. The village, as the owner of a highway easement in Cypress Street which intersects and adjoins the section of the street proposed to be vacated, is not an owner within the meaning of that term as used in the statute above cited.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Cambridge Village Attorney.
July 22, 1953. 396-G-16

# 105

**Street—Vacation—The term "street" includes sidewalk, curb, and gutter—Vacation of street includes the roadway and sidewalk, and upon vacation the fee title vests in the abutting property owners.**

**Facts**

The city of Wabasha operates under a home rule charter. There has been presented to the village council a petition for vacation of a city street over which the council has jurisdiction. Section 108 of the village charter grants power to the council to vacate streets.

**Question**

"Does the word 'street' include sidewalk insofar as a petition for vacation is concerned, so that if a street were vacated, the adjacent public sidewalk would also be included?"

**Opinion**

Section 108 of the city charter grants exclusive power to the council to vacate or discontinue streets within the city by an ordinance passed by a five-sevenths majority vote of the council. The word "street" is not defined in the city charter. Under the generic term "street" all parts of the roadway, gutter, curb, and sidewalk are included. The interest of the city in a street is in the nature of an easement for public purposes. Within the street burdened with an easement the council may improve a portion thereof for the use of the public either for motor vehicles or pedestrians. A sidewalk is a part of the street, and when a street is vacated the owner of the abutting property holds the fee of the vacated street presumably to the center line, discharged from all easements in favor of the public. Dunnell's Minn. Digest, Vol. 4, Section 6623c. For a definition of the word "street" see Words and Phrases, Permanent Edition, Vol. 40, pp. 277-280.

From the foregoing it necessarily follows that the specific question should be answered in the affirmative.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Wabasha City Attorney.
May 15, 1953. 396-C-18

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# 106

**Water system—Extension—Payment of cost—Extension of municipally owned water works system may be financed by improvement warrants that are a secondary lien upon income from water works system in case where income from water works system and future extensions thereto are pledged to pay warrants already in existence—M. S. A., Ch. 475, 412.471, Laws 1953, Ch. 398.**

**Facts**

"In 1945, the Village of South International Falls, by resolution of its Council, authorized issue of $66,000.00 in Water Revenue Warrants, said resolution having been adopted July 6, 1945. A copy of said resolution providing for the issuance of bonds and other terms and conditions of such issuance is herewith enclosed.

"It is assumed that said issuance was pursuant to Chapter 475, appearing in Volume 26, of M. S. A.

"It also appears that at the time of the issuance of these bonds, it was not contemplated that there would be a sudden increase in the population of said Village, and probably at the time it did not appear that any large extensions of the water works system as covered by the bond issue herein referred to was contemplated.

"Since that time, some small additions were made by the Village, without the necessity of any additional bond issue. However, since that time, a portion of the Village has considerably built up and the inhabitants of said portion of the Village have now made a request to the Village Council for an extension of the water works system, which in its nature would be very large, and which the Village at this time does not have funds sufficient to carry on this work, and would therefore necessitate requiring an additional bond issue to carry out the proposed construction and extension of the present water works system.

"However, serious question has arisen insofar as the Village's authority to extend the present system by means of a bond issue, due to the following provisions in the original bond issue as hereinbefore referred to, primarily as follows:

"You will note that on page three of the resolution, I have underlined the following provision that the warrants 'will at all times, constitute a first lien and charge on the net revenues of said system and of any additions thereto' and that such language appears on the face of the revenue warrants.

"You will also note that on page four, paragraph 5.5, similar language appears, and therefore, it would appear that according to said provisions, any future extensions, however, made, and even though not contemplated at the time, would become part of and incorporated in the water system that was built and constructed from the proceeds of said revenue warrants, and that in effect, it is an encumbrance of any future additions, even though at the time, they were not contemplated.

"You will also note that pursuant to said resolution, paragraph 5.8 on page four, provides: 'That the Village will include in each of its annual budget and tax levies an amount sufficient for, and appropriated for, payment of the hydrant charges specified in said Ordinance.' Referring to Ordinance 25, in paragraph 5.7 at page four, and that said ordinance provides for payment by the Village of Fifty and no/100

($50.00) Dollars per hydrant rental from the general fund to the water fund, and also provides that hydrant charges shall be made for additional hydrants that shall be added to said system."

**Question 1**

"Would a proposed large extension costing approximately—say—$25,000.00 be considered as a separate improvement, pursuant to provisions of 412.471?"

**Answer**

The statute now applicable to the construction and extension of a village water works system is L. 1953, C. 398. M. S. 1949, Section 412.471, was repealed by Section 13, Subdivision 1 of said act. "Municipality" is defined therein in Section 1, Subd. 2, as follows:

> " 'Municipality' means any city of the second, third, or fourth class however organized, or any village, borough or any town containing platted land situated wholly or partly within 25 miles of the city hall of a city of the first class having a population of more than 200,000 inhabitants."

Section 2 of said Act provides in part herein material as follows:

> "Subdivision 1. The council of a municipality shall have power to make the following improvements:
>
> * * *
>
> "(5) To construct, reconstruct, extend and maintain water works systems, including mains, valves, hydrants, service connections, wells, pumps, reservoirs, tanks, treatment plants, and other appurtenances of a water works system, within and without the corporate limits."

Section 9 thereof provides for the financing of the cost of the improvements. Subd. 3 of said section provides that the obligations to pay for the cost of the improvements shall be issued in accordance with the provisions of M. S., C. 475. An election is required for the issuance of the bonds if less than 20 per cent of the cost is to be assessed against the benefited property. Subd. 2 of said section provides that the obligations are to be called improvement bonds if the full faith, credit and taxing power of the village is to be pledged for their payment. If not, the obligations are to be called improvement warrants. Subd. 4 thereof provides for the establishment of a separate fund for each improvement.

It is our opinion that the proposed extension of the city water works system of the village should be considered as a separate improvement under the provisions of L. 1953, C. 398.

**Question 2**

"Is the provision appearing on the face of the bond and in paragraph 5.5, page four in said resolution herein submitted to you, properly within the authority of the Council, and would the Council have author-

ity to encumber future additions to the water works system constructed out of the proceeds of said revenue warrants, even though at the time, no extensive additions were contemplated?"

**Answer**

In **Struble v. Nelson,** 217 Minn. 610, 15 N. W. (2d) 101, our Supreme Court said:

> "The weight of authority supports the view that no general obligation or debt is incurred by a municipality by agreeing to pay for an addition or improvement to a utility plant already owned by it out of the income or revenue to be derived from the operation of the plant with the addition or improvement. * * * (Citing cases). Such an obligation does not create a lien or charge upon the water works system. It pledges income or revenue to be derived from the utility by the municipality in its proprietary capacity. * * * "

Thus, our Supreme Court has recognized the right of a municipality to pledge revenue from a utility to pay for the cost thereof.

In **Reed v. City of Anoka,** 85 Minn. 294, 88 N. W. 981, our Supreme Court said in the syllabus:

> "Entering into such contracts and granting a franchise to individuals do not involve an exercise on the part of the municipality of its legislative or governmental functions, as respects the rates and charges to be paid the grantees for a performance of the contracts, or otherwise, but only its proprietary or business powers; and the rules and principles of law applicable to contracts and transactions between individuals apply thereto."

Since a private utility has the authority to pledge income from future extensions of its plant for the payment of existing obligations, it follows that a municipality owning a public utility may do likewise.

Therefore, the provision in the resolution extending the lien of the revenue warrant to additions of the water works system is valid.

**Question 3**

"Are the revenue warrants originally issued pursuant to the resolution of July 6, 1945, confined to the water works system as constructed from the proceeds thereof, and not to any large extension that may be made in the future, and would any attempt to encumber any such future large extension be Ultra Vires, there apparently being no specific statutory power given to the Council to so do?"

**Question 4**

"Assuming that proper bookkeeping system would be set up and an accurate record kept of the original water works system and the extension as contemplated, and a separate sinking fund for the revenues forming said extension to be set up and maintained for the liquidation

of revenue warrants, proceeds from which were used to construct said extension, would the revenue warrants so issued be a first lien on such extension, and the lien of the revenue warrants of the original system would be confined solely to the system as originally constructed, and would not include the large extension as contemplated, even though said extension would be dependent on and connected to the original water works system?"

**Question 5**

"If the proposed large extension to be financed by revenue warrants were constructed and separate funds maintained to liquidate said warrants as distinguished and excepted from original water works system, and assuming that there would be hydrants installed as part of the large extension, would the Village be obligated to pay the hydrant rental on that portion of the extension as provided by the resolution, and the charges made in Ordinance 25 to which said resolution refers?"

**Answer**

The lien of the warrants now outstanding would include the fees paid by the village on account of the hydrants installed as part of the proposed extension.

There is no prohibition against issuing warrants which would be a secondary lien upon the income from the water works system including the proposed extension. In such case, the warrants now outstanding would remain a first lien thereon.

You may, of course, find it advisable to pledge the full faith, credit and taxing power of the village for the payment of the cost of the water works system extension. This would necessitate a bond election.

IRVING M. FRISCH,
Special Assistant Attorney General.

Attorney for Village of South International Falls.
September 4, 1953. 624-D-11

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OFFICERS

## 107

**Assessor—Compensation—Deputy—Towns—Deputy assessor may be appointed by town assessor with approval of county auditor, M. S., 273.06—Compensation of town assessor limited by M. S. A. (CAPP) 367.05, Subd. 1, as amended by L. 1951, C. 345—Vacancy in office of town assessor to be filled by county board, Section 367.03—When not so filled auditor may appoint assessor, Section 367.04.**

**Facts**

"Our township consists of having a valuation of $2,000,000.00 with the population of less than 10,000. The county having a population of 33,000 and less than 35,000 with a valuation of over $20,000,000.00. Due to the fact that the Village of Grand Rapids is situated in the township, the job of assessor is such that he cannot complete his work within ninety (90) days nor can he perform the services required for the compensation set forth by law."

Reference is made to M. S. A. (CAPP) 367.05, Subd. 1, and there is submitted these

**Questions**

1. "What is the maximum compensation which may be paid to the town assessor?

2. "Can as many deputies as necessary be hired and be paid Six Dollars ($6.00) per day plus Fifty per cent (50%) or the sum of Nine Dollars ($9.00) per day?

3. "Can the Town Board disregard the per diem payment and pay our assessor on the basis of an annual salary which would compensate him adequately for the work he is doing?

4. "At the end of the ninety (90) day period can our assessor be employed as a deputy clerk but perform services as an assessor in order to finish his assessing and be paid an adequate salary to compensate him for such work?

5. "Should our assessor have only half of his work done at the end of ninety (90) days, turn his books in and refuse to continue, and if so what would the township board do in order to complete the assessing?"

**Opinion**

Each of these questions will be considered and answered in the order above stated.

1. The compensation of the town assessor for the town of Grand Rapids is prescribed by M. S. A. 367.05, Subd. 1, as amended by L. 1951, C. 345. The maximum compensation which may be paid thereunder is $8.00 per day not exceeding 90 days in one year when authorized by the annual town meeting. The law prior to the 1951 amendment was construed by the attorney general in an opinion dated July 13, 1949, file 12-C-1.

2. M. S. A. 273.06 authorizes the town assessor to appoint a deputy. Such deputy, after giving a bond and taking the required oath, shall perform, under the direction of the assessor, the duties imposed upon the assessor. This statute appears in the same form and language in Revised Laws 1905, Section 806. Construing this statute it was held that the power to appoint was limited to one deputy. Opinion of Attorney General dated May 5, 1928,

file 12-E. This opinion has never been revised, and we think that it is controlling upon the question here considered. The statute, Section 273.06, contains no provision as to the amount of compensation which may be paid to a deputy assessor. It has been held in a previous opinion of the attorney general dated May 21, 1928, that the compensation to be paid to an assistant or deputy assessor may not exceed the amount of compensation which might be paid to the town assessor. It is our opinion that the compensation of such deputy may not exceed the amount which may be paid to the town assessor under Ch. 345, supra.

3. We answer this question in the negative. An analogous question was before our court in the case of **Jerome v. Burns**, 202 Minn. 485, 279 N. W. 237. The second paragraph of the syllabus reads as follows:

> "Where an officer performs duties imposed by law he is entitled to the compensation therefor fixed by law and no other. He is not entitled to extra compensation for services performed in the line of his official duty. The fact that the salary or compensation may be recognized as inadequate remuneration for the services exacted and actually performed does not change the rule. And the principle is the same although his duties are greatly increased. Courts recognize necessity of protecting public funds, and will usually enforce the rule against permitting extra compensation either directly or indirectly."

4. We answer this question in the negative. The conclusions reached in our answer to the previous question are controlling upon this question.

5. The duties of the assessor are by statute required to be performed during the months of April, May, and June of each year. Section 273.08. In the event that the assessor resigns and vacates his office the power to appoint his successor is vested in the town board. Section 367.03. In the event that the town board fails to fill the vacancy in such office the auditor is authorized to do so. Section 367.04.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Attorneys for Town of Grand Rapids.
March 25, 1953. 12-E

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## 108

**Assessor—Deputy—Compensation—Village deputy assessor appointed pursuant to M. S. A. 273.06—Compensation to be determined by M. S. A. 412.131.**

**Questions**

"Assuming the appointment of a deputy by a village assessor, with the approbation of the county auditor, pursuant to M. S. A. 273.06, and further assuming that the village has fixed no specific compensation for either the assessor or his deputy, then

"1. Does the village have a general obligation to compensate the deputy for the services rendered by him in the performance of his duties?

"2. If so, is the deputy entitled to the same basis of compensation as the assessor pursuant to M. S. A. 412.131?

"3. May the village, while fixing no compensation for the assessor and leaving him subject to the provisions of M. S. A. 412.131 as to his compensation, at the same time fix a lump-sum compensation for the deputy of not less than $100.00 per year?

"4. May the village fix the compensation of the deputy at a lump sum of less than $100.00 per year, or at a per diem of less than $6.00 per day?"

**Opinion**

Before considering each of these questions in the order above stated we shall direct attention to certain controlling statutes.

M. S. A. (CAPP) 412.131 in part provides:

"Any assessor may appoint a deputy assessor as provided in Minnesota Statutes, Section 273.06. 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."

Section 273.06 reads as follows:

"Any assessor who deems it necessary to enable him to complete the listing and valuation of the property of his town or district within the time prescribed, with the approbation of the county auditor, may appoint a well-qualified citizen of his town or district to act as his assistant or deputy, and may assign to him such portion of his district as he thinks proper. Each assistant so appointed, after giving bond and taking the required oath, shall perform, under the direction of the assessor, all the duties imposed upon assessors by this chapter."

1. The compensation of the village assessor is prescribed in Section 412.131, supra. According to this statute the assessor may be compensated on a full-time or part-time basis at the option of the council within the limitations prescribed in this statute.

2. It is assumed that the deputy has been appointed pursuant to Section 273.06, and has given a bond and taken the oath as therein required. This statute does not provide for any compensation for a deputy assessor appointed by virtue thereof. The compensation of such deputy may be fixed by the village council by authority of M. S. A. (CAPP) Section 412.111, which in part provides:

"The council may prescribe the duties and fix the compensation of all officers, both appointive and elective, employees, and agents, when not otherwise prescribed by law."

In the instant case, there being no law which prescribes the compensation of the deputy, it rests with the discretion of the council to prescribe the compensation of such deputy assessor.

3. As previously pointed out, the compensation of the assessor is to be determined by the provisions of Section 412.131, and such compensation is not affected by the compensation which may be provided for the deputy. Our answer to the previous question disposes of the salary of the deputy assessor.

4. We believe that our answer to the second question likewise disposes of this question. It will be noted that under the provisions of Section 412.111 the matter of fixing the compensation for the deputy assessor rests with the city council for the reason that compensation of the deputy assessor is not otherwise fixed by law.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

St. Paul Park Village Attorney.
March 31, 1953. 12-E

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## 109

**Assessor—Expenses—Mileage—Tax meeting—County officers attending annual tax meeting at St. Paul — Expenses and mileage** — M. S. A. Section 273.071, Subd. 7, and Sections 350.11, 384.06.

### Question

What amount of mileage may be allowed the county auditor and county treasurer for attending meetings called by the commissioner of taxation?

### Opinion

M. S. A., Section 384.06, provides in substance that the county board shall audit and allow verified claims of the county auditor and county treasurer for actual and necessary expenses incurred and paid in attending any meeting called by the commissioner of taxation to confer in regard to assessments and taxation. The amount of mileage which may be paid to these officers is controlled by the provisions of M. S. A. (CAPP) Section 350.11, being L. 1951, C. 641. See opinion dated March 12, 1941, No. 194, 1942 Report.

As bearing upon the reimbursement to other officers in connection with expenses and mileage incurred in attending tax meetings, your attention is directed to M. S. A. (CAPP) Section 273.071, Subd. 7.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Mahnomen County Attorney.
March 27, 1953. 12-D

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# 110

**County attorney—Clerk hire—Payment should be made directly to employee, not to county attorney**—M. S. A., Section 388.105.

**Facts**

"My office works under an arrangement with the county whereby the county pays something less than half of my clerk hire (one employee) and I pay the difference.

"The employee does not qualify for the public employees' retirement and in order that she may benefit to the full amount of her salary under the Social Security Act I would prefer to have the county pay me directly for the clerk's hire and then I would pay my employee her full salary, deducting from the whole amount for F. I. C. A. taxes instead of deducting as I now do for F. I. C. A. taxes on only that portion of her salary which is paid by me directly."

**Question**

"May the county make a direct payment to the County Attorney's office for clerk hire, leaving the County Attorney to see to the application of the money so received?"

**Opinion**

M. S. A., Section 388.105, authorizes the county board to make an annual appropriation not exceeding $1,800 to be used for providing clerk hire for the county attorney. Such appropriation is made for the benefit of the clerk or secretary employed by the county attorney. The amount to be paid by the county is determined by the county board.

No provision is made in this statute, nor are we aware of any other statute, which authorizes a county to pay the amount appropriated for clerk hire directly to the county attorney, and the county attorney thereafter could pay the same to his clerk or secretary. Absence of such statutory authority requires a negative answer to the question submitted.

A case of interest, although not directly in point, is **Wallace v. Board of County Commissioners of Douglas County**, 227 Minn. 212, 35 N. W. (2d) 343.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Hubbard County Attorney.
December 15, 1953. 121-A-4

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# 111

**Register of deeds—Recording—Certificate—Eminent domain—Final certificate—When certified by county auditor and recorded with register of deeds, notice prescribed by 117.19 has been complied with — Instrument conveying interest in land to a municipality, which has been certified to by county auditor and recorded with register of deeds, satisfies the requirements of 117.19—M. S. A. 117.20 (4).**

## Facts

"It appears that the Registrar of Titles of Hennepin County has recently had brought to his attention Section 117.19, M. S. A., which provides that when a village has taken or acquired by condemnation proceedings or dedication any land or any easement for certain public purposes, a notice in writing of the completion of every such condemnation proceeding and every such dedication shall be filed for record with the Register of Deeds.

"The Registrar of Titles is now raising the question as to whether under this statute a village may properly file a deed conveying an easement or dedicating a street unless the notice prescribed by this statute is first filed. Although he has recently accepted two such deeds conveying street easements to the Village of St. Louis Park, he did so reluctantly, indicating that he might not do so in the future."

## Comments

"It appears to me that the intent of this statute is to provide a means of making a record in the office of the Register of Deeds of any dedication which would not otherwise appear of record, such as a statutory dedication by user. The preparation and recording of the notice contemplated by this statute, where a deed is recorded, seems an unnecessary waste of public funds and not within the intent of the statute.

"The application of this statute to condemnation proceedings also raises a problem since Section 117.20, as amended by Chapter 312, Laws of 1947, provided for the filing with the Register of Deeds of a certifi-

cate of completion of condemnation proceedings. Subsection 4 of Section 117.20 as so amended, as published in the Supplement to M. S. A., states that the notice of filing provided for in Section 117.09 shall be dispensed with. Since no such notice is provided for in Section 117.09, I assume that we are justified in concluding that this is an error and that the reference is to Section 117.19. In any event the recording of both the certificate and notice would be an absurd duplication. Since Section 117.19 appears to be directory, it would appear to us that we are entitled to record such a certificate as well as such a deed with the Registrar of Titles when accompanied by the proper title certificate, without also recording the notice specified in Section 117.19."

**Questions**

1. When a final certificate as provided for in M. S. A. (CAPP) Section 117.20 (4), has been certified and entered in the transfer record by the county auditor and thereafter recorded in the office of the register of deeds, is it necessary to prepare and file the notice prescribed by Section 117.19?

2. When an instrument conveying an interest in lands to a municipality for a public purpose has been certified to and entered in the transfer record by the county auditor and thereafter recorded in the office of the register of deeds, is it necessary to also prepare and file the notice prescribed by Section 117.19?

**Opinion**

For the reasons hereinafter stated we answer each of the questions in the negative.

M. S. A. (CAPP) Section 117.20 (4), reads as follows:

"(4) The notice of filing of report provided for in Section 117.09 shall be dispensed with; as shall also the final decree provided for in Section 117.17, provided the attorney for the petitioner make a certificate describing the land taken and the purpose or purposes for which taken, and reciting the fact of payment of all awards or judgments in relation thereto, which certificate upon approval thereof by the court shall establish the rights of the petitioner in the lands taken and shall be filed with the clerk and a certified copy thereof filed for record with the register of deeds; which record shall be notice to all parties of the title of the state or its agency or political subdivision to the lands therein described;".

Sections 117.09 and 117.17 therein recited constitute Sections 6545 and 6553, respectively, of G. S. 1923.

The notice provided for in Section 117.19, before the amendment by Laws 1941, C. 252, constituted Section 6555, G. S. 1923. By the amendment, C. 252, the state of Minnesota or any county or town were included, and this statute was made applicable to lands dedicated for public purposes therein specified. The amendment contains in part this specific provision:

"Provided that such notice shall first be presented to the county auditor who shall enter the same in his transfer records and shall note upon the instrument, over his official signature, the words 'entered in the transfer record'."

The object and purpose of this statute is to provide the course of procedure so that a notice of a transaction affecting the title to real estate may be prepared as therein prescribed and presented to the county auditor for certification that the same has been "entered in the transfer record" and thereafter recorded in the office of the register of deeds.

In cases where an interest in real estate is conveyed to a municipality by a recordable instrument and such instrument is presented to the county auditor for endorsement and entry upon the transfer record, and thereafter recorded in the office of the register of deeds, there should be no necessity for filing a notice as provided for by Section 117.19, supra.

It appears obvious that in a case where lands or an interest therein have been acquired by condemnation proceedings and a final certificate made in accord with the provisions of Section 117.20 (4), and such certificate is certified to by the county auditor and entered upon the transfer record and thereafter recorded in the office of the register of deeds, the object and purpose of the notice provided for in Section 117.19 have been satisfied. In these circumstances there would be no need or necessity for filing such a notice.

The last sentence of Section 117.19 reads as follows:

"Any failure to file this notice shall not invalidate or make void any such condemnation proceeding for the vacation or abandonment of any public street, road, highway, park, or public grounds, or any portion thereof."

In our opinion the provisions of this statute are to be construed as being directory and not mandatory.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Attorney for Village of St. Louis Park. 817-F
April 8, 1953. 373-B-17-C

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## 112

**Register of deeds—Recording—Conditional sales contracts—Counties containing a city of the first class—Place of filing of conditional sales contracts, chattel mortgages, assignments and releases thereof, bills of sale—M. S. A. 511.04, 511.18, 511.20, 511.26.**

**Statement**

"Our interpretation of the law is that Section (4) makes it mandatory that all conditional sales contracts involving property located within the county shall be filed in the office of the register of deeds.

In other words, our interpretation is that conditional sales contracts, assignments thereof, releases and satisfactions thereof involving property within the county are to be filed with the register of deeds office, whereas chattel mortgages, bills of sale or other instruments evidencing a lien on personal property and assignments, releases and satisfactions thereof are to be filed with the register of deeds if the property involved in such instruments is located within the county but outside the city limits, but in the event the property involved in such instruments is within the city limits then such instruments must be filed with the city clerk."

**Question**

Where is the proper place for the filing of bills of sale, chattel mortgages, assignments, releases, and satisfactions thereof, and conditional sales contracts?

**Opinion**

The statutes which pertain to the filing of the instruments above referred to, and where the situs of the property involved is in a county containing a city of the first class, are in conflict and confusion. See M. L. R. Vol. 36, pp. 77-82. The question here considered has never been passed upon by this office. Neither has the court had before it for decision this specific question. There are decisions of the court, to which reference will be made, that point out the course to be followed and which give support to the conclusions hereinafter stated.

M. M. S. 1927, Section 8346, coded as M. S. A., Section 511.04, has its origin in L. 1860, C. 33. This statute prescribes the place where chattel mortgages should be filed. Two factors control as to the proper place for filing such instruments. See **In re Haskvitz**, 104 Fed. Supp. 173, p. 175.

In 1913 the legislature, by the enactment of L. 1913, C. 143, provided that chattel mortgages and other instruments therein specified should be thereafter filed with the register of deeds. By this act the legislature prohibited the filing of these instruments with the city clerk or a village recorder after July 1, 1913. Under Section 6 of this act every municipal clerk and recorder was required to deliver the instruments therein specified and in his custody to the proper register of deeds who would thereafter be the custodian of such records. Cities of the first class were excepted from the provisions of this act (Section 9). Section 10 of the act contains a clause repealing all inconsistent acts.

Part of Section 511.20 has its origin in L. 1915, C. 364, printed as M. M. S. 1927, Section 8364. Section 7 of this act reads as follows:

> "This act shall not apply to cities of the first class, nor to counties wherein the salary of the register of deeds is fixed by special law."

By this express language cities of the first class are excepted from the provisions of the act. This section is now coded as M. S. A., Section 511.26. Section 8 of said C. 364 repeals all inconsistent acts.

Section 1 of said C. 364 was amended by L. 1917, C. 158, which amendment is as follows:

> "Any bill of sale, instrument evidencing a lien on or reserving title to personal property in satisfactions of liens on personal property, shall be filed with the Register of Deeds in the county in which said personal property is situate."

and is printed as M. M. S. 1927, Section 8364. The last amendment to Section 8364 was by L. 1935, C. 169, which is now coded as M. S. A., Section 511.20 (1) (2) (3) and (4). The 1935 amendment added paragraphs (2) (3) and (4) to M. M. S. 1927, Section 8364, which Section 8364 now constitutes M. S. A., Section 511.20 (1).

By virtue of paragraphs (2) and (3) thereof, the instruments therein specified are required to be filed with the city clerk of every city of the first class where the situs of the property involved or affected by such instrument is within a city of the first class. Where the situs of such property is within a county containing a city of the first class but outside of such city, then such instrument should be filed with the register of deeds. Section 511.20 (4) reads as follows:

> "The provisions of paragraphs (2) and (3) shall not apply to conditional sales contracts."

In view of this provision it is necessary to refer to Section 511.18, Subdivision 1, which prescribes that conditional sales contracts are to be filed in the same place as a chattel mortgage.

It necessarily follows that Section 511.20, paragraphs (2) and (3) are applicable and controlling as to the proper place for filing conditional sales contracts, and the instruments specifically enumerated in said paragraph (2). In other words, whenever the situs of the property involved or affected by a conditional sales contract is situated within a city of the first class the conditional sales contract should be filed with the city clerk. Whenever the situs of such property is outside of a city of the first class but within a county containing the same, then the conditional sales contract should be filed with the register of deeds. See **In re Haskvitz,** supra; **Snyder Automotive, Inc. v. Boyle,** 162 Minn. 261, 202 N. W. 481; **Good v. Brown,** 175 Minn. 354, 221 N. W. 239; **Miller Motor Co. v. Jaax,** 193 Minn. 85, 257 N. W. 653; **Lawin v. Pepe,** 231 Minn. 561, 43 N. W. (2) 804.

What has been heretofore stated disposes of that phase of the question considered in so far as conditional sales contracts, chattel mortgages, and assignments and releases thereof, are concerned, and leaves for disposition the question as to the proper place for filing bills of sale.

Information received from the office of the register of deeds of the three counties containing a city of the first class indicates that there is not a uniformity of practice with respect to the place where bills of sale are filed. The law is not clear upon this subject. We have not found any decisions which are particularly helpful. We are advised that very few bills of sale are filed. Title to personal property usually passes by delivery thereof. In

transactions which involve the sale of motor vehicles the transfer of title thereto is evidenced by a certificate issued by the secretary of state. When cash sales are made of other species of personal property, such as radios, television sets, and other heavy articles such as washing machines and refrigerators, in most instances no bill of sale is given, and, if given, the same is seldom filed.

We believe that a construction of the provisions of Section 511.20 (1) dealing with bills of sale justifies the conclusion heretofore expressed with respect to chattel mortgages and conditional sales contracts, i. e., whenever the situs of the property is within a city of the first class then the bill of sale should be filed with the city clerk, and whenever the situs of the property is outside of a city of the first class then the bill of sale should be filed with the register of deeds of the county wherein the property is situated.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Ramsey County Attorney.
May 7, 1953. 373-B-6

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# 113

**Register of deeds—Recording—Federal tax liens and duration thereof discussed**—M. S. 1949, Section 272.48, as amended by L. 1953, C. 488, Section 1.

**Facts**

"The Register of Deeds' Office of Brown County, Minnesota, has asked that we make the following inquiry concerning Federal liens filed in the Register of Deeds' office:

* * *

"The Register of Deeds advises that some of them are for income tax, some for liquor tax and some for revenue tax."

**Questions**

"1. How far back must they be checked?
"2. Are all Federal tax liens to be considered the same?"

**Opinion**

Ordinarily, we do not deem it advisable to answer requests for opinions of the general nature of your request, but rather we require requests to present a specific question. In an effort to be helpful to you, we have researched the broad field of your questions. However, it must be understood

that there may be other lien provisions in the federal laws not apparent in our search. Therefore, the following information is submitted in answer to your questions.

Income tax liens and estate tax liens are treated separately from other revenue liens of the federal government. Generally, with those two exceptions, the governing code provisions are 26 U. S. C. A. 3671 and 26 U. S. C. A. 3672:

> "Section 3671. **Period of Lien.** Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time. 53 Stat. 449.
>
> "Section 3672. **Validity against mortgagees, pledgees, purchasers, and judgment creditors.**
>
> "(a) Invalidity of lien without notice. Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—
>
> "(1) Under State or Territorial laws. In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or"

M. S. 1949, Section 272.48, as amended by L. 1953, C. 488, Section 1, is a Minnesota statute enacted as a result of this code provision:

> "The filing and recording in the office of the register of deeds, or together with a written statement containing a description of each parcel of land upon which the lien is claimed and a proper reference to the certificate or certificates of title to such land, in the office of the registrar of titles, of any county in this state of notices of liens for taxes due the United States and discharges and releases of such liens is hereby authorized."

Commerce Clearing House explains the operation of the federal tax liens in this manner:

> "1765B.01. **How lien attaches**—After a tax has been assessed, the amount of tax constitutes a lien in favor of the United States until payment, on all the personal and real property of the tax delinquent. **Once recorded,** such a lien takes priority over subsequent mortgages, pledges, purchases or judgments, except as to securities such as stocks and bonds which were mortgaged, pledged or purchased without knowledge of existence of the lien
>
> "The lien arises at the time the assessment list is received by the District Director. It continues until the liability for the tax either is satisfied or becomes unenforceable because of lapse of time."

26 U. S. C. A. 3312 gives the general period of limitation upon assessment and collection:

"3312. Except in the case of income, war-profits, excess-profits, estate, and gift taxes, and except as otherwise provided in Section 1635 with respect to employment taxes under subchapters A and D of Chapter 9—

* * *

"(d) Collection after assessment. Where the assessment of any tax imposed by this title has been within the statutory period of limitations properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun—

"(1) Within six years after the assessment of the tax, or

"(2) Prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer."

Similar provisions appear for the income tax in 26 U. S. C. A. Section 276 (c):

"Collection after assessment. Where the assessment of any income tax imposed by this chapter has been made within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

And, for the estate and gift tax in 26 U. S. C. A. 874B.

No statute has been found requiring the filing of extensions of limitation periods between the government and taxpayers. Consequently, the tax lien must be investigated not only in reference to the statute under which it arises, which is ordinarily in duration six years from the date of assessment, but also investigation must be made as to the existence of any extension agreements.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Brown County Attorney.
March 5, 1954. 373-B-11

# 114

**Register of deeds—Recording—Mortgage registry tax—Quitclaim deed and assignments of sheriff's certificates of foreclosure given as security for a debt construed to be mortgage—Payment of mortgage registry tax required—Section 287.05—Current real estate tax need not be paid as a prerequisite to recording thereof**—Section 272.12.

## Facts

A deed dated April 15, 1952, was a few days ago presented to the register of deeds of Freeborn County for recording. This deed was executed on Minnesota uniform deed form No. 27, being quitclaim deed from individual to individual. Such deed was properly executed by the grantor. In the space provided for stating the consideration there appears the following: "Security for indebtedness owing". Following the description of the premises in such instrument appears the following:

> "The purpose of this quit claim deed is to assign to the grantee the right, title and interest of the grantor in and to the Sheriff's certificate and foreclosure record dated January 18, 1952, and recorded in the office of the Register of Deeds of Freeborn County, Minnesota, on January 18, 1952, at 3:30 P.M., at Book 83 of Deeds, page 109. The grantor herein is indebted to the grantee and this deed and assignment is executed and delivered for security purposes."

The instrument does not express the amount of the debt. The grantee presented the deed for recording and tendered to the register of deeds the sum of $4.50 in payment of a mortgage registry tax on $3,000, together with $2.25 as the fee for recording a mortgage. The 1952 taxes due and payable in 1953 have not been paid on the premises involved. The period of redemption from the mortgage foreclosure sale above referred to expired one year from January 18, 1952. The purchaser and the person to whom the sheriff's certificate of foreclosure was issued is the same and identical person who executed the instrument involved, and the only interest of this party in the premises at the time of the execution and delivery of such instrument was by virtue of the mortgage foreclosure certificate.

## Questions

"(1) Is payment of the 1952 real estate taxes due and payable in 1953 a condition precedent to recording of this instrument under Section 272.12, M. S. A.?

"(2) Is this instrument subject to payment of a mortgage registry tax under the provisions of Chapter 287, M. S. A.?"

## Opinion

These questions will be considered together.

The answer to each question involved depends upon whether the instrument dated April 15, 1952, is in effect an equitable mortgage or an instru-

ment conveying land. If such instrument is a mortgage, then the same is subject to the payment of a mortgage registry tax, and the payment of the current real estate taxes is not necessary in order that such instrument may be recorded. If, however, such instrument is in legal effect a conveyance of land, then the current taxes must be paid before the same may be recorded. M. S. A. 272.12.

The sheriff's mortgage foreclosure certificate could have been recorded without the payment of the real estate taxes. Section 272.12, supra. An assignment thereof could also be recorded without the payment of such taxes. This certificate is not an interest in real property. It is personal property—a lien on real property. See Dunnell's Minn. Digest, Vol. 4, Section 6364.

The instrument involved, although dated April 15, 1952, was not presented to the register of deeds for recording until the period of redemption had expired. There having been no redemption the fee title to the premises described in the certificate and in the instrument involved passed to the purchaser or his assignee. See Section 6364, supra.

The intent and purpose for which the instrument was given appears from the express language stated therein, and as above quoted. Although the same is in form a quitclaim deed, nevertheless the intention of the parties and the purpose for which it was given are controlling.

In Dunnell's Minn. Digest, Vol. 4, Section 6150, it is stated:

> "In equity, when the real nature of a transaction between the parties is confessedly that of a loan, advanced upon the security of realty granted to the party making the loan, whatever the form of the instrument of conveyance taken as the security, it is treated as a mortgage. The court will look through the form to the actual character of the transaction. An equitable mortgage may be in the form of an absolute deed. * * * The rights and obligations of the parties under an equitable mortgage are the same as under a legal mortgage, except that an equitable mortgage can only be foreclosed by action."

See also Section 6154.

A mortgage is defined in Section 287.01, Subd. 3, as follows:

> "The word 'mortgage' means any instrument creating or evidencing a lien of any kind on such property, given or taken as security for a debt, notwithstanding such debt may also be secured in part by a lien upon personalty."

Failure in the instant case to express the amount of the indebtedness as prescribed in Section 287.03 would not destroy the vitality of the instrument as an equitable mortgage. See cases cited under Section 287.03, supra.

The instrument containing the express language that the same was given as "Security for indebtedness owing", together with the purpose for which such instrument was given, as appears from the express language

contained therein, is in legal effect an equitable mortgage and not an instrument conveying land. Consequently, the rule that a mortgage which is once a mortgage is always a mortgage is applicable. See Dunnell's Minn. Digest, Vol. 4, Section 6146, and cases cited.

From the foregoing we reach the conclusion, and it is our opinion, that the instrument involved is in legal effect an equitable mortgage and may be recorded without payment of the 1952 real estate tax. This instrument, being an equitable mortgage, is subject to the payment of a mortgage registry tax as prescribed in Section 287.05.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Freeborn County Attorney.
June 25, 1953. 373-B-17-d

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## 115

**Register of deeds—Recording—Plats—L. 1951, C. 638, coded as Sections 272.191 to 272.196, require that a certified copy of coded parcel or tract of land be recorded in the office of the register of deeds—Section 272.196—Recording fees should be paid by county.**

### Questions

1. When a parcel of land has been coded as provided for in C. 638, supra, should a certified copy thereof be recorded or filed in the office of the register of deeds?

2. From whom should the register of deeds collect his fee for recording or filing the same?

### Opinion

Both of these questions may be conveniently answered together. L. 1951, C. 638, Section 6, coded as (272.196), reads as follows:

> "When any parcel of land has been coded under the county code system, as provided in this act, the county auditor shall make a certified copy thereof and cause the same to be recorded in the office of the register of deeds."

In our opinion the county auditor should cause such certified copy to be recorded in the office of the register of deeds. The term "filed for record" has been defined by the legislature. See Section 645.44, Subd. 9, which was in effect at the time of the enactment of C. 638. Consequently, it would appear reasonable to presume that the legislature intended that such certified copy should be filed for record with the register of deeds.

I am not aware of any statute, nor has any been directed to my attention, which exempts the county from payment of the fees of the register of deeds for filing such certified copy. It, therefore, necessarily follows that the register of deeds should present a statement of his fees for recording a certified copy, as required by Section 272.196, to the county for payment.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Roseau County Attorney.
August 18, 1953. 373-B-15

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## 116

**Register of deeds—Registrar of titles—Recording—Resolution—Village council declaring that certain tracts or parcels of lands situated within the village are not served by public highway, road, or alley—Not entitled to record**—M. S. A. 507.29.

**Statement**

"A resolution which the Village Council of the Village of Golden Valley may wish to pass from time to time and cause to be filed with the proper recording officer of Hennepin County.

"From time to time people build homes on unplatted land which is served by what appears to be a public road, but which, in effect, is a private road or driveway. Later, they seek such maintenance as snow-plowing for these roads and the village encounters many problems. The purpose in filing a resolution of the above type would be to put purchasers of such land on notice of the fact that the land upon which they intend to build is not served by a public road and thus save both them and the council trouble in the future.

"In my own opinion there is no reason why the Register of Deeds or the Registrar of Titles should not accept and file such notice. It is perhaps a little unusual but, in my opinion, does contain material which is the proper subject of the recording statutes in that it puts prospective buyers on notice of what is a 'defect' of which they might well wish to be advised."

The resolution referred to reads as follows:

"BE IT RESOLVED by the Village Council of the Village of Golden Valley, that the Village Clerk be, and he hereby is, authorized and instructed to file the following notice in the office of the Register of Deeds, or Registrar of Titles, Hennepin County, Minnesota, as the case may be.

NOTICE

"Notice is hereby given that it has come to the attention of the Village Council of the Village of Golden Valley that construction of a building is being undertaken on the following described tract or parcel of land situated in the Village of Golden Valley, Hennepin County, Minnesota:

(Description of land)

"Notice is further given to all interested persons that said tract or parcel of land is not served by any public street, highway or alley and that there is no ingress or egress to or from said tract of land from any public street, highway or alley, and that any public street, highway or alley seeming or appearing to serve the above described tract of land, is a purely private road and that the Village of Golden Valley does not assume any obligation to build, maintain, or construct, or otherwise service any such private road or to maintain any right-of-way to furnish ingress to or egress from the above described tract of land.

"Passed by the Village Council this.....day of....., 1953.

.....
Mayor

Attest:.....
Village Clerk "

**Question**

"Should the Register of Deeds, or Registrar of Titles, accept and file such a resolution?"

**Opinion**

For the purpose of this opinion we shall assume that the resolution as finally adopted by the village council of Golden Valley will contain a legal description of the premises within the village in the space provided for such purpose, and that such resolution will be certified to by the proper village officers.

It does not appear that the village has or claims any interest in the premises constituting unplatted lands upon which homes will be built from time to time, or in any private road or driveway which may be provided for the convenience of certain persons for the purpose of providing access to an existing public highway.

The resolution does not purport to convey any interest in real estate, nor is the title to any real estate affected in any manner by such resolution. Such resolution is not entitled to be recorded under the provisions of M. S. A. 507.29.

We are not aware of any statutory provision nor has any been called to our attention which entitles the proposed instrument to be recorded or filed with either the register of deeds or the registrar of titles of your county. Accordingly, we answer the question, as above stated, in the negative.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Hennepin County Attorney.
September 9, 1953. 373-B-17-a

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# 117

**Sheriff — Compensation — Boarding prisoners — Entitled to $2 per day for boarding prisoners, M. S. A. 641.11, L. 1953, C. 296, but commissioner of highways may pay only $1.50 per day for boarding prisoners under M. S. A. 161.03, Subd. 22.**

**Statement**

By the provisions of Laws 1953, Ch. 296, which amends M. S. 1949, 641.11, the sheriff is entitled to receive from the county compensation for board and laundry of prisoners at the rate of $2 for each day or fractional day for each prisoner. This does not relate to counties covered by special law relating to this subject unless with consent of the county board.

M. S. 1949, 161.03, relates to the powers of the commissioner of highways. Subd. 22 of that section relates to fines and forfeited bail money from traffic and motor vehicle law violations collected from persons apprehended by the state highway patrol. In that subdivision it is provided that out of the fines and bail money aforesaid shall be paid to the counties all costs and expenses incurred by the county in the prosecution and punishment of persons arrested by the members of the highway patrol in cases where the county has not been reimbursed for the payment of costs and expenses by the person prosecuted. A limitation is placed upon such payment in this language: "* * but no claim shall be made exceeding $1.50 per day for board and lodging of a prisoner."

**Questions**

1. "May the Sheriff bill and collect from the county $2.00 per day for boarding prisoners prosecuted by the Highway Patrol, thereby obligating the county to pay 50c a day for each such prisoner?

2. "If the county must pay the additional 50c per day for prisoners prosecuted by the Highway Patrol, may the county refuse to accept such prisoners for boarding in its jail?"

**Opinion**

The right of the sheriff to collect $2 per day from the county for each day or fractional day for each prisoner is specific and unambiguous, as shown in Ch. 296, supra. That is his right.

The right of the commissioner of highways to pay the claim of the county is limited by Subd. 22 to $1.50 per day for the board and lodging of a prisoner. That is definite and unambiguous. The commissioner of highways cannot pay more than the law authorizes him to pay.

The county could not refuse to accept a prisoner committed to it by a court. The court has the determination when a prisoner is sent to jail and how long he shall be confined therein. It is not a money-making proposition. It is a part of the execution of the criminal laws.

CHARLES E. HOUSTON,
Assistant Attorney General.

Washington County Attorney.
June 10, 1953. 390-A-16

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## 118

**Sheriff—Mileage—For serving summons, warrants, writs or process issued by court of record—To be computed from place where court (district) is usually held**—M. S. 1953, Section 357.09.

**Facts**

"In Grant County a deputy sheriff lives in the village of Herman in the southwest part of the county and about 18 miles from Elbow Lake."

and this

**Question**

"When this deputy sheriff serves process in or about the vicinity of Herman, is he entitled to charge mileage from the Village of Elbow Lake or is his mileage limited to the actual number of miles that he travels from his home in the Village of Herman?"

**Opinion**

M. S. 1953, Section 357.09, which pertains to sheriff's fees and mileage, in part provides:

"The fees to be charged and collected by the sheriff shall be as follows, and no other or greater fees shall be charged for:

"(1) Serving a summons, warrant, writ, or any process issued by a court of record, $1.50 for each defendant served and mileage;

"* * * *

"(24) For services not herein enumerated, the sheriff shall be entitled to the same fees as for similar duties.

"When mileage is allowed the sheriff it shall be computed from the place where court is usually held and, except as otherwise specially fixed, shall be at the rate of 15 cents per mile for the first 30 miles of the total mileage and ten cents per mile thereafter."

Substantially the same language is contained in Revised Laws 1866, C. 70, Section 10, Revised Laws 1905, Section 2697 (1) (25), G. S. 1913, Section 5762 (1) (25), G. S. 1923, Section 6993 (1) (25), M. M. S., Section 6993 (1) (25).

Although the legislature has changed the amount which a sheriff may receive as mileage for serving process enumerated in Section 357.09 (1), the provision that the same "shall be computed from the place where court is usually held" has been a part of the statutory law pertaining to sheriff's fees and mileage since R. L. 1905. See paragraph number 25 of the above cited sections of R. L. 1905, G. S. 1913, 1923, and 1927.

For certain services a sheriff is entitled to receive payment for mileage based upon the number of miles necessarily traveled. Section 357.09 (11) (12). The legislature has placed no such limitation when computing mileage for serving process as prescribed in paragraph (1) of said Section 357.09. Under this section the mileage is to be computed from the place where the (district) court is usually held. In the instant case such court is held at Elbow Lake, and when process is served by the deputy sheriff mileage should be computed from Elbow Lake and not from Herman where the deputy resides. If the mileage is computed from Herman, the home of the deputy, instead of from Elbow Lake, the county seat, and on the basis of the number of miles traveled when serving process, then 18 miles (being the distance from Herman to Elbow Lake) would have to be added for process served in Ashby. Such a method of computation would lead to confusion and, in our opinion, is not warranted under the provisions of said Section 357.09.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Grant County Attorney.
May 20, 1954. 390-A-11

# 119

**Sheriff—Radio telephone service—County Board is authorized to provide the sheriff with radio telephone facilities if required for the performance of his duties. Radio telephone facilities provided as a utility service does not come within M. S. 1949, Section 375.21, so as to require competitive bidding.**

### Facts

The county is considering the matter of making available to its sheriff a radio telephone system in connection with his law enforcement duties. Radio telephone facilities, if contracted for, will be furnished by the Northwestern Bell Telephone Company. The proposed contract which you have submitted for our consideration in substance provides that the telephone company will furnish, install and maintain the requisite facilities in accordance with a schedule of rates including installation and termination charges as set forth in the contract; that the county will obtain the requisite permits from the Federal Communications Commission to construct and install the facilities; that the county will furnish an antenna mast, the space required and provide the requisite power and that the county will also assume responsibility for the control and operation of the equipment.

In connection with the foregoing, you have in substance asked the following

### Questions

1. Is the county authorized to provide radio telephone facilities for the use of the sheriff?

2. In order to provide such radio telephone facilities, is it necessary that bids be called for under M. S. 1949, Section 375.21?

3. May the county board properly enter into a contract which might run for five years or more providing the agreement may be terminated by either party at any time?

### Opinion

We think that the county board is authorized to furnish the sheriff of your county with radio telephone service if it is required in the performance of his duties. Opinion of the Attorney General printed No. 166 in the 1950 Report.

It appears from the proposed form of contract that the telephone company will furnish the county a utility service as indicated in paragraph 6 of the proposed agreement. Said paragraph 6 reads as follows:

> "The rates and regulations provided by this agreement will be superseded by the Telephone Company's filed tariffs at any time that Mobile Radio-telephone Service of the type covered hereby is made available to the public at regularly established rates and regulations,

in which event the Applicant will have the option of continuing the service at the then authorized rates and regulations or of discontinuing the service without the payment of a termination charge."

If the county is in fact contracting for a utility service, then it is our opinion that M. S. 1949, Section 375.21, has no application thereto. However, the proposed agreement does provide that the county will furnish, install and maintain an antenna mast for use in connection with the radio telephone service. If the antenna installation exceeds the amount prescribed in Section 375.21, it is our view that the county shall comply with the provisions of that section in procuring and installing said item.

In reply to your third question, see opinion No. 66, 1954 Report, dated January 23, 1953, and the case of Manley v. Scott, 108 Minn. 142, 121 N. W. 628, cited therein.

We have not reviewed any provisions of the proposed contract submitted except those to which reference has been made.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Itasca County Attorney
January 28, 1953. 390-a-17

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## 120

**Village trustee—Salary—Village council may not enter into arrangement with village trustee whereby trustee, in order to keep his income from other sources within limits to qualify for U. S. Government retirement benefits, agrees to serve for less compensation than that fixed by council for other trustees**—M. S. 1949, Section 412.181, as amended by L. 1951, C. 378; see also L. 1953, C. 49.

**Facts**

"One of the trustees of the Village of Richfield is a retired air force officer who now receives certain retirement benefits from the United States Government including premium-free life insurance. In order to continue to qualify for such insurance he must keep his income from sources other than his retirement pay below $1,000. In order to do this he desires to take less than the full compensation provided for the other village trustees of Richfield.

"The Village of Richfield falls within the assessed valuation and population classifications set out in M. S. A. 1949, Section 412.181, Subdivision 2. No election of the kind authorized in Section 1 of Chapter 49, Laws of 1953, has been held to determine a salary for village councilmen. To date no resolution has been passed by the council setting the salaries of mayor and trustees at a rate different than that prescribed by the statute."

**Questions**

"1. Can a village trustee legally agree to serve for less compensation than other village trustees, so that the authorized salary which he declines to take will not become personal income?

"2. If the answer to the first question is in the affirmative, is such an agreement binding so as to preclude a later claim against the village for salaries which such person declined to take?"

**Opinion**

Under the facts stated, the compensation of trustees of the Village of Richfield is fixed by statute. See M. S. 1949, Section 412.181, as amended by L. 1951, C. 378; see also L. 1953, C. 49.

In 160 A. L. R., commencing at p. 490, appears an annotation on the question of the validity and effect of an agreement or arrangement by a public officer to accept less than the compensation fixed by law or of acceptance of reduced amount. At p. 491 the annotator says:

> "* * * according to the great weight of authority **a contract whereby a public officer or employee agrees to perform services required of him by law for less compensation than that fixed by law is contrary to public policy and void; and so also is the acceptance by him of less compensation than that fixed by law.**"

See also annotations as 70 A. L. R. 973 and 118 A. L. R. 1459; and see McQuillin, Municipal Corporations (3d Ed.), Vol. 4, Section 12.191; 22 Minn. Law Rev. 889; 24 Minn. Law Rev. 580; and cases therein cited.

The majority and minority views on this question are stated in **Ostraum v. City of Minneapolis**, 236 Minn. 378, 53 N. W. 2d 119. That was an action brought to recover overtime pay for services performed by the plaintiff as a laborer for the City of Minneapolis. During the period of time involved, an ordinance of the city provided for overtime pay to laborers in plaintiff's class. During this period, and with knowledge of the ordinance involved, plaintiff accepted without objection a sum less than the one prescribed under the ordinance. The trial court held that, under the facts of the case, the plaintiff was estopped from claiming more. On appeal the Supreme Court affirmed. After referring to the disagreement in the authorities as to whether an employee of a municipal corporation may waive, or be estopped by his conduct from asserting, his right to compensation as prescribed by the city ordinances, the Supreme Court held that, under "the peculiar facts of this case" and in "view of these circumstances, * * * the ordinary principles of estoppel and waiver apply." The court pointed out that **in that particular case** there was no public policy "sufficient to prevent plaintiff from being estopped to press his claim for overtime wages due him." With reference to the peculiar facts of the Ostraum case, the Supreme Court said:

> "* * * We are of the opinion, even assuming that the public-policy argument is controlling, that there is no such policy here."

The earlier Minnesota cases of **Nelson v. City of Eveleth,** 197 Minn. 394, 267 N. W. 261, and **Pratts v. City of Duluth,** 206 Minn. 557, 289 N. W. 788, are to the effect that the agreement of an officer or employee, in time of economic depression or other emergency, to accept a deduction or to donate or contribute part of his salary to the city is valid and is not against public policy and precludes any recovery of the amount so deducted or contributed. However, **the situation here considered** is entirely different and distinguishable from the situations considered by the court in the three Minnesota cases cited.

In 43 Am. Jur., Public Officers, Section 373, p. 157, it is stated, among other things, as follows:

> "* * * the courts, with some exceptions, declare invalid as against public policy a contract or agreement by a public officer to render services for a different compensation than that provided by law, whether the stipulated compensation is less than the legal allowance or greater than the compensation fixed by law * * * . Agreements of this character are invalid, whether made by the officer with a private individual or association, or with another officer or public body.
>
> "The fact that the agreement to take less compensation is entered into before the legal compensation has been fixed does not render the agreement any less invalid.* * *
>
> "The rule of public policy which invalidates agreements to render official services for a compensation less than or different from that fixed by law has reference to services yet to be performed."

In **Lamper v. City of Dubuque,** 237 Iowa 1109, 24 N. W. 2d 470, the Iowa Supreme Court held that an express or implied agreement or arrangement between a police matron and a city, whereby the matron was paid and accepted less than the statutory salary, was contrary to public policy and void and did not bar the matron from recovering the unpaid portion of the statutory salary where the reduction in salary was not due to economic or financial difficulties confronting the city. In the course of its opinion the Iowa Supreme Court said:

> "In 22 R. C. L. 538, section 235, is the statement: 'As a general rule an agreement by a public officer to render the services required of him for less than the compensation provided by law, is void as against public policy.'
>
> "Under a like headnote to an annotation following Werner v. Hillman Coke & Coal Co., 300 Pa. 256, 150 A. 471, 70 A. L. R. 967, 971, et seq., decisions supporting the note from twenty-one jurisdictions are listed and commented on. The reasons back of the rule are thus stated in Crutcher v. Johnson County, Tex. Civ. App., 79 S. W. 2d 932, 933; 'It is to be presumed that the Legislature, in fixing the salary to be paid to those who filled the various public offices of this state, did so with due regard to the nature of the service and the character of the individual

needed to fill the office, and the type of officer that could be obtained for the salary offered. If a candidate for public office is permitted to obtain appointment or election by a promise to serve for less than the amount fixed by the Legislature, or if, after having obtained appointment or election, he is permitted to more securely entrench himself in office by such a promise and thus bring about his reappointment or re-election, such practice will ultimately result in the virtual auctioning off of official positions to the lowest bidder, and the obtaining of the least efficient employees to fill the positions. Those capable of earning the salary fixed by the statute, and of the type contemplated by the Legislature, will be eliminated from such competitive bidding, so that none but the inefficient will be available for selection to fill the offices. Official morality and public policy alike prohibit the undermining of the public service by permitting officers to thus make merchandise of their official services'."

The **Ostraum** case, as I read it, does not reject the public-policy doctrine on this question in this state; that case merely held that the peculiar facts and circumstances of the case there considered did not present a proper one for the application of the public-policy doctrine.

If the public-policy doctrine is sound, and most courts say it is, the reasoning underlying the policy should apply whether the agreement or arrangement is entered into subsequent to rather than contemporaneously with or in advance of the appointment or election. See 43 Am. Jur., Public Officers, Section 372. See also 22 Minn. Law Rev. 889.

While the council of the Village of Richfield has the legal authority to fix the salaries of the mayor and trustees of the village for any year in an amount smaller than that prescribed by the applicable statute, yet I do not consider that the village council has the legal authority to fix the annual compensation of one trustee in an amount different from that fixed for another trustee.

It is my view that the council of the Village of Richfield is without legal authority to enter into any agreement or arrangement, express or implied, with the trustee involved for the purposes stated in your inquiry. In the particular circumstances presented, your first question is answered in the negative.

Since your second question is expressly made dependent upon an affirmative answer to your first question, we do not consider your second question.

LOWELL J. GRADY,
Assistant Attorney General.

Richfield Village Attorney.
January 27, 1954. 471-K

OFFICERS AND EMPLOYEES

# 121

**Pensions—Policemen's Relief Association—City's general and special funds distinguished from Association's general and special funds—Where special fund of Association is insufficient to pay pension, there is no authority for City to make payment thereof out of City's general fund; if Association has moneys in or available to its general fund, sufficient amount thereof may be transferred to Association's special fund to pay pension until tax receipts restore special fund.**

**Facts**

"The city of Thief River Falls is a city of the fourth class and has adopted an ordinance establishing a Policemen's Relief Association under M. S. A. 423.41 et seq.

"One of its policemen retired some months ago and he is receiving a service pension under 423.55. Now, the funds for payment of this service pension, the special fund as designated in 423.50 and 423.51, have been exhausted.

"The ordinance establishing the association was passed on January 11, 1949.

"There was no association existing in the city prior to the enactment of that ordinance.

"The city levied its first tax in the amount of one-tenth mill in October, 1949, and has levied one-tenth mill in each year after that.

"There are sections in the Laws of 1895, Chapter 8 (169-172), authorizing a Policemen's Relief Association but no such association was ever organized.

"The Articles of Incorporation and By-Laws have nothing covering this situation."

**Question**

"[a] Is the city of Thief River Falls authorized to make payment of this pension out of its general fund until such time as funds are made available in the special fund for resumption of these pension payments,

or [b] is there any other source from which these payments can be made?"

**Opinion**

The question presented, so far as I can find, has never been considered by our Supreme Court or by the Attorney General. However, analysis of the legal relationship between the City of Thief River Falls, a municipal corpo-

ration (hereinafter called the "City"), and the Thief River Falls Policemen's Relief Association (hereinafter called the "Association") discloses, without too much difficulty, the answer to your inquiry.

We assume, for the purposes of this opinion, that the pensioner involved possessed all the qualifications for the allowance of the service pension involved and that the same was duly granted to him by the Association.

L. 1947, C. 624, now coded as M. S., Sections 423.41-423.62, authorizes the police department of any city of the fourth class employing five or more regular and fully paid policemen to maintain a policemen's relief association "which shall be duly incorporated under the laws of this state." Section 423.41. The incorporation and maintenance of an association thereunder must first be authorized "by an ordinance approved or adopted by the unanimous vote of the governing body of said city." Id.

An association so authorized to be maintained and required to be incorporated is permitted to govern and manage its affairs in accordance with its own articles of incorporation and by-laws, **"subject, however, to the regulations and restrictions of Sections 423.41 to 423.62** and other laws of this state pertaining to corporations; not inconsistent herewith." Section 423.42.

Articles of incorporation of the Association were filed in the office of the Secretary of State on July 15, 1949. Thereby the Association's corporate life commenced as of August 10, 1949. Its duration is perpetual.

The Association is a **private domestic corporation.**[1] That character is not changed or affected by the circumstance that the Legislature, for obvious reasons, requires as a condition precedent to incorporation of an association of the type here involved, the adoption of the enabling ordinance by the governing body. The management of the affairs of the corporate Association is vested in its Board of Directors. Section 423.45. Among other officers, the Association must have a secretary and a treasurer. Thus, we start with the proposition that the City and the Association are separate and distinct corporations. One is a public municipal corporation; the other is a private domestic corporation. Except in respect of the tax levy hereinafter referred to, the city has no control or supervision over, or voice in, the management of the affairs of the corporate Association. Full charge of, and complete responsibility for, the control and management of all funds coming into the possession of the Association is lodged with the Association. Section 423.49. The Legislature has required the Association to keep moneys received by it in two separate and distinct funds — (1) its "special fund" and (2) its "general fund."

> "* * * All money received from the city * * *, including wage deductions from the basic pay of policemen, shall be deposited in the special fund and shall be expended only for the purposes hereinafter authorized. All money received from other sources shall be deposited in the general fund, and may be expended for any purpose deemed proper by such association." Section 423.50.

[1]The Association was incorporated as a social domestic association in 1949 under what was then M. S. 1949, Sections 309.01 to 309.09. Cf. L. 1951, C. 550, Section 78, coded as M. S. 317.69.

Money received by the Association and by it deposited in its special fund may be disbursed **only** for the three purposes expressly enumerated in Section 423.51, to-wit:

> "(a) For the relief of sick, injured and disabled members of the association, their widows and orphans.
>
> "(b) For the payment of disability and service pensions to members of such relief associations.
>
> "(c) For the payment of salaries and expenses of its officers and employees, and the expense of operating and maintaining such relief association, including the premiums on the official bonds of its officers and employees."

When the Legislature referred in Section 423.50 to "money received from the city * * * , including wage deductions from the basic pay of policemen," it referred to the proceeds of the tax provided for in Section 423.47 and the policemen's pay roll deductions prescribed in Section 423.48.[2]

M. S. 423.47, in its portion here material provides:

> "The city council * * * **may** each year, at the time the tax levies for the support of the city are made, and **in addition thereto,** levy a tax for the benefit of the special relief fund of such policemen's relief association of one mill on all taxable property within such city, **until the balance in said special fund * * * has reached the sum of $50,000,** and **thereafter said levy may be reduced** by such city to a sum sufficient to maintain the balance in said special fund at not less than $50,000."

The statute last cited also provides that the tax levied thereunder shall be certified to the county auditor and the tax shall be collected and payment thereof enforced in like manner as state and county taxes are paid. When the tax so levied is collected, the county treasurer is required by the statute to pay the same to the treasurer of the Association. Thus, the Legislature has prescribed that the municipal tax levy procedures and the county tax spreading and collection devices shall be utilized for the benefit and purposes of the special fund of the Association.

That the Legislature intended by Section 423.51 that disbursements for the payment of relief benefits, pension payments, and the Association's administrative expenses specifically enumerated therein should be made out of, and only out of, the special fund admits of no serious question. Yet, the only Association receipts required to be deposited by it in its special fund are those received by it from the proceeds of the levy made by the City under Section 423.47 and the three per cent pay roll deduction from the basic salaries of policemen under Section 423.48.

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[2]The first portion of Section 423.48, here material, provides:

> "In addition, and only if such tax [prescribed by Section 423.47] is levied, the city treasurer, finance commissioner or other officer charged with the responsibility of the city's finances, shall, each month, deduct from the salary of each policeman of such city subject to the provisions of Sections 423.41 to 423.62, three per cent of the basic pay of all such policemen of such city, and transfer the total thereof to the treasurer of the special fund of the policemen's relief association * * *."

With these preliminaries in mind, we consider first that portion of your inquiry which raises the specific

**Question**

(a) Is the City "authorized to make payment of this pension out of its general fund until such time as funds are made available in the special fund for the resumption of these pension payments"?

This specific question is answered in the negative.

The City operates under L. 1895, C. 8. Section 87 thereof makes provision for the "general fund, into which shall be paid all moneys not specifically designated as belonging to any particular **fund**, and (1) from which there may be drawn to be credited to any **such fund**, (2) or for such other purposes as may be designated by law or (3) authorized by the city council".[3] The phrase "such fund" refers back to the phrase "any particular fund". Assuming, without indicating, that clause (1) authorizes transfers of moneys from the general fund to a particular fund, it means the particular funds of the City, such as the Permanent Improvement Fund, the Permanent Improvement Revolving Fund, the Park Fund, and the Library Fund. It does not authorize a transfer of moneys from the City's general fund to a special fund belonging to the private corporate Association in the circumstances here considered. Clause (2) is likewise inoperative here, for the reason that the Legislature has prescribed that the service pension shall be payable out of the special fund of the Association and not out of the general fund of the City. Clause (3), while broad in its statement, is limited by the implicit requirement that **any** expenditure of general funds of the City authorized by the city council must find warrant, express or implied, in some statutory or charter provision.

The service pension here involved is, by express legislative direction, payable out of the special fund of the corporate Association. There is no contractual relationship between the pensioner involved and the City, at least so far as his right to a service pension is concerned. The obligation to pay the pension arises by virtue of statute and not by virtue of contract. The Legislature has imposed **the obligation to pay the pension** upon the Association's special fund. **Lage v. City of Marshalltown**, 212 Ia. 53, 235 N. W. 761, was an action at law against the defendant city to recover judgment for the balance due on policemen's pensions. The Iowa Supreme Court held that the defendant city, as such, was not liable for the payment of the pensions there involved. Considering statutes somewhat similar to those here involved, the Iowa Court said:

> "* * * **The pension may be paid only out of the fund authorized by the statute and maintained in the manner therein directed.**"

We consider next that portion of your inquiry which raises the general

[3]Numbers in parentheses and underscoring supplied.

**Question**

(b) "Is there any other source from which these payments can be made?"

(1) No funds of the City are usable for the purposes mentioned.

(2) We have given careful consideration to L. 1895, C. 8, to ascertain whether any provisions thereof authorize the issuance of warrants in anticipation of the collection of the tax levy made under Section 423.47 and now in process of collection. We have been unable to find any such provision; nor have we been cited to any provision suggesting that such tax-anticipation warrants may be legally issued.[4]

(3) This is not to say that the pensioner involved is not without his rights in the matter. On the contrary, I think the pensioner has some definite legal rights in respect thereof. See **Stevens v. Minneapolis Fire Department Relief Association,** 124 Minn. 381, 141 N. W. 35. See also 23 Minn. Law Rev. 540, and cases therein cited. I say merely that his right to the payment of the monthly installments of his pension as those installments mature is not an enforceable **money demand against the City as such or against any of the funds of the city.**

Analysis of the material provisions of Section 423.47, hereinabove quoted, in the light of the entire subject matter, purposes, and objects of M. S. 423.41-423.62, strongly suggests the conclusion that the Legislature intended that, until the special fund of the policemen's relief association "has reached the sum of $50,000," the levy of the one-mill tax prescribed by Section 423.47, although stated in permissive form, is mandatory. If the Legislature had intended the one-mill levy to be merely discretionary with the council, it would have been completely needless for the Legislature, in the continuation of the same sentence, to expressly authorize that when the fund reached $50,000, the levy "thereafter * * * **may be reduced**" to a sum to maintain at least a $50,000 balance in the special fund. See Attorney General's opinion dated August 6, 1951 (file 519c).[5] **Aberle v. Faribault Fire Department Relief Association,** 230 Minn. 353, 41 N. W. 2d 813, suggests the liberality with which statutes of the type here involved are construed. The question as to whether the provision as to the tax levy under Section 423.47 is mandatory can, of course, be determined in a mandamus proceeding to compel such levy in the future. See **Lage v. City of Marshalltown,** supra, and **Mathewson v. City of Shenandoah,** 233 Ia. 1268, 11 N. W. 2d 571. But that is a matter more properly referable either to the attorney for the pensioner involved or to the attorney for the Association, or both. However, it occurs to me that the practical problem involved is not of such magnitude that it may not be composed without too much difficulty or delay. If the Association has any moneys in its general fund which have been received with no conditions as to expenditure thereof, or if moneys are available to the Association for its general fund, no sub-

[4]We have not overlooked the parenthetical matter appearing in Section 119 of C. 8, L. 1895. We consider the same inapplicable to the situation here involved.

[5]While the statutes involved in the enclosed copy of Attorney General's opinion had a legislative history that Sections 423.41-423.62 do not have, yet the cases cited in the August 6, 1951, opinion are equally applicable to the statute here considered.

stantial reason suggests itself why unencumbered moneys in the Association's general fund cannot, in the judgment and discretion of the Association's board of directors, be transferred therefrom to its special fund so as to permit payment of pensions as authorized by Section 423.51 (b).

LOWELL J. GRADY,
Assistant Attorney General.

Thief River Falls City Attorney.
June 4, 1953. 785-J

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# 122

**Pensions—Retirement—Veterans' preference—The Pension Act applicable to the City of Minneapolis, in so far as it requires compulsory retirement of certain city employees at the age of 65 is subject to the terms and conditions of the Veterans Preference Law and veterans cannot be compelled to retire under the pension act but can only be separated from the service of the city in conformity with the Veterans Preference Law**—M. S. A. 422.01, et seq.

## Facts

Certain employees of the City of Minneapolis who are veterans as defined by the Veterans Preference Act, M. S. A., Section 197.45 et seq., will soon reach the age of 65. These city employees are within the coverage of the Municipal Employees Pension Act applicable to the City of Minneapolis, M. S. A., Sections 422.01 et seq., as being in the contributing class and are not employees of the Municipal Building Commission.

Section 422.04 of that act reads in part as follows:

> "* * * Subject to the limitations stated in Sections 422.01 to 422.23, any employee in the contributing class who shall have attained the established age for retirement shall be entitled to retire, and any such employee who shall remain in the service thereafter, shall be retired upon reaching the age of 65 and receive a service allowance as specified in Sections 422.01 to 422.23; provided, that the compulsory retirement age of 65 shall not apply to employees of the Municipal Building Commission. * * * "

In connection with the foregoing, you ask the following

## Question

Under the terms and provisions of the Pension Act referred to, is the city compelled to retire the employees who are war veterans upon reaching the age of 65?

**Opinion**

Your letter clearly indicates that the employees referred to are within the coverage of the Veterans Preference Law, M. S. A. 197.45, et seq. That act reads in part as follows:

> "197.45. Subd. 2. * * * honorably discharged veterans shall be entitled to preference in appointments, employment and promotion over other applicants therefor, and the persons thus preferred shall not be disqualified from holding any position hereinbefore mentioned on account of his age or by reason of any physical disability, provided such age and disability does not render him incompetent to perform properly the duties of the position * * * "
>
> "197.46. * * * No person holding a position by appointment or employment in * * * cities * * * , who is an honorably discharged veteran, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing. * * * "
>
> "197.47. The provisions of Sections 197.45 and 197.46, known as the 'Veterans' Preference Law,' shall apply to and govern any appointment, employment, promotion, and removal of all employees of the state and of all other governmental agencies within the state enumerated in said sections, notwithstanding any provision to the contrary in any other existing law or in any city charter relating thereto."
>
> "197.48. No provision of any subsequent act relating to any such appointment, employment, promotion, or removal shall be construed as inconsistent herewith or with any provision of Sections 197.45 and 197.46, unless and except only so far as expressly provided in such subsequent act that the provisions of these sections shall not be applicable or shall be superseded, modified, amended, or repealed. Every city charter provision hereafter adopted which is inconsistent herewith or with any provision of these sections shall be void to the extent of such inconsistency."

Sections 197.47 and 197.48, supra, were initially enacted in 1931, at which time the compulsory retirement age of the city employees covered by your letter was 68. By L. 1933, C. 328, that compulsory age was extended to 70, and by L. 1943, C. 62, it was changed to 65 (M. S. A., Section 422.04).

The enactment of Sections 197.47 and 197.48 as L. 1931, C. 347, had the effect of amending the pension act then applicable to the City of Minneapolis (now Sections 422.01, et seq.), and making it subject to the provisions of the Veterans Preference Law. See **State ex rel. Kangas v. McDonald**, 188 Minn. 157, 246 N. W. 900. L. 1933, C. 328 and L. 1943, C. 62 were reenactments of earlier provisions of the pension act referred to. M. S. A., Section 645.38, reads as follows:

"A law which reenacts the provisions of an earlier law shall not be construed to repeal an intermediate law which modified such earlier law. Such intermediate law shall be construed to remain in force and to modify the reenactment in the same manner as it modified the earlier law."

Under this rule of statutory construction, the 1933 and 1943 reenactments of the provisions of the pension act are also subject to the provisions of the Veterans Preference Law.

The Veterans Preference Law is one especially applying to ex-service men. Although it applies only to a special class the constitutionality thereof has been sustained in numerous cases and can no longer be questioned in this state. It has been the laudable purpose of the Minnesota lawmakers, declared on numerous occasions, to give a well earned preference in appointments in the public service to those who have honorably served the nation in its time of peril. See **State ex rel. Kangas v. McDonald**, supra.

The pension act applicable to the City of Minneapolis is a law general in its application and though it was re-enacted in 1933 and 1943, it cannot be construed to supersede an earlier act, special in its nature, such as the Veterans Preference Law, unless such was the manifest intention of the legislature. We do not think that in 1933 or 1943 the legislature intended to in any way interfere with or abrogate the Veterans Preference Law. For if it did, it would have said so. See **Phelps v. City of Minneapolis**, 174 Minn. 509, 219 N. W. 872.

It is therefore our opinion, as applied to the facts contained in your letter, that the city cannot compel the retirement of war veterans who have reached the age of 65 and such employees of the city cannot be separated from their city employment against their wishes except in conformity with the terms and conditions of the Veterans Preference Law. For the reasons expressed herein, it is our opinion that the retirement provisions of the pension act applicable to the city of Minneapolis are subject to and governed by the Veterans Preference Law.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Minneapolis City Attorney. 59-A-33-
May 19, 1953. 85-a

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## 123

**Residence — Interest in contracts — Member of liquor commission appointed by council need not be a resident of city—Question of validity of purchase of land by city from manager of liquor store considered—Kotschevar v. Township of North Fork, 229 Minn. 234, 39 N. W. (2d) 107 controlling.**

**Facts**

The city of Robbinsdale operates under a Home Rule Charter. The city council has appointed a liquor commission who acts in an advisory capacity to the council; one of the members of this commission is not a resident of the city although he does have a business which is located within the city. This commission is primarily an advisory body and has not been created by any ordinance of the city. There is no restriction with respect to the qualifications of the members who serve upon such advisory commission.

**Question**

**Is it legal for a nonresident to serve as member of said commission?**

**Opinion**

We assume that the council in appointing said commission acted by authority of Section 39 of the city charter which in part reads as follows:

> "Employees shall be appointed by the council upon a basis of merit and fitness alone and shall be removed by it only for sufficient cause after a reasonable notice and hearing."

We do not find any provision in the city charter which requires that employees of the city appointed by the council shall be residents of the city.

The weight of authority supports the view that residence of an employee within a municipality is not essential to such municipal employment. See 120 A. L. R., p. 672; 42 Am. Jur. "Public Officers," Section 49, p. 914; **State v. Marsh** (Neb.), 5 N. W. (2d) 206.

From the foregoing, we answer the question here considered in the affirmative.

**Facts**

The manager of the liquor store while employed in that capacity, was the owner of a tract of land situated within the city which the city desired to purchase. The council and the manager of the liquor store agreed upon the purchase price of this particular tract of land, which was thereafter purchased by the city; the deed has been executed conveying this tract of land to the city, and the purchase price has been paid.

**Question**

Was it legal for the city to purchase a tract of land from the manager of the liquor store by virtue of the provisions contained in Section 88 of the city charter?

**Opinion**

It appears from the facts presented that the real estate transaction between the manager of the liquor store and the city has been closed. The deed has been executed and delivered to the city and accepted by it. The

consideration has been paid. In view of the fact that the deal has been closed, it would now appear that the question is a moot one. We do not deem it advisable to express an opinion upon a moot question. However, as bearing upon the question of the consideration which has been paid by the city for the purchase price of this tract of land, we direct to your attention a recent case entitled: **Kotschevar v. Township of North Fork,** 229 Minn. 234, 39 N. W. (2d) 107.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Attorney for City of Robbinsdale. 59-a-29
October 16, 1953. 90-E-6

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# 124

**Salary — Increase — Employees on strike — City is without authority to grant a pay increase retroactively—Terms of employment and the regulations of the city comprising a part of the terms of employment relating to leaves with and without pay**—Laws 1951, Ch. 146.

**Facts**

The board of water, electricity, gas and power commissioners of Austin is a separate legal entity under the city charter with powers of self-government. The board manages the local utilities and employs the necessary personnel therefor.

A dispute has arisen between the employees of the board regarding working conditions, hours and wages. In connection with this dispute the employees of the board have acted as follows: On Monday morning, June 22, the employees of the plant started to conduct what they called a union meeting. They previously informed the board last week that they were going to have a meeting at 7:00 A.M. Monday morning. They were in the office of the union at the time your letter was written and were there all day Monday, June 22, and claiming that they are holding a union meeting and not on strike. There has been no violence and no picketing. Power is being generated at the power plant and the shift operators are reporting for work regularly. The plant is operating with a skeleton crew and is giving limited service.

One of the complaints of the employees of the board is that they want additional pay and when the additional pay is decided upon, it should be made retroactive for a period of a year.

**Questions**

"1. Do the activities outlined above constitute a strike and do they fall within the prohibition of public employees striking as forbidden by Chapter 146, 1951 Session Laws?

"2. Would it be legal for the Board to agree to make pay retroactive for the past year? To illustrate: If the pay were increased $5 a week, could that be made retroactive and the employees receive a lump sum of $250 right away and then $5 a week increase in the future?

"3. Would the Board be justified in docking their pay for the days they were absent at this so-called union meeting? Is it mandatory for the Board to dock their pay for their absence on these days or is it a discretionary matter?"

**Opinion**

L. 1951, C. 144, prohibits any person holding a position by appointment or employment in the government of the State of Minnesota or in the government of any one of the political subdivisions thereof to strike or participate in a strike. "Strike" is defined in that act as:

"* * * 'strike' shall mean the failure to report for duty, the wilful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment, for the purpose of inducing, influencing or coercing a change in the conditions or compensation or the rights, privileges or obligations of employment."

A public employee who violates the provisions of the act abandons and terminates his appointment and employment and no longer holds such position, nor is he entitled to any of the rights or emoluments thereof, except if he is appointed or reappointed as the act provides. See L. 1951, C, 145, Sections 4, 5, and 6.

Whether a person is in violation of the act prohibiting a public employee from striking necessarily involves questions of fact. The Attorney General passes on questions of law, not on questions of fact. The matter of determining if the foregoing statutory provisions have been violated is for the board. If it decides that certain employees have violated the act, Section 6 thereof provides the means of giving the employees a hearing so that it may be determined whether such employee did or did not violate the act.

Your second question is answered in the negative. The present employees of the board have been paid on the basis of a wage scale previously fixed. To now retroactively increase those wages on the basis of the facts contained in your letter would, in our opinion, be conferring a gratuity on such employees, the payment of which is unauthorized. See **Mollet v. Hoffman**, 210 Minn. 88, 297 N. W. 164.

The answer to your third question depends upon the terms of employment presently existing between the board and its employees. Such terms are determinative of the wages and the working conditions of those employees. If the board has promulgated rules and regulations governing leaves of absence with and without pay, such rules and regulations comprise a part of the terms of employment. Unless such terms

of employment provide for the payment of wages to the employees of the board when they are absent from work, under the circumstances outlined in your letter, the board is unauthorized to pay for services not rendered, for such payments, in our opinion, would constitute a gratuity.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Austin City Attorney. 59-a-41
June 30, 1953. 270-D

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OFFICES

## 125

**Incompatible — City assessor and Deputy City Clerk — Deputy city clerk, appointed by city clerk under home rule charter who is not a member of city council or board of equalization is not incompatible with city assessor—Charter provisions of city of Chisholm construed.**

**Facts**

"Recently the City Assessor of this city died while in office and leaving an unexpired term of office up until the 31st of December, 1953. The City Council is desirous of having our Deputy City Clerk serve the position as Assessor for the balance of this term, if the same is possible. They wish, however, to still have him serve as Deputy Clerk while holding the position of Assessor."

**Question**

"May the same person hold the appointive position of assessor and also that of deputy city clerk in the city of Chisholm and draw appropriate remuneration for such positions?"

**Opinion**

The city clerk and assessor are appointed by the city council under authority of Section 36 of the city charter. The city clerk is not a member of the city council.

The clerk with the approval of the city council may appoint a deputy. Section 48.

It does not appear from the provisions of the city charter that the functions and duties of the city assessor and a deputy city clerk are inconsistent so that the performance thereof would result in a conflict of duty to the extent that the incumbent of one could not discharge with fidelity and propriety the duties of both; consequently, in our opinion the positions of

deputy city clerk and city assessor are not incompatible, and may be held by the same person. See **State ex rel. Hilton v. Sword**, 157 Minn. 263, 196 N. W. 467.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Chisholm City Attorney.
May 19, 1953. 358-e-2

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## 126

**Incompatible—Justice of the Peace and Deputy City Clerk are not incompatible.**

**Question**

Is there any incompatibility between holding the office of Justice of the Peace of the City of Fairmont and that of Assistant City Clerk?

**Answer**

The City Clerk of the City of Fairmont is not a member of the City Council. Under Chapter V, Section 34, of the Charter of the City of Fairmont, the City Clerk and the Deputy City Clerk are appointed by the City Council.

It is therefore our opinion that the offices of Justice of the Peace of the City of Fairmont and Deputy City Clerk are not incompatible.

IRVING M. FRISCH,
Special Assistant Attorney General.

Martin County Attorney.
August 10, 1953. 358-D-5

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## 127

**Incompatible—Municipal Judge—Special deputy sheriff.**

**Facts**

"The Village of Nashwauk has a Municipal Court organized under the General Municipal Court Laws of the State of Minnesota. The Municipal Judge who was elected and is qualified has been sworn in as a special deputy sheriff with his jurisdiction limited to the property of the M. A. Hanna Company who he serves as a special policeman."

**Question**

"Under the above circumstances, are the office of the special deputy sheriff and Municipal Judge incompatible?"

**Opinion**

The corporation mentioned is engaged in the business of mining iron ore within your county. As a corporation it might be proceeded against for a violation of law in the municipal court of the village of Nashwauk under the provisions of M. S. A., Section 630.15.

We assume that the deputized special deputy sheriff when serving as a special policeman would receive compensation for such services from the corporation mentioned and not from the village or county. It is also assumed that the judge of the municipal court of your village receives compensation for his services. M. S. A., Section 387.13, so far as here material, provides:

"* * * nor shall any sheriff or deputy sheriff be eligible to any other lucrative civil office, except village or city marshal."

The office of a municipal judge receiving compensation for such services comes within this prohibition.

Offices are said to be incompatible where the nature and the duties of the two offices are such as to render improper, from consideration of public policy, for one person to retain both.

"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.

Applying these principles of law to the facts here considered, together with the above statutory provisions, the question submitted is answered in the affirmative.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Nashwauk Village Attorney.
January 11, 1954. 358-B-2

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## 128

**Incompatible—Village trustee may not hold appointive position of village street commissioner at additional compensation — M. S. A. 412.311, 471.87, 471.88.**

**Officers and employees — Appointment — Village council may not delegate powers of appointment and tenure of nonelective officers, employees, and agents conferred by M. S. A. 412.111.**

**Question**

"1. Is a duly elected village trustee disqualified, by reason of incompatibility or otherwise, from holding the appointive position of Village Street Commissioner at such additional compensation as may be fixed by ordinance?"

**Opinion**

Your question is answered in the affirmative.

We are not furnished with sufficient factual information to ascertain whether the incumbent of the position of village street commissioner is an **officer** or an **employee** of the village, but in either event, the answer is the same.

If the position be considered as an office, the office of village street commissioner under the standard form of village government and that of village trustee are incompatible. See 5 Dunnell's Minnesota Digest (2d Ed.), Section 7995. See also Attorney General's opinion No. 413 in the 1910 Report, file No. 358-e-9.

If the position of street commissioner is considered as an employment rather than as an office, we must consider the provision of M. S. A. 412.311 reading as follows:

> "Except as provided in Sections 471.87 to 471.89, no member of a village council shall be directly or indirectly interested in any contract made by the council";

and also M. S. A. 471.87, which provides:

> "Except as authorized in Section 471.88, a public officer who is authorized to take part in any manner in making any sale, lease, or other contract in his official capacity shall not voluntarily have a personal financial interest in such sale, lease, or contract or personally benefit financially therefrom. Every public officer who violates this provision is guilty of a gross misdemeanor."

A contract of the type involved in your inquiry is not within the exceptions authorized in Section 471.88.

If a village street commissioner is to be employed, the village council will do the hiring. See M. S. A. 412.111. That arrangement will necessitate a contract of employment between the village, acting through its council, and the person appointed as street commissioner. A contract between a village councilman and the village of the type here considered is within the express prohibition of both M. S. A. 412.311 and M. S. A. 471.87 and is void. See **Stone v. Bevans**, 88 Minn. 127, 92 N. W. 520.

**Question**

"2. Is it the intent of M. S. A. 412.111 that the appointment and tenure of non-elective officers, employees and agents for the village shall be solely at the discretion of the council, or may the council by ordinance vest the appointment and tenure of such an officer, employee or agent in the Mayor alone?"

**Opinion**

The powers conferred by the legislature upon the village council by the terms of M. S. A. 412.111 are, in my opinion, nondelegable by the village council.

In **Jewell Belting Co. v. Village of Bertha**, 91 Minn. 9, 97 N. W. 424, the rule is stated thus:

> "The village council, under our statutes, is the governing body of the municipality, charged with the management of its affairs, legislative and administrative, and alone clothed with power and authority to enter into such contracts as are deemed necessary for the public welfare. The authorities very generally hold that such a body cannot in any case delegate to a member or committee thereof functions or prerogatives of a legislative or administrative character, or involving the exercise of judgment and discretion. * * * [Cases cited.]
>
> "Merely ministerial functions may be delegated to an officer or committee. Harcourt v. Common Council, 62 N. J. L. 158, 40 Atl. 690. But such power as requires the exercise of judgment and discretion must be performed by the body itself. Ministerial functions are those that are absolute, fixed, and certain, in the performance of which the board or officer exercises no discretion whatever."

See also 4 Dunnell's Minnesota Digest (2d Ed.), Section 6576, and Supps.

LOWELL J. GRADY,
Assistant Attorney General.

St. Paul Park Village Attorney.
November 3, 1953. 358-e-9

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ORDINANCES

## 129

**Cemeteries—Perpetual care and maintenance—Enforceability of ordinance requirement compelling owners of cemetery lots theretofore purchased to contribute to permanent care and maintenance fund.**

**Facts**

"The Village of Harris, Chisago County, Minnesota, owns a village cemetery which has been in use for over sixty years. The same is platted into lots and the plat is on file in the office of the Register of Deeds in and for Chisago County

"For many years, there was no ordinance regulating the care of this cemetery and in 1947 an ordinance was passed, a copy of which I enclose. You will note that the ordinance provides for a permanent care and improvement fund. Under this ordinance the purchase price

for the lots is set at a high enough rate to provide funds for the perpetual care of the grave lots in the future. However, there are several lots in this cemetery which were bought many years ago when the perpetual care provisions were not in force and many of the owners and descendants of owners have moved from the community, are unknown, or have died, with the result that these lots must be cared for at the expense of the Village.

"The deeds by which the lot owners took title from the time the Village cemetery was organized, contained the following clause: 'To have and to hold the same, subject to all the laws of this State now or hereafter enacted for the management and regulations of cemeteries in villages and also subject to all rules and by-laws of the said Village now or hereafter made for the regulation of the affairs of the same, or any part thereof.'

"The Village is now contemplating an ordinance which would forbid burials in any lots in said cemetery for which permanent care has not been provided. They base their right to enforce such an ordinance upon the clause from the deeds which is above quoted, and which provides that all cemetery lot owners are subject to rules and by-laws of the Village existing or enacted in the future.

"The Village Council indicates that a great number of purchasers of lots in the cemetery have now made provisions for perpetual care of the lots purchased, but that there are many lots for which such provisions have not been made, and they feel that when the last person of a family tree is buried in the lot, and no perpetual care has been provided for, the Village will be forced to care for these lots without reimbursement if the cemetery is to appear neat and presentable."

**Question**

"Would such an ordinance forbidding burial in lots in said cemetery for which no permanent care has been provided be enforceable?"

**Opinion**

The ordinance submitted by you was passed by the Harris village council on December 1, 1947. Among other things, it provides that after the passage of the ordinance the purchase price of cemetery lots shall be in the amounts therein set, which amounts are fixed with regard to the size of the lot. The ordinance prescribes that of the purchase price for each lot thereafter sold a stated portion of that purchase price "shall be set aside in trust" in the Permanent Care and Improvement Fund established by the ordinance, the proceeds of which are to be used for the perpetual care of the cemetery lots thenceforth sold. The ordinance further provides that after its passage owners of lots who acquired the same prior to the passage of the ordinance but "who had not paid into such" Permanent Care and Improvement Fund the specified sum for perpetual care of their respective lots shall be assessed a specified sum each year for the care of their respective lots.

If I understand your inquiry correctly, the village council now intends to enact an ordinance the effect of which would be to forbid burials in any of the cemetery lots purchased before December 1, 1947, unless the owner of the lot or the person desiring to have burial made therein pays into or contributes to the Permanent Care and Improvement Fund an amount sufficient to assure perpetual care for the particular lot in which the burial is to be made. While this condition may be raised by an ordinance for application to lots to be sold in the future, I take it that you are concerned with the **enforceability of such a condition or ordinance as applied to cemetery lots heretofore sold by the village.** If that is the question, I think it should be, and it is, answered in the negative.

While I have been unable to find any Minnesota case directly in point, **Mansker v. Astoria,** 100 Ore. 435, 198 Pac. 199, is authority for my view that the condition of the proposed ordinance could not be enforced against one who had purchased his cemetery lot before the ordinance embodying that condition is adopted. In the **Astoria** case the city owned the public cemetery and sold to the plaintiff the right of sepulture in a burial lot subject "to the laws of the state of Oregon, and the ordinances, rules, and regulations of the said grantor, now or **hereafter existing,** with reference to said cemetery * * * ." At the time of the conveyance, the city recognized the right of the lot owner personally to care for and maintain the lot. The Oregon court held that the city could not, by a subsequent rule, deprive the lot owner of the right to care for the lot, or compel her, against her will and consent, to provide a permanent fund for the perpetual care of the lot, the same being an unreasonable rule and one not contemplated by the contract of purchase. In that case the Supreme Court of Oregon said:

> "When the plaintiff purchased her lot the city recognized her right to care for and maintain the lot, for at that very time among the rules and regulations for the government of the cemetery were 11 rules 'concerning the improvement and the keeping of the grounds'; and these 11 rules assumed that purchasers were entitled to do the work of improving and caring for their lots. The plaintiff, as the owner of the right of burial is entitled to care for the lot where her dead are buried, and she may do so either in person or by her own agent. Nor can the city deprive her of this right without her consent. By the resolution of June 25, 1918, and the form of contract adopted by the cemetery commission, the city, as the cemetery proprietor, has in effect said to the plaintiff and to all others who purchased prior to the adoption of the endowment plan:
>
> 'You must agree that your lot shall be kept up under the park and lawn plan; you must agree that the work shall be done by the city, and not by yourself, nor by any other agent selected by you; you must agree that this work is to be done through all time; and you must agree perpetually to pay, for this work is never to be completed, but is to go on forever; and if you do not so agree and if you do not furnish the fund which the city thinks is necessary to earn through all time enough money to pay the expense of caring for your lot, the commission will refuse to grant you a permit for future interments in your lot.'

"These limitations attempted to be placed upon the rights of the plaintiff amount almost to a deprivation of such rights, and consequently are unreasonable and unenforceable. 5 R. C. L. 246. See, also, Monett Lodge v. Hartman, 185 Mo. App. 148, 170 S. W. 670.

"[11] The circumstances are not such as to make the attempted action of the cemetery commission a lawful exercise of the police power, broad though the scope of the police power is. Nor can the city say that the right to compel the application of the endowment plan was reserved to the city at the time of the conveyance of the lot to the plaintiff. The city is without power to bring the plaintiff's lot within the embrace of the endowment plan, unless the plaintiff consents."

See annotations in 32 A. L. R. 1406 and 47 A. L. R. 70. See also **Scott v. Lakewood Cemetery Association**, 167 Minn. 223, 208 N. W. 811.

LOWELL J. GRADY,
Assistant Attorney General.

Attorney for the Village of Harris.
June 30, 1954. 870-J

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## 130

**Constitutionality—City of Minneapolis requiring registration of persons convicted of crimes other than misdemeanors.**
**Minneapolis City Charter, C. 4, Section 5;**
**Minnesota Constitution, Article I, Section 7; Article I, Section 11;**
**Federal Constitution, Fifth and Fourteenth Amendments;**
**M. S. 169.09, 610.49.**

**Statement**

"I enclose herewith copy of a proposed ordinance providing for registration of persons convicted of crimes other than gross misdemeanors or misdemeanors, and request your opinion as to whether or not such an ordinance, if passed, would be valid and constitutional.

"This ordinance follows an ordinance which the City of St Paul has had for many years. Cincinnati and Miami have similar ordinances.

"I am unable to find any case precisely in point. In my judgment the serious question raised by this ordinance is whether persons who have committed felonies and come into the City of Minneapolis from outside thereof must register with the Chief of Police, be photographed and fingerprinted, and required to notify the Chief of any change of residence while in the city, although other persons who have not been convicted of felonies are not required to comply with the provisions of this ordinance. It might be claimed that such classification is arbitrary, fanciful and a denial of the equal protection of the law. Theoretically a man who has been convicted and punished for a crime has paid the

penalty and is entitled to the same rights as one who has not been convicted and punished for a felony. This ordinance is based on the theory that a man who has committed one serious crime is more likely to commit others."

The ordinance submitted may be summarized as follows: Section 1 prescribes that every "person who has been convicted * * * of any crime other than a misdemeanor, who comes into the City of Minneapolis from any point outside of such city with intent to remain in the City of Minneapolis for a period of twenty-four hours or longer, shall immediately" register with the chief of police of the city by giving a written statement to the chief containing the name, description, the stopping, lodging, or residence place of the registrant, and the nature of each crime of which the registrant has been convicted. Section 2 provides for the photographing and fingerprinting of the registrant. Section 3 imposes similar duties of registration upon every person residing in the city at the time the ordinance becomes effective who has been convicted "of any such crime other than a misdemeanor." Section 4 provides for notification of change of address of the registrant. Section 5 requires the chief of police to keep a permanent record relating to the information furnished by the registrant. Section 6 makes it unlawful to furnish false, untrue, or misleading information. Section 7 fixes the penalties for violations. Section 8 contains the declaration that the measure is "an emergency ordinance rendered necessary for the preservation of the public peace, health and safety."

**Question**

Would such an ordinance, if passed, be valid and constitutional?

**Opinion**

Our research has failed to disclose any reported case passing upon the constitutionality of an ordinance of the particular type here considered.

The task of attempting to determine the validity of an ordinance in the abstract is exceedingly difficult. The ordinance may be held to be constitutional as applied to a particular set of facts and unconstitutional as applied to a different set of facts. Constitutional issues are determined by reference to the particular facts and circumstances in which it is claimed that the legislative enactment is invalid. We are given no facts. Consequently, we cannot, and we do not, offer any categorical answer to the general question you submit. However, we consider the ordinance generally from the point of view of several constitutional provisions, taking up first the equal protection provision to which you refer.

Chapter 4, Section 5, of the Minneapolis City Charter provides that the "City Council shall have full power and authority to make * * * all such ordinances for the government and good order of the city, for the suppression of vice and intemperance, and **for the prevention of crime,** as it shall deem expedient." The proposed ordinance is clearly within this charter

authority, but, of course, the ordinance cannot legally conflict with the provisions of either the Federal Constitution applicable to state action or with the prohibitions of the State Constitution.

In **Dimke v. Finke**, 209 Minn. 29, 295 N. W. 75, we find the following:

> "Legislation which selects particular individuals from a class and imposes upon them special burdens from which others in the same class are exempt is class legislation, violative of the equal protection clause of the federal constitution and of the uniformity clause of the state constitution. Minn. Const. Art. 9, Section 1. (Cases cited.) These contitutional limitations do not curtail the power of the legislature to classify and to adopt different rules for different classes. **They both require, however, that the classification be not unreasonable, arbitrary, or discriminatory, but that it operate equally and uniformly upon all persons in similar circumstances** * * * ; **that it be reasonable and based upon actual differences** * * * (citing cases).
>
> **"Classification is, in the first instance, a legislative matter; and it must be borne in mind that 'there is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds.'** Middleton v. Texas P. & L. Co. 249 U. S. 152, 157, 39 S. Ct. 227, 229, 63 L. ed. 527. If the classification be based upon substantial distinctions which make one class really different from another, it is not violative of the constitutional provisions even though some inequalities may result."

The test, then, is whether there is a valid basis for the classification of persons to whom it is proposed to make the ordinance applicable. The ordinance differentiates between convicted criminals and others. Whether there is a reasonable basis for that classification is, in the first instance, for the legislative determination of your city council within the meaning of the rule above stated. The council may be justified in differentiating convicted criminals from others, having in mind the evils to which the ordinance is directed. Our legislature has differentiated between convicted criminals who are witnesses and others who are witnesses. Cf. M. S. 610.49. The fact that the proposed ordinance does not embrace all convicted criminals is no objection.The council might well conclude that there is no necessity, in order to accomplish the purposes for which the ordinance is designed, to make it applicable to persons convicted of crime prior to ten years before the passage of the ordinance.

If the ordinance is a legitimate exercise of the police power of the city, its enactment cannot be successfully assailed upon the ground that the ordinance is unconstitutional in that it deprives a person within its classification of due process of law either under the due process clause of the Fourteenth Amendment to the Federal Constitution or under Section 7, Article I, of our State Constitution. See **City of St. Paul v. Kessler**, 146 Minn. 124, 178 N. W. 171. Whether the ordinance is a legitimate exercise of the police power of the city depends upon an affirmative answer to these

two questions: (1) Do considerations for the government and good order of the city and for the prevention of crime therein make the ordinance either necessary or expedient? (2) Do the means selected have a real and substantial relationship to the object sought to be attained and the evil desired to be eliminated? The evil at which the ordinance is directed is sufficiently obvious to render unnecessary any extended generalizations with reference thereto. Similarly, the means selected appear to this writer to have a reasonable relationship to the mischief sought to be remedied. The imposition of special police measures upon a defined and reasonable class of society has analogies. Legislative enactments providing for the sterilization of criminals and insane persons have been upheld as constitutional against the objections of want of substantive due process. See **Buck v. Bell,** 143 Va. 310, 130 S. E. 516, discussed in 10 Minn. Law Rev. 343. **State ex rel. Freeman v. Zimmerman,** 86 Minn. 353, 90 N. W. 783, sustained as valid a regulation made by the commissioner of health of the City of Saint Paul requiring the vaccination of children as a condition precedent to their right to attend public schools.

**State v. Hovorka,** 100 Minn. 249, 110 N. W. 870, upheld as constitutional an act of the legislature regulating the business of pharmacy and, among other things, requiring pharmacists to register. In that case our Supreme Court said:

> "* * * The rights and liberty of the citizen are all held in subordination to that governmental prerogative, and to such reasonable regulations and restrictions as the legislature may from time to time prescribe."

See also **State v. Crombie,** 107 Minn. 171, 119 N. W. 660.

The question whether the ordinance may offend the prohibition against self-incrimination contained in Section 7 of Article I of our State Constitution presents more difficulty.[1]

In **State v. Gardner,** 88 Minn. 130, at 139-140, 92 N. W. 529, in speaking about the constitutional guaranty here involved, the Supreme Court said:

> "* * * The constitutional guaranty is, not that no person shall be compelled to give evidence against himself which is made the basis of an indictment against him, but it is that he shall not be compelled to be a witness against himself. This constitutional guaranty must receive a liberal construction, to the end that personal rights may be protected. It was not necessary for the defendant to show that he had been in fact injured, for, as was well said by the court in the case of U. S. v. Edgerton, supra: 'Where a witness is compelled to testify against himself, the injury inheres in the violence done to his rights. It is not susceptible of proof, nor the policy of the law to require it; and the injury done to the public in such case outweighs that suffered by the defendant. It is a

[1]The comparable provision in the Federal Constitution prohibiting "self-incrimination" is contained in the Fifth Amendment thereto, and, of course, the Fifth Amendment to the Federal Constitution is a limitation only upon federal action and not upon state action. However, the reported cases construing the prohibition against "self-incrimination" under the Fifth Amendment to the Federal Constitution have persuasive effect upon the construction of the similar provision contained in our State Constitution.

matter of the highest public policy that crime shall be punished by legal methods.' Better an occasional miscarriage of justice than that the constitutional rights of the meanest man should be disregarded.

"The constitutional guaranty not only protects a person from being compelled to give direct evidence tending to establish his guilt, but also from giving any circumstance or link in the chain of evidence which may tend to convict him of a crime. It is a reasonable construction to hold that it protects a person from being compelled to disclose the circumstances of his offense, the sources from which or the means by which evidence of its commission or of his connection with it may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him. For all practical purposes, such disclosures would have the effect to furnish evidence against the party making them. They might furnish the only means of discovering the names of those who could give evidence concerning the transaction, an instrument by which a crime was perpetrated, or even the corpus delicti itself. Both the reason upon which the rule is founded and the terms in which it is expressed forbid that it should be limited to confessions of guilt, or statements which may be proved in subsequent prosecutions as admissions of facts sought to be established therein. Emery's Case, 107 Mass. 172, 182."

In **Hale v. Henkel**, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. ed. 652, the United States Supreme Court, referring to the prohibition against "self-incrimination" contained in the Fifth Amendment to the Federal Constitution, said:

"The interdiction of the 5th Amendment operates only where a witness is asked to incriminate himself, — in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the amendment ceases to apply. **The criminality provided against is a present, not a past, criminality,** which lingers only as a memory, * * *. * * * It is here that the law steps in and says that if the offense be outlawed or pardoned, or its criminality has been removed by statute, the amendment ceases to apply."

M. S. 169.09, among other things, requires the driver of a motor vehicle involved in an accident resulting in injury to or death of any person or damage to any vehicle driven or attended by any person to stop and give his name and address and the registration number of the vehicle driven by him. The constitutionality of legislative enactments of a similar type, as against the claim that such legislation offends the prohibition against self-incrimination is discussed in 13 Minn. Law Rev. 150. See also **People v. McCormick** (Cal. 1951), 228 P. 2d 349, although the ordinance involved in the last-cited case differs in legal principle from the proposed ordinance here considered.

The principle enunciated in **Hale v. Henkel**, supra, seems broad enough to suggest the general observation that the proposed ordinance may not offend the constitutional guaranty here considered, although a court might hold that it does as applied to a particular factual situation presented to the court.

The question, then, remains, whether the proposed ordinance, if enacted, would constitute ex post facto law in violation of Article I, Section 11, of the State Constitution. The proposed ordinance imposes no new or additional penalty for the prior conviction. Upon the authority of **State v. Zywicki**, 175 Minn. 508, 221 N. W. 900, I am of the view that the ordinance is not vulnerable to attack on that ground.

LOWELL J. GRADY,
Assistant Attorney General.

Minneapolis City Attorney.
March 24, 1953. 62

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## 131

**Milk—Neither board of county commissioners nor county board of health constituted under M. S. A., Section 145.01, has authority to enact "milk ordinance" regulating sale, distribution, and handling of milk throughout the county.**

### Facts

"Pipestone County has not established a county health department under Chapter 405, Laws 1949 [M. S. A., Sections 145.47-145.54], but is still operating under Section 145.01, that is, its board of health is composed of a resident physician and two members of the county board."

### Question

"Does * * * [the County Board of Pipestone] County have the power under the law to adopt a so-called 'milk ordinance,' that is, an ordinance similar to city and village ordinances, to regulate the sale, distribution and handling of milk throughout the county?"

### Opinion

The question is answered in the negative.

The county governments of this state can exercise only such powers as are expressly granted them by the legislature and such as may be fairly implied as necessary to the exercise of the express powers. See **Cleveland v. Rice County** (Minn. Sup. Ct., Dec. 26, 1952), 56 N. W. 2d 641.

Since Pipestone County is not under the provisions of M. S. A., Sections 145.47-145.54, we have here no need to consider the extent of the authority conferred by Section 145.53.

A county is not a "municipal corporation" within the meaning of M. S. A., Section 32.30.

I fail to find any statute whereby the legislature has conferred upon the board of county commissioners in the situation here considered, or upon a county board of health constituted under M. S. A., Section 145.01, the power or authority to enact a "milk ordinance" of the type suggested in your inquiry. Hence, the negative answer to your question.

LOWELL J. GRADY,
Assistant Attorney General.

Pipestone County Attorney.
August 12, 1954. 292-E

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# 132

**Sabbath Day—Coin music box—Ordinance prohibiting coin operated music machine on Sunday in 3.2 beer establishment is valid.**

**Facts**

"On October 6, 1951, the Village Council passed an ordinance as follows:

" 'No coin operated music machine is to be played on Sunday in any tavern where 3.2 beer is sold'."

**Question**

Is the ordinance in question valid?

**Opinion**

Under the provisions of M. S. 1949, Section 340.01, the governing body of the Village of Myrtle has been granted the authority to license and regulate the business of vendors at retail of non-intoxicating malt liquors.

In **Cleveland v. Rice County** (dated Dec. 26, 1952), 56 N. W. 2d 641, Minnesota Supreme Court said in the syllabus at p. 642:

"The express delegation of the power to license, regulate, and restrict the hours of sale of non-intoxicating malt liquor includes, by implication, as necessary to the effective exercise of that power, the authority to require that the premises on which such sale is licensed must close completely during the hours in which such sales are forbidden." Our Supreme Court also said at p. 643:

"The business of selling alcoholic beverages at retail has always been considered especially susceptible to local control. See Anderson v. City of St. Paul, 226 Minn. 186, 32 N. W. 2d 538; City of Duluth v. Cerveny, 218 Minn. 511, 16 N. W. 2d 779. When the legislature has delegated such control to a local governing body, it cannot be inferred that it intended to confer any broad authority to control all of the activities

of a licensee. But the intent of the legislature to invest these subdivisions with the power to regulate other activities of a licensee which conflict with, or are closely related to, the sale of such beverages may and should be implied, insofar as such regulation is reasonably necessary to effectuate the control expressly conferred. * * *"

It therefore follows that since the Village of Myrtle has the authority to regulate the sale of non-intoxicating malt liquors, it also has the authority to include in its regulations a provision prohibiting the operation of a coin operated machine on Sunday in any establishment licensed for the sale of non-intoxicating malt liquor. Such a provision is neither arbitrary nor capricious.

It is therefore our opinion that the ordinance in question is valid.

IRVING M. FRISCH,
Special Assistant Attorney General.

Attorney for Village of Myrtle.
August 12, 1953. 477-B-26

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# 133

**Safeguards—Construction of adequate safeguards around open pits, excavations and other dangerous conditions existing upon private property, for protection of its inhabitants, and penalties for violation thereof —** M. S. A., Sections 412.221, subd. 32, and 412.231.

**Facts**

"There is a vacant corner lot near the center of the village which consists of a considerable excavation relatively close to the sidewalk. The excavation is the basement of a structure previously located there which burned down. The village council feels that someone may get injured by falling into this excavation at night and they have, therefore, requested the owner of the lot to put a fence of some sort to protect against this happening. The owner has failed to do anything, however."

**Questions**

1. "Does the village have the power, under police powers or otherwise, to require the owner to construct some sort of protecting fence around this excavation where it borders the sidewalk?
2. "If they do, can this power be exercised by resolution specifically directed at this property or must an ordinance be passed?
3. "If the owner does not provide such protection, can the village have the work done and assess the costs as other taxes as in the case of sidewalks?"

**Opinion**

**These questions will be considered together and likewise answered.**

By virtue of the police power imposed in the village, the council has authority to adopt an ordinance to require the placement and maintenance of adequate safeguards around open pits, excavations and other conditions existing upon private property which are inherently dangerous to the inhabitants of the community. M. S. A., Section 412.221, subd. 32, grants such power and authority to the village council.

The extent to which such police power may be exercised by the council is not susceptible of an exact definition. It is broad and comprehensive. It comprehends, generally speaking, the power to enact and enforce ordinances requiring each citizen to conduct himself and use his property so as not to unnecessarily injure another. See McQuillin Mun. Corp., 3d Ed., Sections 24.01, 24.02 and 24.03.

The ordinance which the council may adopt for the aforesaid purposes must be reasonable. Whether it is reasonable presents a judicial question.

The council is empowered to declare that a violation of such an ordinance shall constitute a penal offense, and to prescribe penalties for violation thereof within the limitations provided in Section 412.231.

We are not aware of any other appropriate remedy of which the council may avail itself so as to secure protection to its inhabitants from injuries which might result from the factual conditions above related.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Attorney for Village of Cobden.
May 22, 1953. 477-B-20

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## 134

**Trailer coach or trailer house—Validity of ordinance requiring permission of the village council to keep a trailer house or trailer coach within the village discussed—M. S. A., 412.221, subd. 32.**

**Facts**

The Village of Osakis proposes to enact an ordinance regulating trailer houses to read as follows:

> "No person shall place or keep a trailer house on any premises in the platted portion of the Village of Osakis, either owned by him or not, without the written permission of the Village Council. This ordinance shall not apply to trailer courts, resorts or motels."

**Question**

Is the village council authorized to enact an ordinance prohibiting a trailer house on any premises in the platted portion of the Village of Osakis except with the written permission of the village council in the form above set forth?

**Opinion**

M. S. A., Section 412.221, subd. 32, the general welfare clause of the village code, confers upon the village council a broad power to enact ordinances under the police power of the village.

The ordinance as proposed relates to a restriction in the use of private property within the village. The general rule governing the enactment of ordinances regulating the use of private property as stated in 16 C. J. S., Section 220, at p. 645, is as follows:

> "A statute or ordinance that attempts to impose unreasonable restrictions on the use of private property is void as an attempt at impairment of vested rights. However, there cannot be any vested right to the use of property in such a manner that it constitutes a nuisance, or an injury to the public health or morals, or an injury to the property rights of others. * * *"

Under this rule the question presented in reviewing every ordinance affecting private property is: Is it reasonable?

In **Young v. Mall Invest. Co.**, 172 Minn. 428, 215 N. W. 840, 55 A. L. R. 461, an ordinance of the City of Minneapolis was held invalid. The ordinance proposed to alter the common law doctrine relating to sublateral support by placing a duty on the person excavating his property to protect not only the land of the adjoining owner but also the buildings on the adjoining land from weakening. The court, after setting forth the rule contained in 16 C. J. S., supra, said:

> "The ordinance here in question is absolute in terms, without qualifications or exceptions. It has no reference to location of the land, whether in the built-up sections of the city or in practically rural or unsettled sections; it has no reference to nearness or distance from streets or highways; no reference to the kind of structures or loads required to be protected against. In its present form it is clearly applicable to cases where no public interest is involved and where its only effect is to serve private interests and grant property rights to one private party and impose burdens upon another private owner of property.
>
> "For these reasons this court is constrained to hold that this ordinance cannot be sustained under the police power of the municipality; that it is not a reasonable restriction on the use of private property; that it impairs vested rights of the use of real property, and is invalid and unconstitutional. * * * "

In **State v. Wittles**, 118 Minn. 364, 136 N. W. 883, an ordinance of the City of Minneapolis prohibiting, without a special permit from the city council, the storing, piling or placing of unused boxes, barrels or other inflammable material upon or in any place within the city, without regard to the quantity, place or manner in which the material was kept or used, was held unreasonable and void. The court said:

> "But to justify legislative interference with property rights in the interest of fire protection and prohibit the citizen, without special permit, from keeping upon or within his premises any particular class or kind of property, it should appear either that the property itself, by reason of its character or the manner in which it is kept or used, is a menace to the public welfare. Legislation which goes beyond these limits and attempts to prohibit the accumulation of such material, regardless of quantity or its dangerous character, upon vacant lots or in buildings within any part of the city, including the private residence and adjacent barns and sheds, we think, exceeds the rule of reasonableness.
>
> * * *"

See also **State v. McCormick**, 120 Minn. 97, 138 N. W. 1032; **Village of Golden Valley v. M. N. & S. Ry.**, 170 Minn. 356, 212 N. W. 585, and **State v. Clarke Plumbing and Heating**, 56 N. W. (2d) 667, and the dissenting opinion of **Anderson v. City of St. Paul**, 226 Minn. 186, 32 N. W. (2d) 538.

It is the rule that an ordinance may be declared void when, from its inherent character or from competent proof, its operation is shown to be unreasonable, unless the contrary appears from the text thereof or is established by proper evidence. See **Village of Golden Valley v. M. N. & S. Ry.**, supra.

Unquestionably, M. S. A., Section 412.221, subd. 32, authorizes the enactment of an ordinance regulating the use of trailer houses within the platted portion of the village but the question of whether this power is being properly exercised must be determined by considering it in connection with the facts and circumstances in the particular locality.

We therefore cannot answer the question submitted categorically. Whether the ordinance is reasonable must necessarily depend upon the facts and circumstances in each instance where it is applied.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Osakis Village Attorney.
March 1, 1954. 238-i

ORGANIZATION

## 135

**Villages—Annexation—Petition—Must be signed by a majority of owners—Life tenant owner within meaning of statute—M. S. A., 412.041, subd. 4.**

### Facts

A tract of land identified as No. 1 abuts the village on the north side thereof; tract No. 2 adjoins tract No. 1; tract No. 3 adjoins tract No. 2, and tract No. 4 adjoins tract No. 3. Tracts 1, 2 and 3 are owned by H and W; tract No. 4 is owned by W and C-1 and C-2. The interest of W is that of a life tenant, and C-1 and C-2 have a vested remainder in tract No. 4.

Reference is made to M. S. A., Section 412.041, subd. 4, and there is presented these

### Questions

"(1) In the situation where W is a life tenant and C-1 and C-2 have the vested remainder, may all three be considered 'owners' within the meaning of this statute?

"(2) If question number one is answered in the affirmative, will the owners of tracts three and four be a 'majority of the owners' so as to entitle them to petition for annexation of all four tracts?"

### Opinion

Both of these questions are common to one another and may be conveniently considered together, and likewise answered.

So far as material to the questions considered, M. S. A., Section 412.041, subd. 4, reads as follows:

"If the land is platted or, if unplatted, does not exceed 200 acres, the owner or a majority of the owners may petition the village council to have such land included within the village."

We assume that the area of the four tracts above referred to does not exceed 200 acres.

It appears that tracts 1, 2 and 3 are owned by H and W. Consequently, if the petition for annexation should be limited to tract 1, or tracts 1, 2 and 3, then it would be necessary for both H and W to sign the petition for annexation in order to meet the requirements of the statute with reference to the requisite number of signers. Tract 4 is owned by W, C-1 and C-2. If the petition for annexation includes tracts 1, 2, 3 and 4, then it will be necessary for at least three of the owners of such four tracts to sign the petition in order to comply with the requirements of said statute.

In our opinion, W as a life tenant and C-1 and C-2 as owners of a vested remainder therein are deemed to be owners within the meaning of the above statute. See **Keith v. Albrecht,** 89 Minn. 247, 94 N. W. 677; **Nolan v. Greeley,** 150 Minn. 441, 185 N. W. 647; **Moritz v. City of St. Paul,** 52 Minn. 409, 54 N. W. 369.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Mower County Attorney.
September 30, 1953. 484-E-1

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**PROPERTY**

## 136

**Easement—Real estate—Sale—County is authorized to sell and convey an easement over and across a county-owned poor farm under M. S. A., Section 373.01 (3), upon compliance with the terms and conditions thereof.**

**Facts**

An electric power corporation has requested the county board of commissioners to grant it a perpetual easement for electric transmission lines over and upon lands owned by the county and used for its county poor farm. The county commissioners are willing to grant and convey the easement requested.

**Questions**

"May such an easement be granted only if the form of Section 373.01, subd. 3, M. S. A., is followed?

"May the county grant an unconditional perpetual easement over its real property if requested?"

**Opinion**

A county is authorized to sell, lease and convey real or personal estate owned by the county in conformity with the provisions of M. S. A., Section 373.01 (3). An easement is an interest in land. **United States v. Welch,** 217 U. S. 333, 339, 30 S. Ct. 527, 54 L. ed. 787, 789. **In re Petition for Establishment of County Ditch No. 78,** 233 Minn. 274, 282, 47 N. W. (2d) 106.

Accordingly, it is our opinion that the authority conferred upon the county by Section 373.01 authorizes the county to sell and convey an easement in conformity with the provisions and conditions of such section. However, such power to sell imposes a duty upon the appropriate county officials to secure the best price obtainable therefor. See opinion of the attorney general dated September 15, 1950, No. 180 in the 1950 Report.

M. S. A., Section 373.01 (3), under the facts recited in your letter, is the only statutory provision providing a method for the sale and conveyance of an easement by the county and its provisions must be complied with.

We believe the foregoing answers your questions. However, we express no views on the desirability of the sale of an easement over public property nor do we express any views about the right of an electric power corporation to establish a power transmission line upon property owned by the public and devoted to a public use. See **Minnesota Power and Light Company v. State**, 177 Minn. 343, 225 N. W. 64.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Rice County Attorney.
October 2, 1953. 125-a-42

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PUBLIC HEALTH

## 137

**Nurses—Services—Contract—County boards—May jointly employ public health nurse — M. S. 1953, Section 145.08, Subd. 1, and Section 471.59 —Reimbursement authorized for payments for nursing service under Section 145.125.**

**Facts**

"Minnesota Statutes, Section 145.125, provide that the State of Minnesota shall reimburse each county $1500 annually toward the salary of a county nurse employed by the respective county. The Minnesota State Department of Health supervises the county nurses and lays down certain qualifications and standards.

"It is possible that Pennington and Red Lake Counties may hire a county nurse to serve both counties. These two counties have a total population of less than 20,000 and are small in geographical area. Other much larger counties of much greater geographic area and of 50,000 to 60,000 population have one county nurse and receive the $1500 annual reimbursement from the State of Minnesota. The State Department of Health has notified us that it will give its approval to the employment of one nurse by the two counties."

**Question**

"In your opinion, is it legal for the State of Minnesota to pay out this $1500 annual reimbursement when the two counties jointly hire one nurse, and if it is legal, would the amount be $1500 to each county or $1500 in all?"

**Opinion**

A categorical answer cannot be given to the question as specifically submitted.

The amount which may be paid by the state to a county on account of payments made by it for public health nurse services is in part dependent upon the amount expended by the county for such services. Consequently, our opinion will be limited to the authority of the county board of commissioners of the counties involved to jointly employ or contract for the services of a public health nurse, and the right of reimbursement, as authorized by M. S. 1953, Section 145.125, on account of payments made by each county for such services.

M. S. 1953, Section 145.08, subd. 1, authorizes every county board of county commissioners, except in counties now or hereafter having a population of 550,000 or more, "to employ and to make appropriations for the compensation and necessary expenses of public health nurses, for such public health duties as may be deemed necessary." Under this statute the county board of either of the counties here considered could severally employ a public health nurse. This statute neither authorizes nor forbids the joint exercise of the power and authority granted to each county under this statute. However, under Section 471.59, subd. 1, two or more governmental units, including counties, by agreement entered into through the action of their governing bodies, may jointly or cooperatively exercise any power common to the contracting parties. Consequently, we are of the opinion that the authority to employ a nurse by either Pennington or Red Lake County under Section 145.08, subd. 1, may be jointly and cooperatively exercised by the county board of these two counties under Section 471.59, subd. 1. The services of the public health nurse to be paid for by Pennington County under joint agreement should be limited to the territorial limits of that county, and the same situation should be observed by Red Lake County. In other words, the county of Pennington does not have any authority under the statute to pay for services of a public health nurse beyond the territorial limits of that county.

Section 145.125 specifies the conditions to be complied with so that a county may receive payment from the state. Each county here considered would be entitled to such payment from the state not exceeding $375 in any quarter upon compliance with the conditions contained in this statute.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Pennington County Attorney.
May 10, 1954. 905-J

# 138

**Nurses — Services — Contract — School districts — Towns—A village and a school district or a town may jointly contract for services of public health nurse—M. S. 1953, Section 145.08, construed.**

### Question

"Under this section, may one village and one school district only combine and form a separate nursing district?"

### Opinion

M. S. 1949, Section 145.08, was amended by L. 1951, C. 563. By Section 1, Subd. 1, of the amendment the board of county commissioners of the county of Hennepin was excepted from the authority granted to "every board of county commissioners." No such exception was made with respect to the power and authority granted to every city council, village council, school board, and town board. Consequently, the power and authority thus granted to the governing body of these units of government under Subd. 1 above is applicable to Hennepin County

Subdivision 3 of the amendment (coded as M. S. 1953, Section 145.08, Subd. 3), so far as here material, reads as follows:

> "In each county now or hereafter having a population of 550,000 or more, every city and village council and every school and town board is hereby vested with the authority and power provided for and imposed by provisions of Subdivision 1. In such counties two or more municipalities, school districts and towns may by written agreement of their respective governing bodies, form a nursing district within the territory comprising the contracting municipalities, school districts and towns for the purposes set out in Subdivisions 1 and 2. All such agreements shall contain provisions for the apportionment of the cost and expenses incident to the carrying out of the hereinbefore mentioned purposes. Once formed, no such nursing district shall be discontinued, nor shall any municipality, school district or town withdraw from same, within three years from the effective date of formation."

Having in mind that every city council, village council, school board, and town board within Hennepin County may severally exercise the authority prescribed in Subd. 1 of C. 563, we believe it reasonable to conclude that a municipality, either a city or a village, and a school district or a town may jointly form a nursing district within the territory comprising the contracting units of government in accord with the provisions of said Subd. 3. We have not overlooked this specific language: "In such counties two or more municipalities, school districts and towns" might be construed so as to require at least two municipalities to join in the proposed agreement. However, we believe that a logical construction compels a conclusion that by Subd. 3 of the amendment the legislature intended to authorize the political subdivisions therein enumerated to jointly exercise the power

thereby conferred, which authority in substance could be severally exercised under Subd. 1 thereof. An absurd or unreasonable conclusion should be avoided. Section 645.17.

Accordingly, we answer the question in the affirmative.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Attorney for Village of Bloomington.
May 7, 1954. 905-J

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PUBLIC RECORDS

## 139

**Destruction—Cancelled bonds of county may not be destroyed except upon compliance with M. S. 384.14—Settlement records or work sheets prepared by County Auditor for distribution of tax settlement should not be destroyed except upon compliance with 384.14.**

**Question**

"Is there any Statute on our books which would authorize our County Auditor to destroy old cancelled bonds issued by our County? If there is such a law would you please tell us what cancelled bonds can be destroyed?"

**Opinion**

M. S. 384.14 provides what vouchers, files, records, and papers filed in the office of the county auditor may be destroyed at the time and under the conditions in that statute specified. The "old cancelled bonds" mentioned constitute "miscellaneous papers" within the meaning of 384.15 (5).

**Facts**

"Our County Auditor, when he makes settlement of tax receipts to the various governmental units within the County, makes up certain work sheets which are called settlement records. When the state auditors [Public Examiner] audit the County's books they check these settlement records";

and you ask this further

**Question**

"Can these settlement records or work sheets be destroyed after auditors have made their audits?"

**Opinion**

M. S. 276.10 provides that at the time therein stated the county auditor and county treasurer shall make the tax distribution therein specified. Except for the report thereof required by the statute to be made to the state auditor, the statute cited does not specifically require the preparation and preservation of a composite record of the apportionment and distribution made as is apparently reflected by the "settlement records or work sheets" mentioned in your inquiry. The report to the state auditor required by 276.10 is different, not only in purpose but also in factual information, from the "settlement records or work sheets" here involved. In the performance of an important duty such as is imposed upon the county auditor and county treasurer under 276.10, it seems clear that the statute intends that there should be made and kept available some record of the tax distributions made under 276.10 other than the individual warrants issued to the individual taxing units entitled to participate in the distribution. To be sure, the "settlement records and work sheets" here involved are prepared not only for the purpose of facilitating the distribution, but also to reflect the composite distribution to all the participating taxing units at the periodic times stated. It is upon the basis of the "settlement records" that the auditor appears to make his distribution under 276.10, and the public examiner apparently considers those "settlement records" as official records of the county auditor for auditing purposes where no other composite record of the tax distributions is otherwise kept by the auditor. The public examiner is required by M. S. 215.11, in respect of each county, to make an "examination of all accounts and records relating to the receipt and disbursement of the public funds." Since these "settlement records" are records relating to the disbursement of public funds, I am inclined to resolve any doubt on the question of destructibility against it and to entertain the view that these "settlement records or work sheets" should be preserved and not destroyed unless destruction thereof is effected under M. S. 384.14.

LOWELL J. GRADY,
Assistant Attorney General.

Swift County Attorney.
October 7, 1953. 851-F

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PUBLIC SAFETY

## 140

**Fire protection—Beyond corporate limits—Contract—Villages may furnish fire protection beyond corporate limits—Contracts therefor should be in writing—Income derived therefrom should be paid to village and not to volunteer fire department**—M. S. A., Sections 438.08 and 438.09. Town board may contract for fire protection when authorized by electors—L. 1953, C. 57.

**Facts**

"The Volunteer Fire Department of this Village has been in the habit of making fire calls outside the Village limits to the various surrounding Townships and also to nearby villages. When a call is made to a nearby village, it has been the policy for the Village of Lamberton to pay the fire department for the call under the terms of an oral gentlemen's agreement that the other villages would answer calls for fires in Lamberton paying their own fire department for said calls. Some of the surrounding townships have been making regular yearly payments direct to the fire department in return for this service. However, the Village has been paying the fire department compensation for making these calls and, of course, under this arrangement has been getting nothing in return since the money from the townships has been going direct to the fire department. With the remaining townships the fire department has been making calls and being paid by the Village but receiving no compensation from these townships."

**Questions**

"1. Has the volunteer fire department any authority to make calls outside the corporate limits of the Village without the Village and the municipality being served having a contract with each other?

"2. Where there is an oral contract, should the money paid by the municipalities served be paid to the Village or should it be paid directly to the fire department?

"3. Under the provisions of said statutes, is it required that a formal contract be entered into before the Village can answer fire calls outside the limits of the Village?

"4. Does the above referred to gentlemen's agreement between the villages in this area authorize the Village to send its fire department to the surrounding villages under this reciprocal arrangement?"

**Opinion**

1. As a general proposition, the Village of Lamberton has no duty to furnish fire protection beyond its corporate limits.

By virtue of M. S. A., Sections 438.08 and 438.09, the council by a five-sevenths vote may authorize its fire department to attend fires outside of the corporate limits. Under Section 438.09, the body or person having control of a municipal fire department is authorized to contract with other municipalities for compensation for services rendered in fighting fires as prescribed by Section 438.08. These statutes should be considered together. Section 438.09 grants authority to contract for fire protection. Without a contract between municipalities providing for fire service protection as authorized by the statutes referred to, we are of the opinion that a voluntary fire department has no authority to attend fires outside the village limits.

2. Under said statutes, we believe that the contract between the municipalities as therein authorized should be a written contract and not an "oral gentlemen's agreement." The revenue accruing to the village as a result of fire protection services rendered outside of the village should be paid to the village and not to the fire department. Section 438.09 provides that the agreed compensation for the services to be rendered shall be a legal charge and collectible by the municipality rendering the same. This language clearly indicates that the compensation to be paid for such services inures to the village and not to the voluntary fire department.

3. Our answers to questions 1 and 2 render unnecessary an answer to this question.

4. We are not advised as to the legal import of the so-called "oral gentlemen's agreement." Nor have we been able to find this term defined. A gentleman is a man of integrity and honesty. Presumably a gentlemen's agreement is some sort of an understanding or contract between gentlemen which would be carried out and performed by them because of their intellectual honesty and integrity rather than upon the premise of a legal responsibility. The contract, however, for fire protection between municipalities authorized by the statutes referred to should be in writing. We believe that sound business practices by a municipality suggests that such a contract should be in writing and not an oral understanding.

We are not advised of any reason, nor has any been directed to our attention, which suggests that the contract referred to in the statutes should not be a written instrument defining the conditions and terms to be assumed and carried out by the contracting municipalities.

As bearing upon the necessity of requiring a written contract between the municipalities for fire protection, we direct attention to Section 69.02, which relates to the annual report to be made by the commissioner of insurance. It will be noted that this statute refers to the term "services are furnished as evidenced by the **service contracts filed with him.**"

Obviously, only written contracts could be filed with the commissioner of insurance.

Although no question has been submitted relative to the authority of a town board to enter into a contract for fire protection purposes, it will be observed that authority must first be obtained from the town electors before the town board is authorized to make a contract for such purposes. See L. 1953, C. 57, Section 3.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Lamberton Village Attorney.
December 15, 1953. 688-a

# 141

**Fire protection—Towns and villages—Contract—May mutually contract for fire protection when authorized by town electors—May jointly acquire and own equipment and housing facilities therefor—Expenditures by contracting political subdivisions subject to tax limitations contained in Section 275.09—Contract made by towns for fire protection purposes should be on annual basis—**Sections 365.15 to 365.18.

**Facts**

"The village of Goodhue and the townships of Belvidere, Hay Creek, Featherstone, Zumbrota, Goodhue and Belle Creek in this county by joint action in 1940 organized themselves into an association known as the Goodhue Community Fire Truck Association. No specific contract was ever made between the various parties although the representatives of the town boards and the village council did adopt certain By-laws under which the association has operated since its organization. At the time of its organization, they purchased a fire truck and have since acquired three other pieces of fire fighting equipment. This equipment has been housed in the village of Goodhue. The housing available in said village is inadequate for the association's present equipment.

"The various units included in the association are desirous of entering into a contract whereby each of the governmental units involved would contribute a certain amount towards the construction and erection of adequate housing for the association's fire fighting equipment in the village of Goodhue. The proposition was submitted to the electors of the several towns for vote by ballot at the annual meeting as follows:

'Shall the Town Board be authorized to enter into a contract with the village of Goodhue and (the other towns included in the association naming them) for the purpose of jointly acquiring housing for the fire fighting equipment now jointly owned or used by this and said other municipalities at a cost to this township of not more than $..... plus an annual cost to this township for maintenance of such housing not to exceed ..... per cent of the total cost of such maintenance.'

"At the annual elections, one of the towns included in the association failed to submit the proposition by ballot and on a voice vote at the annual meeting the proposition was voted down. Another of the towns submitted the proposition by ballot and the proposition was defeated. The remaining four townships approved the foregoing proposition. The town officers of the two dissenting towns now feel that their electors, after having the proposition more thoroughly explained to them, would approve the foregoing proposition. Upon further investigation, it also appears that the amount of money specified in the quoted propositions for the towns voting in favor of the proposition together with the share to be paid by the village of Goodhue will be sufficient to erect the contemplated housing.

"* * *

"It is proposed to provide in the contract that the village is to acquire the real estate on which the housing is to be erected and the towns are not to be required to contribute to the cost of such land. Each of the contracting parties is to pay a proportionate share of the maintenance of the housing and the contract shall run for fifty years, at the end of which time ownership of the building would be vested in the village. However, should the contract be terminated at an earlier time, the building is to be disposed of by competitive bids and the proceeds divided among the contracting parties."

and the following

**Questions**

"1. May the members of the association legally enter into a contract providing for the erection and maintenance of adequate housing for the fire fighting equipment?

"2. May the towns who voted favorably on the quoted proposition enter into a contract with the village of Goodhue (which village we presume will vote favorably on the proposition) for the construction and erection of housing facilities for the fire fighting equipment of the association, which contract would require the two towns that did not approve the proposition to pay a reasonable rental for the premises?

"3. May the town boards of the two dissenting towns enter into the contract without the approval of the electors in such towns obtained by ballot vote at the annual meeting? If the answer to this question is in the negative, may a special town meeting be called for the purpose of resubmitting the proposition to the electors?"

**Opinion**

Questions 1 and 2 will be considered together.

1-2. By authority of M. S. 1953, Section 365.15, the electors of each town at its annual meeting are authorized to provide fire protection or the purchase or acquisition of apparatus therefor, either by itself or jointly with any other town, city, or village, or number thereof; to provide for the maintenance and operation of such apparatus, and to determine by ballot the amount of money to be raised for such purpose.

After the electors have authorized the providing of apparatus for fire protection or the maintenance and operation of such apparatus, or both, and determined the amount of money to be raised therefor, the town board may thereafter levy a tax for such amount, or lesser amount, and enter into contract necessary for the purpose of providing fire protection.

The town board shall have control and management of the fire protection apparatus or equipment, subject to control and management under a contract or agreement entered into jointly with other units of government as provided in Section 365.16.

Under Section 365.17, after the electors of a town have authorized the providing of fire protection and determined the amount of money to be raised by the respective towns, the town board of each town so authorized may arrange for pooling the amounts raised by such towns and to provide jointly for the acquisition of apparatus, and for maintaining the same in common, upon such terms and conditions as may be mutually agreed upon.

Section 365.18 grants authority to the town board, when first authorized by the electors and when funds have been provided therefor, to enter into a contract with the county in which the town is located, or with any adjacent city or village, or with any volunteer fire department or association for the furnishing of fire protection within the limits of the town and for the care, maintenance and operation of such equipment upon such terms and conditions as may be mutually agreed upon.

From the foregoing statutory provisions it is clear that when the electors of a town have authorized the providing of fire protection and have voted funds for such purpose, the town board of such town may enter into a joint agreement with other towns or villages, or any number of them, for the purpose of pooling the amount of money available to each town board for fire protection purposes upon such terms and conditions as the respective units of government may mutually agree upon. It also seems clear that the various towns here involved had authority to authorize the town board to enter into a contract with the village of Goodhue for the purpose of jointly acquiring housing for fire fighting equipment jointly owned or used by such towns, as contained in part in the ballot and submitted to the electors of the respective towns for their approval. However, in addition to the aforementioned proposal the following additional provision is also contained in said ballot:

> "* * * plus an annual cost to this township for maintenance of such housing not to exceed ..... per cent of the total cost of such maintenance."

From the last paragraph of the statement of facts above it appears that "Each of the contracting parties is to pay a proportionate share of the maintenance of the housing and the contract shall run for fifty years, at the end of which time ownership of the building would be vested in the village. However, should the contract be terminated at an earlier time, the building is to be disposed of by competitive bids and the proceeds divided among the contracting parties."

From the statutes above referred to it seems obvious that the authority to provide fire protection must be authorized by the town electors at their annual meeting. Inasmuch as the amount of money is to be raised by the electors at an annual meeting, it necessarily follows that the contract which may be made by a town board must be on an annual basis. We therefore believe that it was beyond the authority of the electors to vote an annual cost for the maintenance of such housing facilities to be spread over a period of 50 years. There being no statutory authority authorizing the electors to provide for a tax levy beyond the current year, then that portion of the ballot which authorizes a fund for the maintenance of the

housing equipment not exceeding a certain per cent of the total cost of maintenance for a period extending beyond the current year is void and without legal effect.

Neither the electors nor the town board have authority to create an obligation for the current year in excess of the funds available therefor, or in anticipation of taxes levied and in the process of collection as provided in Section 471.69.

The foregoing disposes of questions 1 and 2.

3. The town boards of the two dissenting towns may not enter into the proposed contract without approval of the electors as provided in Sections 365.15 to 365.18.

The question of whether the electors may vote upon the question of providing for fire protection and raising money for such purposes at a special election was considered in opinions of attorney general dated April 21, 1938, and February 23, 1940, file 688-c-1.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Attorney for Village of Goodhue.
March 30, 1954. 688-K

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**PUBLIC UTILITIES**

## 142

**Funds—Expenditure—Expense of election—Charter city without power to expend public funds in advertising to bring about a favorable vote upon a question to be submitted at an election.**

### Facts

The city of Fergus Falls owns its electrical distribution system. It buys electricity and supplies it to its customers.

It has been proposed that the city sell its distribution system and an election will be held at which the people will have an opportunity to vote upon the question whether the city shall sell such system. There is opposition on the part of some of the people to the sale of the system.

### Question

May the city use money from its electric fund for the purpose of paying the expense of dissemination of the facts which the city authorities believe have a bearing on the question on which the people will vote?

**Opinion**

**15 McQuillin Municipal Corporations,** 3rd ed., Section 39.21, is authority for the statement that expenditures have been held unauthorized for advertising to bring about a favorable vote upon a proposed bond issue. See also **Elsenau v. Chicago,** 334 Ill. 78, 165 N. E. 129; **Mines v. Del Valle,** 201 Cal. 273, 257 Pac. 530; **Powell v. City and County of San Francisco,** 62 Cal. App. 2d 291, 144 P. 2d 617; **State ex rel. Port of Seattle v. Superior Court,** 93 Wash. 267, 160 P. 775, LRA 1917B 354.

Following the reasoning of the cited decisions, it is my opinion that money from the electric fund of the city may not be used for the purpose suggested.

The underlying thought in the cases above mentioned is that cities have those powers which the legislature has granted to them. They have no inherent powers. The powers must be either expressly granted or necessarily implied from the powers granted. The charter of Fergus Falls gives no such power as that involved in this question and there is nothing in the charter that implies such power.

CHARLES E. HOUSTON,
Assistant Attorney General.

Fergus Falls City Attorney.
March 11, 1953. 624-C-16

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# 143

**Municipally owned—Service—A village in the electric light business is subject to the same duties and obligations as persons or corporations doing the same class of business.**

**Facts**

"The Village of Russell in Lyon County owns a system for distribution of electricity within its corporate limits. It purchases its electricity from the City of Marshall, also in Lyon County, which electricity is brought to the Village of Russell by means of a transmission line between the two towns. This transmission line is owned and maintained by the Village of Russell and extends over a distance of approximately thirteen miles. Russell retails the current to its customers and is entirely independent from the system at Marshall except insofar as they rely upon Marshall to supply current at wholesale.

"In January of 1953 'A', a grain elevator company, installed a feed mill requiring current beyond the capacity of the then existing facilities of the Village of Russell. By agreement the Village installed an additional transformer at a cost of approximately $600.00, 2/3 of which or $400.00 'A' company agreed to pay.

"'B' company, also a grain elevator and competitor of 'A', now is installing a similar feed mill which will further tax the facilities of the distribution system. It will be necessary to install additional transformers to accommodate this additional load. It also is believed that if both feed mills are operating at the same time and coupled with an otherwise normal load throughout the rest of the system that the transmission line from Marshall to Russell will be inadequate to supply the demand, and that the result will be a dangerous reduction of voltage on the entire system."

**Questions**

1. May the village lawfully refuse to furnish electric current to B?

2. If it is the duty of the village to furnish current to B, may the village require B to contribute to the cost of transformers necessary to supply that service?

3. May the village require B to contribute to rebuilding the transmission line?

4. May the village require A and B to operate such additional items of equipment on alternate days so as to avoid peak loads?

**Opinion**

It appears that the reading of two Minnesota cases furnishes the answers to your questions. See **State ex rel. Armstrong v. City of Waseca**, 122 Minn. 348, 142 N. W. 319, and **State ex rel. Mason v. Consumers Power Co.**, 119 Minn. 225, 137 N. W. 1104.

Your first question requires a negative answer.

As stated in the City of Waseca case, the method of adjustment of the additional expense required to furnish the service to B is a problem for the village. It may, in its discretion, make an installation charge, or it may take care of such expense by the rate charged. It is a matter for the village to regulate. Its regulation will be binding if fair and reasonable and free from discrimination either in favor of or against B. It is the duty of the village council to fix the rates charged and to be charged for this class of service.

It is my opinion that the third and fourth questions require a negative answer.

CHARLES E. HOUSTON,
Assistant Attorney General.

Russell Village Attorney.
November 9, 1953. 624-C-16

# 144

**Water mains—Easement—Reasonableness of agreement in perpetuity for right to lay and maintain water mains across private premises, and authority of village to terminate same without incurring liability for resulting damages considered.**

### Facts

In 1914 the village of Heron Lake entered into an agreement with the owners of the premises therein described whereby in consideration of the village furnishing and providing 1,200 gallons of water each month to such parties the village would have the perpetual right to construct, lay, and maintain water pipes and mains over and across the premises described in such agreement. A copy of the agreement was enclosed with your letter. The village, as soon as such agreement was entered into, exercised all of its rights thereunder and has, in consideration therefor, provided 1,200 gallons of water free each month to the original parties to the agreement and their successors in interest. The village now finds that it no longer has any need to exercise the rights granted to it by the terms of this agreement, and the village has abandoned the water main extending across the premises described in such agreement. The present owner of the premises insists that he is entitled to receive 1,200 gallons of water each month without charge from the village as provided for in the agreement.

### Question

Is the present owner of the premises described in said agreement, and through which the village has constructed and maintained a water pipe line as provided for in said agreement, entitled to receive 1,200 gallons of free water per month from the village?

### Opinion

Restated the question here involved is whether the village may now terminate its agreement whereby it acquired a perpetual right to maintain its water pipes and mains over and across the premises therein described in consideration of furnishing 1,200 gallons of water each month to the original parties to such agreement, or to their successors in interest. The agreement is in effect a perpetual easement where the consideration is to be paid by furnishing 1,200 gallons of water each month during the existence of the agreement. The easement therein granted to the village runs with the land. This agreement is not only unique but it is likewise unusual.

In our examination of decisions which have any bearing upon the question under consideration, we have not found any case which involved a contract or agreement of like import.

There is no doubt as to the power and the authority of the village to furnish water to its inhabitants. In so doing the village acts in its proprietary capacity. **Reed v. City of Anoka**, 85 Minn. 294, 88 N. W. 981; **City of Crookston v. Crookston Water Works, Power & Light Company,**

150 Minn. 347, 185 N. W. 380. It was essential and necessary for the village to acquire easements or rights in order to lay and maintain water pipes and mains so as to provide water service for its inhabitants.

We are not informed as to the availability of water for municipal purposes at the time when the agreement was made. Neither are we advised as to the economic changes which have occurred since that time. No facts have been presented as to the value of 1,200 gallons of water each month which have been furnished by the village since the agreement in question was made. All of these facts have a bearing upon the reasonableness of this agreement.

Both parties to such agreement have accepted the mutual benefits as therein provided for 39 years.

The village has now abandoned the water main extending over the premises described in such agreement and apparently has no further need to avail itself of rights thereby granted.

We cannot say that the water which has been furnished to the original parties to the agreement, or their successors, does not constitute an adequate consideration for the rights granted and which have been exercised by the village. Obviously when the water main was abandoned by the village and the village surrendered all of its rights which it acquired by virtue of the agreement, then and in that event no damages would result to the premises through which the water main extends. The loss or damage, if any, to the present occupant of the premises would be, and result from, the failure of the village to furnish 1,200 gallons of water each month without cost as specifically provided for in such agreement.

We have heretofore referred to **Reed v. City of Anoka.** In that case it is stated in the syllabus as follows:

> "The authority given municipalities to enter into contracts of this character confers upon the local authorities large discretionary powers, with the exercise of which courts will not interfere unless clearly abused, unless contracts made by them are unreasonable, inequitable, and unfair.
>
> "Contracts of the nature of those in question in this action are not, merely from the fact that they cover a period of thirty-one years, and definitely and finally fix the rates and charges to be paid the grantees for the full period, prima facie void, as unreasonable and unfair. They are prima facie valid, and, in the absence of a showing of unreasonableness, must be upheld.
>
> "The questions whether the necessities of a municipality justify a contract for so long a period of time, and the fairness and reasonableness of the terms thereof, are addressed to the sound judgment of the municipal officers; and, as such officers are presumed to act within the scope of their authority, and for the best interests of the municipality they represent, the burden to impeach the contract is upon the person who calls it in question."

The court in its decision distinguishes the case of **Flynn v. Little Falls Electric & Water Company**, 74 Minn. 180, and on page 186 said:

> "Where municipal authorities are authorized to contract in relation to a particular matter, they have a discretion, as to methods and terms, with the honest and reasonable exercise of which a court cannot interfere, although they may not have chosen the best method, or made the most advantageous contract. But this is not an unlimited and arbitrary discretion to make any kind of contract that they see fit, as the court below, in its memorandum, seems to think. If so, the city council might have made a contract running 100, or even 500, years, as well as 30 years. This would be a very dangerous doctrine, for by reason of the incompetency or dishonesty of these officials the powers of a municipality might be thus bartered away for so long a period of time as to practically disable it from performing its public duties. While the ordinance, on its face, does not purport to grant any exclusive franchise, yet the practical effect is almost necessarily to give the grantees a monopoly for 30 years of the business of furnishing water to the city and its inhabitants. If the city is bound to pay $4,400 a year for 30 years for water for fire protection alone, it probably could not afford to incur the extra expense of either building waterworks itself, or making any contract with any other company that would induce it to do so. Hence whatever improvements may be made in the future in the methods of supplying the public with water, in the quality of water supplied, or in the method of fire protection, the city and its inhabitants are tied down by this ordinance to the present system, and practically confined to the supply furnished by the company for 30 years."

In a more recent case involving a similar legal question, **City of Staples v. Minnesota Power & Light Company**, 196 Minn. 303, 265 N. W. 58, on page 305 the court said:

> "In this state it is settled law that in providing water and electricity for its inhabitants a municipality acts in its proprietary capacity. Reed v. City of Anoka, 85 Minn. 294, 88 N. W. 981; City of Crookston v. Crookston Water Works, P. & L. Co., 150 Minn. 347, 185 N. W. 380. Contracts relating thereto are governed by the same rules of contract law regarding laches and estoppel as those of private corporations or individuals. The 'doctrine (that laches will not be imputed to government) is not extended to such a municipal corporation.' County of Boone v. Burlington & M. R. R. Co., 139 U. S. 684, 693, 11 S. Ct. 68, 690, 35 L. ed. 319. See also Metropolitan R. Co. v. District of Columbia, 132 U. S. 1, 10 S. Ct. 19, 33 L. ed. 231. The principle of ratification by laches or delay is as applicable to such a municipal corporation as it is to a private corporation or to an individual person. 1 Dillon, Municipal Corporations (4 ed.) Section 548; Clark v. City of Washington, 25 U. S. 40, 6 L. ed. 544; St. Charles Township v. Goerges, 50 Mo. 194; City of Cincinnati v. Evans, 5 Ohio St. 594.

"That is about enough to decide the case. An individual occupying the same relative status as does plaintiff in respect to defendant would have so little chance of avoiding a ten-year contract which it had performed, and performance of which by the other party it had accepted, for five years, that no well advised attorney would even suggest that the attempt be made, where the only question was as to the authority of some agent to make the contract. For obvious reasons, there is an estoppel to question the agent's authority if the bargain itself is confirmed by five years of open-eyed and unquestioning performance, and acceptance of performance, by the principal."

It would be impossible to give a categorical answer to the question here considered without first exploring all of the facts and circumstances which existed at the time when the agreement was made, and which have any material bearing upon its terms and conditions, as well as economic changes which have occurred since that time, and all of the facts and circumstances which, in the opinion of the village council, necessitated an abandonment of such agreement. These facts, as well as any other facts which have any bearing thereon can only be determined in a judicial proceeding. Consequently, it is our opinion that the safe course for the village to pursue would be to institute an action for a declaratory judgment, and in such a proceeding the rights of all of the interested parties would be determined and adjudicated.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Attorney for Village of Heron Lake.
July 3, 1953. 624-D-9

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# 145

**Water and sewer system—Authorization from voters required for construction—M. S. A. 412.321—Opinion of attorney general dated February 3, 1953, File 44b-17 followed.**

**Finances—Funds—Public works reserves—M. S. A. 471.57—Taxes levied for general and special purposes, may not exceed per capita limitation prescribed by M. S. A. 275.11, as amended by L. 1953, C. 577.**

## Question

May the village acquire, own and operate a public utility for a water or sewer system under L. 1953, C. 398, notwithstanding the provisions of M. S. A. 412.321?

## Opinion

Our opinion dated February 3, 1953, following the quotation therein from Section 412.321, Subd. 2, stated:

"The provisions of the above statute prescribe that no public utility shall be constructed, purchased, or leased until the proposal to do so has been submitted to the electors and approved by five-eighths of those voting on the proposition."

L. 1953, C. 398, provides for local improvements and special assessments by certain municipalities, including villages. This law amends M. S. A. 429.19, and Section 13, Subd. 1, thereof repeals specific sections of M. S. 1949, as therein enumerated. Section 412.321 is not specifically amended nor repealed by this chapter. If the legislature had intended to remove the prohibitions contained in Section 412.321 and empower governing bodies of a municipality to acquire, own and operate a public utility without authorization from the voters, as required by this section, it could have done so. This the legislature has not done. We do not believe that the prohibition against acquiring a public utility until authorized by the voters, as provided in said section, has been in any manner modified or affected by the provisions of Ch. 398. Accordingly, it is our opinion that no public utility may be acquired, owned or operated by a village until authority has been secured from the voters in the manner provided for in Section 412.321.

There is attached to your letter a copy of village ordinance establishing a "Public Works Reserve Fund" pursuant to M. S. A. 471.57, and in connection therewith you submit this further

**Question**

What is the tax levy limitation authorized by Section 471.57 for a public works reserve fund?

**Opinion**

So far as here material Section 471.57, Subd. 1, provides:

"The council of any city, village, or borough, however organized, may establish by ordinance a public works reserve fund and may annually levy taxes **within existing limits for the support of such fund.**"

In our opinion the amount of tax levy authorized under this section may not, when added to the total amount of taxes levied by the village for any and all general and special purposes, exclusive of taxes levied for special assessments for local improvements on property specially benefited thereby, exceed the per capita limitation as prescribed by M. S. A., Section 275.11, as amended by L. 1953, C. 577.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

New London Village Attorney. 44-B-17
August 7, 1953. 476-a

PUBLIC WORKS

# 146

**Parks—Baseball—Grandstand and fencing—Control and supervision—Not vested in water, light, power and building commission—M. S. 1953, C. 453.**

**Facts**

Many years ago the city of Shakopee purchased a baseball park which has been used for recreational purposes. The park is fenced. A grandstand has been constructed in the park. The baseball park, including the grandstand and fence, has been under the supervision and control of the city council.

**Question**

Are the grandstand and the fence, built and maintained by the city in the baseball park, subject to the jurisdiction of the water, light, power, and building commission under the provisions of M. S. 1953, C. 453?

**Opinion**

The powers of the water, light, power, and building commission, created under the provisions of M. S. 1953, Section 453.01, are prescribed in Section 453.04 which, so far as here material, provides:

> "The commission shall have full, absolute, and exclusive control, except as hereinafter provided, of and power over the water, light, and power plants, and municipal heating plants, and all parts, attachments, and appurtenances thereto, and all apparatus and material of every kind and description used or to be used in operating these plants, or any or either of them, in all these municipalities, **including all other public buildings and halls owned by the municipality.** * * * "

We do not believe that the phrase "all other buildings and halls owned by the municipality" was meant and intended to give the water, light, power, and building commission, created under the provisions of Section 453.01, supra, jurisdiction, supervision and control over the city baseball park, including the grandstand and fence, used primarily for recreational purposes. Accordingly, we answer the question in the negative.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Shakopee City Attorney.
May 21, 1954. 59-B-11

# PUBLIC WELFARE

MENTALLY ILL

## 147

**Maintenance—Apportionment of cost therefor between county and city in counties of the first class**—M. S. A. 393.01, Subd. 4, 393.07, 393.08, L. 1953, C. 732, Section 1, coded as [246.47]

**Statements**

"By Minnesota Statutes, Section 393.01, Subd. 4, the Board of Public Welfare for Ramsey County is continued in existence, with its appointment as provided by Laws 1929, Chapter 371, as amended, and having the powers granted by this latter citation in addition to the general powers of boards of public welfare as set out in Minnesota Statutes, Section 393.07.

"Minnesota Statutes, Section 393.08, requires that the County Welfare Board of this county present its estimate of the amount needed by it to perform its duties, including expenses of administration, to the Board of County Commissioners and the Council of the City of Saint Paul.

"This latter statute states:

'The cost of all of such relief, including maintenance of any almshouse, sanatorium, or hospital maintained by such county and city shall be paid 72½% by such county and 27½% by such city.'

"Laws 1953, Chapter 732, relates to the charge to be made for the care and treatment of mentally ill patients.

"Subd. 2 thereof relates to the charge to be made for patients in receiving units of state hospitals and requires payments by the relatives of voluntary patients. It provides that if the relatives are unable to pay for voluntary patients and if it be determined that it is an emergency case where danger to the public or damage to the patient from delays in hospitalization and treatment, a guarantee of payment by the county welfare board of the patient's residence must be immediately sought. The same subdivision refers to 'The liability of the county' and states that the county welfare board shall be charged on a certain basis, and further states that the county shall be billed for all of said charges and shall pay to the state all money collected by the county from the patients or relatives of the patient, who are responsible for his care plus one-half of the remaining uncollected balance.

"Subd. 3 of the same section refers to care and treatment in a state mental hospital other than in a receiving unit of patients who are under the age of 65 years. It states that if a voluntary patient or his relatives are unable to pay, a guarantee of payment by the county

welfare board must be immediately sought. It refers to the liability of the county of residence and this same third paragraph of Subd. 3 states that the county welfare board shall be billed. It states:

'The County Welfare Board shall be billed for all such charges and shall pay to the state all money collected by the county * * * plus one-half of the remaining uncollected balance.'

"The fourth paragraph of Subd. 3 relates to committed patients under 65 and states that if the patient or his relatives are unable to pay, the county welfare board of the patient's legal residence shall be billed for one-half of such cost. It further states that the county shall thereupon collect from the patient or his relatives and that the county welfare board shall pay to the director one-fourth of the total amount billed after subtracting the amount of collections made by the county welfare board and remitted to the director

"Subd. 4 of this same section refers to patients 65 years of age or older. The second paragraph of this subdivision states that if the director determines that the patient or his relatives are unable to pay that the county welfare board of the patient's legal residence shall be billed. It further states that the county shall pay the director an amount equal to the county's share and refers to the amount the county might recover from the patient or his responsible relatives."

**Question**

"Where under Minnesota Statutes 393.08 the cost of public welfare is paid 72½% by the county and 27½% by a city of the first class in such county are the payments required for mentally ill patients, under Laws 1953, Chapter 732, Section 1, coded as [246.47], to be paid by the welfare board, and hence 72½% of the cost borne by the county as a whole and 27½% borne by the city, or is the county as a whole to pay all of such charges?"

**Opinion**

L. 1953, C. 732, amends M. S. 1949, Sections 526.01, 526.05, and 526.06, and repeals M. S. 1949, Section 246.31, Subd. 4, as amended by L. 1951, C. 173, Section 1. Section 1, Subds. 1, 2, 3, 4, 5, and 6, coded as [246.47], does not expressly amend or repeal any existing statute. It seems reasonably clear from this section that the legislature intended to establish a standard to compute charges for the care and maintenance of certain patients in state institutions. This section leaves undisturbed the provisions of M. S. A., Sections 393.01, 393.07, and 393.08, which relate to the establishment of a county welfare board in a county having a city of the first class. The powers and duties of such board are set forth in said sections. Section 393.08, which in part provides: "The cost of all such relief, including the maintenance of any almshouse, sanatorium, or hospital maintained by such county and city shall be paid 72½ per cent by such county and 27½ per cent by such city," is not repugnant to, nor in conflict with, the provisions of L. 1953, C. 732.

It is therefore our opinion that Section 393.08, which provides for an apportionment of the charges for the care of certain patients, is unaffected by L. 1953, C. 732, which act becomes effective January 1, 1954.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Ramsey County Attorney.
July 17, 1953. 248

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OLD AGE ASSISTANCE

## 148

**Claims—Liability for assistance granted spouse prior to marriage—M. S. 256.25.**

**Facts**

One "N" received old age assistance from November, 1940, to December, 1941, in the amount of $350.00 from the Ramsey County Welfare Board. In 1942 "N" married her fourth husband, "B". "N," later Mrs. "B," died in 1952 while still married to "B". Mr. "B" died May 3, 1953, and his estate is currently being probated in the Ramsey County Probate Court. At no time during her marriage to Mr. "B" did "N" (Mrs. "B") receive any old age assistance.

**Question**

Upon the foregoing facts, is it proper for the county welfare board which has paid old assistance to file a claim in the Probate Court against the estate of Mr. "B" for reimbursement for the assistance granted "N," later Mrs. "B," prior to her marriage with the decedent?

**Opinion**

That portion of M. S. 1949, Section 256.25, which we think material, is as follows:

> "On the death of any person who received any old age assistance under this or any previous old age assistance law of this state, or on the death of the survivor of a married couple, either or both of whom received old age assistance, the total amount paid as old age assistance to either or both, without interest, shall be allowed as a claim against the estate of such person or persons by the court having jurisdiction to probate the estate. * * * "

Your letter does not raise any question which involves a lien on Mr. "B's" property, if any, nor his duty to support his spouse. The question therefore resolves itself into the intention and the authority of the legis-

lature when passing the above law to obligate a husband to make reimbursement for aid which his spouse received before her marriage to him.

The statute possibly is indefinite as to the time when the assistance was granted which obligates the spouse for reimbursement. The canons of statutory construction direct attention to the mischief which the legislature was attempting to remedy. In this case we believe the intention was to prevent one spouse from receiving assistance while the other failed in his duty to provide support. So far as we know, Mr. "B" was not remiss in this respect. The canons provide a presumption that the legislature does not intend a result that is unreasonable. Numerous cases counsel us to avoid a construction which would result in absurdity or injustice if the language used would reasonably bear any other construction. **Township of Equality v. Township of Star**, 200 Minn. 316, 274 N. W. 219.

Ordinarily, the spouse's obligation to reimburse the public for aid granted his spouse is based upon the ability of the spouse to furnish support and his obligation so to do which he has managed to transfer to the public. We find no such elements in this case. The legislature, being composed of serious, thoughtful and experienced men, must appreciate that matrimony is not all moonlight and roses but we cannot bring ourselves to the conclusion that it was the intention of that body to impose on a spouse obligations of his partner implied by accepting assistance from the public before the marriage was contracted.

We therefore answer your question in the negative. Bearing on, but not directly deciding, the point are **In re Morrisson's Estate**, 49 N. Y. S. (2d) 464, 183 Misc. 530; **State v. Whitver**, 71 N. D. 664, 3 N. W. (2d) 457; **Hodson v. Stapleton**, 290 N. Y. S. 570, 248 App. Div. 524.

G. L. WARE,
Special Assistant Attorney General.

Ramsey County Attorney.
October 16, 1953. 521-G

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**RELIEF**

## 149

**Minor—Settlement—Emancipation of minor presents factual question—** M. S. A. 261.07, Subd. 3.

**Facts**

A girl (hereinafter referred to as a minor), 18 years of age, left the home of her parents in A county and went to B county. She obtained employment in B county and was self-supporting for a period of approximately three years. During this period her parents did not exercise any control or supervision over her. About a year after she attained her majority she moved from B county to C county.

**Questions**

"(1) Did she acquire legal settlement in County 'B'?

"(2) Regardless of the fact that she was self supporting and away from her parents' home, custody and control, does she retain the legal settlement of her parents?"

**Opinion**

Both questions will be considered together.

M. S. A. 261.07, Subd. 3, so far as pertinent to the questions under consideration provides:

> "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 feebleminded, delinquent, or dependent person shall have the same settlement as the parent with whom he has resided."

The fundamental problem presented is whether or not there has been an emancipation by the minor from her parents. This presents primarily a factual question, and we do not express opinions upon a factual question. Each case must be considered and decided by applying the law to the facts as they are found to exist.

We shall point out the applicable rules of law.

The general rule is stated in Dunnell's Minn. Digest, Vol. 5, Section 7309, as follows:

> "The mere waiver by a parent of the right to the earnings of a minor does not alone constitute an emancipation. To constitute an emancipation there must be a surrender of the right to his services and to the control of his person. Marriage emancipates a minor. Emancipation may be complete or partial. If it is complete it relieves the minor from the custody and control of the parents and destroys the filial relation."

In **Taubert v. Taubert**, 103 Minn. 247, 114 N. W. 763, the court on page 249 said:

> "A mere waiver, however, by the parent of the right to the earnings of his minor child, does not alone constitute such emancipation. There must be a surrender by the parent of the right to the services of his minor child, and also the right to the custody and control of his person."

The question of whether there had been an emancipation was again before the court in **Lufkin v. Harvey**, 131 Minn. 238, 154 N. W. 1097. In the course of the decision the court on page 240 said:

> "Under the English common law, emancipation of children by their parents as we now understand the term was quite unknown. In the United States the doctrine of emancipation has been applied with some

liberality. Emancipation is not, however, to be presumed. It must be proved. A minor may be emancipated by an instrument in writing, by verbal agreement, or by implication from the conduct of the parties. There may be complete emancipation, even though the minor continues to reside with his parents.

"Complete emancipation gives to the minor his time and earnings and gives up the parents' custody and control, and in fact works an absolute destruction of the filial relation. Emancipation may, however, be partial. A minor may be emancipated for some purposes and not for others. The parent may authorize his minor child to make contracts of employment and collect and spend the money earned and still not emancipate him from parental custody and control."

And on page 242 the court said:

"When we consider that complete emancipation involves an absolute destruction of the filial relation, it is quite clear that it should not be inferred from the fact alone that the parent gives the child the right to hire out and collect and disburse his earnings. It is matter of common knowledge that, in very many, if not in most, cases where such right is given to minor children living at home there is no thought of destruction of the filial relation."

In a later case, **In re Settlement of Horton v. Town of Orono,** 212 Minn. 7, 2 N. W. (2d) 149, on page 9 the court said:

"Emancipation need not be in writing or in express words. It may be implied from conduct. These considerations apply in whatever form of action or proceeding emancipation is for determination. * * * The principles or rules of law to be followed in determining the fact issue of emancipation are clearly stated. The latest application of that case by the supreme court of Maine is Inhabitants of Trenton v. City of Brewer, 134 Me. 295, 186 A. 612. In that case the father was living. In the proceeding at bar the mother took the father's place, he being dead. The syllabus reads:

'If the pauper settlement of the father changes during the child's minority, that of the child likewise changes, by operation of law, and regardless of the consent or desire of the parties. Upon emancipation, the child takes his father's pauper settlement, and retains it until he himself acquires a new one.

'Emancipation may take place in one of several ways, during the minority of the child.

'Marriage of a minor son, with the consent, and not contrary to the direction of his parents, works complete emancipation.

'Emancipation is never presumed, but must always be proved. It may be implied from circumstances, or inferred from the conduct of the parties'."

The court held that there had been no emancipation until the majority of the minor, page 11.

The foregoing decisions establish the rule of law which should be applied to the facts in the instant case so that the question of whether or not there has been emancipation can be determined. The fact that the minor has been self-supporting for a period of time and there has been no supervision or control exercised by the parents during such period of time is not conclusive proof that there has been an emancipation. All of the facts which have any bearing upon the ultimate question of whether there has been an emancipation must be taken into consideration.

In the instant case, in the event that there has been no emancipation of the minor from her parents then the residence of the minor follows the residence of her father.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Stearns County Attorney.
March 13, 1953. 339-D-4

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# RAILROADS

## CROSSINGS

## 150

**Signals—Speed of trains—Cities—Created by special act—May be repealed in part by general law—Minn. Const. Art. IV, Section 33—State v. Sullivan, 62 Minn. 283, 64 N. W. 813; City of Winona created by and operating under special act may require, upon approval of Railroad & Warehouse Commission, installation of signal devices at grade crossing —M. S. A. 219.28—City may regulate speed of trains within municipality until R. & W. Com. has taken action as prescribed in Section 219.383—Frazier v. Northern Pacific Railroad Company (Idaho), 28 F. Supp. 20-23.**

**Facts**

"The charter of the City of Winona is contained in Chapter 5, Special Laws of 1887. Chapter 4 of this Charter, Section 3, Paragraph 27, grants to the City of Winona the right to regulate the rate of speed of all railway trains within the city. It also grants to the City of Winona the right to require railroad companies to construct at their own expense such tunnels, bridges, or other conveniences at public railway crossings as the city council may deem necessary.

"Chapter 219 of Minnesota Statutes 1945 (M. S. A. 219.383) grants to the Railroad and Warehouse Commission the right to fix the rate of speed in any city and the right to require additional safeguards at grade crossings, such as grade separation, signal devices, etc.

"One of the railroads passing through the City of Winona has a large number of public street crossings which are unprotected except for the required stop sign."

In addition to the foregoing facts the records of the Railroad and Warehouse Commission disclose that on October 24, 1939, an order was made and filed requiring the installation of traffic signals at certain grade crossings within the city of Winona. These records further disclose that no order has been made by the commission fixing or regulating the speed of trains within the city.

**Questions**

1. May the city of Winona regulate the speed of trains within the corporate limits of the city?

2. May the city require the installation of automatic lighted signal devices at all grade crossings within the city?

**Opinion**

1. The city of Winona has its origin in a special legislative charter, Sp. Laws 1887, C. V. Chapter IV, Section 3, paragraph Twenty-seven reads as follows:

"To regulate the use of locomotive engines and the rate of speed of all railway trains within the city; to direct and control the location of steam railway tracks and to require railway companies to construct at their own expense such bridges, tunnels or other conveniences at public railway crossings, as the city council may deem necessary; also to require such companies to station and keep flagmen and to display danger signals on the approach of trains at such public crossings as the council may designate; also to regulate the running of horse railway cars, the laying down of tracks for the same, and the kind of rail to be used, and the transportation of passengers on such horse railways."

Minn. Const. Art. IV, Section 33, in part provides:

"In all cases when a general law can be made applicable, no special law shall be enacted; and whether a general law could have been made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined without regard to any legislative assertion on that subject."

The legislature may by general unconditional law expressly repeal all special laws so far as inconsistent with it, though this may have the effect of leaving other parts of such special law in force and unrepealed. **State ex rel. Baker v. Sullivan**, 62 Minn. 283, 64 N. W. 813; **State ex rel. Childs v. Copeland**, 66 Minn. 315, 69 N. W. 27.

Prior to the adoption of L. 1945, C. 220, coded as M. S. A. 219.383, a municipality was empowered, by virtue of its delegated police powers, to

regulate within reasonable bounds the speed of trains within its limits. **Lang v. Chicago & North Western Railway Co.**, 208 Minn. 487, 489, 295 N. W. 57.

So far as material to the question here considered, Section 219.383, supra, provides:

> "The railroad and warehouse commission on petition of any city or village council or any railway corporation may fix and determine after a hearing a reasonable rate of speed for the operation of an engine or train on and over any railroad crossing of a public highway or street in such city or village.
>
> "* * *
>
> "Where the railroad and warehouse commission has fixed the rate of speed of an engine or train over a public highway or street crossing in a city or village as provided in this section, such rate of speed so fixed shall be the lawful maximum rate of speed at which an engine or train can be operated on and over such public highway or street crossing, until changed by subsequent order of the commission."

The original act, C. 220, supra, contained a repealing clause, as follows:

> "Minnesota Statutes 1941, Section 616.31, and all acts or parts of acts inconsistent herewith are hereby repealed."

which has been omitted from Section 219.383, supra.

The Railroad and Warehouse Commission has not fixed and determined the reasonable rate of speed for the operation of engines or trains on or over any railroad crossing of any public highway or street within the corporate limits of the city. The city council, by virtue of Section 3, paragraph Twenty-seven, as above quoted, is empowered to regulate the rate of speed of all railway trains within the city. We are informed that the city has adopted, and there is now in force and effect, ordinances which prescribe the rate of speed for trains within the city.

In our opinion the city council may proceed to regulate the speed of all trains within the city until the Railroad and Warehouse Commission has acted pursuant to Section 219.383, supra, and by its order fixed and determined the rate of speed for the operation of engines and trains within the city as authorized by said statute. In reaching this conclusion we adopt the decision of the court in the case of **Frazier v. Northern Pac. Ry. Co.** (Idaho), 28 F. Supp. 20-23, where the court, in considering an analogous statute, said:

> "The mere fact that the legislature of the State has given power to the Public Utilities Commission to regulate the speed of railway trains does not prevent the City from doing so in absence of proof that the Commission has taken action."

2. The power and authority to prescribe conditions for the construction and reconstruction of grade separations and bridges is vested in the Railroad and Warehouse Commission. **State v. Northern Pacific Railway Company,**

176 Minn. 501-507, 223 N. W. 915; **State ex rel. City of St. Paul v. Minneapolis, St. Paul and Sault Ste. Marie Railway Company**, 190 Minn. 162, 251 N. W. 275.

Section 219.26 reads as follows:

> "It shall be the duty of the commission, so far as practicable, to secure uniformity in the devices used to protect grade crossings. No such devices shall be installed until the same have been approved by the commission. All such devices which are now in use or which may be hereafter installed, which, in the opinion of the commission, conflict with the devices approved by the commission, either in their design or method of operation, so as to create a hazardous condition to the travel at such crossing, shall be immediately modified by the railroad company controlling the same so as to conform to those approved by the commission."

The question of the power and authority of the Railroad and Warehouse Commission to require the installation and prescribe the type of safety devices and signals was before the court in **Lydia M. Olson v. Chicago Great Western R. Co.**, 193 Minn. 533, 259 N. W. 70. On page 537 the court said:

> "It is obvious that the legislature has by statute prescribed a uniform system of crossing signs and the manner of their placements. In the instant case no showing was made that since the enactment of this law the then existing sign of the railway company had been replaced or that the commission had ordered it to furnish crossing signs and that the company had failed so to do. The legislature having made or provided for adequate rules and regulations respecting crossing signs and warnings, it is not for us to conjure others. We should not interfere. The title of the act is: 'An act providing for the manner of constructing crossings, and for the construction and maintenance of certain signs at the crossings of railroads, streets and public highways, and regulating the use of such crossings by the public, and for the establishment, vacation and re-location of such crossings and prescribing penalties.' This indicates a clear intention on the part of the legislature to occupy the entire field."

In **Licha v. Northern Pacific Railway Company**, 201 Minn. 427, 276 N. W. 813, the court, upon a re-examination of the Olson case and the meaning of the term "the entire field," on page 433 said:

> "What is meant by the expression in the Olson case that C. 336 occupies 'the entire field'? If it is meant that the legislature has conferred on the railroad and warehouse commission the power to provide for the installation of signs, safety devices, stationing of flagmen, and similar measures, the statement concededly is correct. * * * The legislature has not indicated any intention to exonerate railroads from the duty of exercising due care by acts in addition to the statute and orders of the commission if necessary for public safety. * * * The granting of exclusive authority to the railroad and warehouse commission **relates not so much to the occupation of the entire field of**

**regulation of the operation of railroads as it does to the governmental authority by which such regulations shall be made. The statute simply revokes previous delegations of regulative authority and redelegates such authority to the commission."** (Emphasis supplied.)

It seems reasonably clear from the language of the court in this case that the regulation and control of the various types of safety devices and signals which may be used, as well as the installation thereof, is by statute now vested in the Railroad and Warehouse Commission. This decision, in our opinion, requires a negative answer to the second question.

In the opinion of the Attorney General, No. 82, 1930 Printed Report, there is cited in support of the conclusions reached Laws 1911, C. 243, Section 6, as follows:

> "That nothing herein contained shall be construed as repealing, abridging, modifying or in any manner affecting the power contained in the charter of any city or village in this state to require railroads to maintain gates, flagmen or safety devices at public highway crossings therein, or any ordinance, now existing or hereafter enacted pursuant to such power."

This section, from the note following Section 219.44, M. S. A., Vol. 15, p. 350, has been omitted, and is considered as having been repealed by Laws 1925, C. 336.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Winona City Attorney.
May 18, 1953. 369-M

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# STATE

## LEGISLATURE

## 151

**Powers—State departments—Transfer of functions of department of public examiner to a legislative post-auditor and post-audit department—**Art. III of Minn. Const.; M. S. A. 215.11, 43.24.

### Facts

Several bills "have been introduced in the Legislature proposing to abolish the Department of Public Examiner and transferring all of the duties and responsibilities of the Public Examiner to a department in the legislative branch of our government. This proposed department would be in charge of a legislative post-auditor."

**Question 1**

"Can the Legislature under the provisions of our Constitution create such an office as that of legislative post-auditor, for the purpose mentioned, and fix his term to cover a six year period or any other period that would last longer than from the beginning of one legislative session until the beginning of the next?"

**Opinion**

Article III of the Constitution of Minnesota reads as follows:

"Section 1. The powers of government shall be divided into three distinct departments—legislative, executive, and judicial; and no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, except in the instances expressly provided in this constitution."

Notwithstanding the above quoted constitutional provision, the courts, it appears, in such decisions as that in **Tucker v. State**, 218 Ind. 614, 35 N. E. 2d 270, have taken the position, as stated by the court in the Indiana case, that:

"It is equally well established by our decisions and decisions elsewhere that the general assembly [legislature] may exercise the executive power of appointment of officers and employees whose duties are incident to its legislative functions."

It is my opinion that the proposed office of legislative post-auditor may be created and filled by the legislature for a term of such length as to the legislature shall seem proper, provided his duties are made incident to legislative functions. For example, he may be authorized to examine the expenditure of legislative appropriations and appropriations of local governments for the purpose of acquiring information with reference thereto and any other information to be used as a basis for future appropriations or other legislation, such as the extension or limiting of the powers of state and local officers, or legislation with reference to municipal debt limitations, and the need of the delegation of further authority to local governments or the reduction of the powers heretofore conferred upon them.

Assuming the duties of such office in the legislative department are so limited as to be constitutional, the term of a legislative post-auditor may, in my opinion, be for a six-year period or any other period. The length of the term may continue for a longer time than from the beginning of one legislative session to the beginning of the next. However, one legislature cannot bind a succeeding legislature. One legislature may appoint a post-auditor for a certain period, and the next legislature may remove the post-auditor or reduce his term of service as it may see fit.

You state that in the bills to which you refer it is proposed to transfer all the functions, powers, duties, rights, and obligations of the office of public examiner to the legislative post-audit department to be in charge of a legislative post-auditor. If the duties of the proposed post-audit

department were limited to investigations and reports to the legislature as a basis for future legislation, as hereinabove stated, although such duties may be partly of the nature of administrative and executive functions, it is my opinion that the exercise thereof would not be in conflict with the above referred to provision of the constitution dividing the powers of government into three distinct departments.

However, in so far as the officers or employees in a legislative post-audit department are to be given power to perform executive duties other than those incident to legislative functions, any legislation imposing upon legislative officers and employees such executive duties would result in the exercise by persons in the legislative department of powers properly belonging to the executive department. Obviously, that kind of legislation is prohibited by the above cited Article III of our constitution.

It appears to be clear that the transfer as proposed of all the functions and duties of the public examiner to a legislative post-auditor and post-audit department would mean the exercise by the legislative department of some powers belonging to the executive department, for the reason that the present duties of the public examiner are not limited to examination of the expenditure of appropriations and acquisition of information pertaining to state and local governmental departments and officials for legislative purposes. The powers now conferred upon the public examiner cover many functions other than those incident to legislation. Some of his investigations are mandatory; others are furnished on local request. Counties and local governments are obliged to pay the salaries and other expenses of the examiners while engaged in the making of examinations. Among other duties imposed upon the public examiner of an executive nature are ascertainment of the character of official bonds and financial ability of bondsmen, enforcing a proper custody and depository of funds, causing of subpoenae issued by him to be served and enforced, and gathering of evidence for the enforcement of our penal and other laws.

In the case of **State v. Lowrie**, 235 Minn. 82, 49 N. W. 2d 631, the court said (p. 87 of Minn. Rep.):

> "* * * No doubt the public examiner has a duty to investigate bribery charges when those charges grow out of matters which it is his duty to investigate and examine."

The same detection duty is unquestionably imposed upon him when his examinations disclose the commission of any other crime. M. S. A., Section 215.11, provides for filing of certain reports with the county attorney and that "it shall be his duty to institute such civil and criminal proceedings as the law and the protection of the public interests shall require."

It is, therefore, apparent that law enforcement and many of the other above mentioned powers conferred and duties imposed upon the public examiner pertain to the exercise of executive, and not legislative, functions of government. To the extent that any executive duties of the public exami-

ner imposed upon officers and employees of the state legislature are not an incident to legislative function, the transfer thereof to the legislative department of our state government will, in my opinion, be invalid.

**Questions 2 and 3**

"Although the Legislature, under this bill elects the legislative post-auditor, the only candidates that can be considered are those submitted by the Legislative Research Committee. Do you consider such a restrictive provision valid?

"The Legislative Research Committee is also authorized to fill a vacancy in the office of the legislative post-auditor if one occurs between legislative sessions. Is this a power of appointment that the Legislature can delegate to an agency such as the Legislative Research Committee?"

**Opinion**

If the legislative department of post-auditor is properly limited to legislative functions of such a nature that the duties of the department and officers and employees thereof would be incident to the legislative functions of the legislative department of government and not an encroachment upon the powers of the executive department, it is my opinion that the legislature itself could elect or provide for the appointment of a legislative post-auditor by any officer or group of officers within the legislative department, or empower the legislative research committee alone to nominate candidates for or to fill the vacancy in the office of post-auditor.

**Questions 4 and 5**

"Can these employees [of the public examiner's office], after they are transferred, be separated from the service without the notice and hearing provided for in M. S. A., Section 43.24?

"If the foregoing question is answered in the negative, would the decision of the Civil Service Board be subject to review by the Courts, and thus give the judiciary a check on the Legislature's right to discharge its own employees?"

**Opinion**

Again, assuming that the post-audit department is only for the purpose of examining the expenditure of appropriations made by the legislature and the procuring of information, whether by examining state offices and officials or local offices and their officials, as a basis for legislation and incidental to legislative functions, it is my opinion that the legislature, by transferring the employees of the public examiner's department who become employed in a legislative post-audit department so limited, would separate them from the present executive civil service status, eliminate the jurisdiction of the civil service board over such employees, and render unnecessary the notice of hearing required by M. S. A., Section 43.24. The legislature has the

power to discharge its own employees without any interference therewith by the civil service board or by any other executive board or officer or by the judiciary department. For the discharge and removal of its own officers and employees, the legislative department may adopt such method as it deems advisable.

J. A. A. BURNQUIST,
Attorney General.

House of Representatives Judiciary Committee.
April 13, 1953. 353-a-1

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# TAXATION

## AD VALOREM TAXES

## 152

**Real estate—Assessment—Local board of review has no authority to change assessments in odd-numbered years**—M. S. 1949, Sections 274.01, 273.01, 273.17, 270.07, Chapter 278.

### Facts

"The Clarkfield Village Council, acting as a Board of Review under Section 274.01, M. S. A., has had under consideration certain inequalities in real estate tax. The County supervisor of assessments claims that real estate taxes cannot be changed by the Board this year. All real estate taxes under consideration were assessed in 1952. No changes were made by the assessor in 1953.

"It may be that the time to change the taxes was when the Board met in 1952, at which time the assessment was complete. But as a practical matter, the taxpayers did not know the result in dollars and cents until the real estate taxes were paid in 1953, and this year's Board gives them the first chance to appear after knowing the changes in taxes. The property in the Village was completely revalued for the 1952 assessment, and many changes were made."

### Questions

"Can the Board of Review change real estate taxes in odd numbered years, that is, can it equalize the real estate taxes?

"If not, is the only recourse to apply to the County Board for a refund? And if the application to the County Board is made is there a permanent change made accordingly in the assessment book?"

**Opinion**

It is the opinion of this office that the function of the local Board of Review under Section 274.01 (all statutory references are to Minnesota Statutes 1949, as amended) is to review the assessments made by the assessing officials. The statute says in part:

> "* * * Such board shall meet at the office of the clerk to review the assessment of property in such town or district, and immediately proceed to examine and see that all taxable property in that town or district has been properly placed upon the list, and duly valued by the assessor * * * "

The assessments referred to in your letter were made in the even-numbered year of 1952. By the terms of Section 273.01: "All real property subject to taxation shall be listed and assessed every even-numbered year with reference to its value on May first preceding the assessment, and all real property becoming taxable in the intervening year shall be listed and assessed with reference to its value on May first of that year * * * " With regard to the property listed and assessed in 1952, it would follow that except under the circumstances contemplated by Section 273.17, there was no assessment of the property in the year 1953 and no review by the local Board would lie.

Having held that the local Board of Review under the circumstances set out above cannot change the assessment of real estate taxes in the odd-numbered years, you ask if the only recourse is to apply to the County Board for a refund. We assume you make reference to Section 270.07 wherein application may be made for reduction or abatement of assessed valuations to the Commissioner of Taxation upon the favorable recommendation of the County Board. If the Commissioner of Taxation takes affirmative action on an application for reduction or abatement of taxes, the records of the County Auditor are changed accordingly. This is not the only recourse of the taxpayer. Under the terms of Chapter 278 of the statutes, a petition may be filed in District Court wherein the claims, defenses or objections of the taxpayer may be asserted.

You state in your letter that "as a practical matter, the taxpayers did not know the result in dollars and cents until the real estate taxes were paid in 1953, and this year's Board gives them the first chance to appear after knowing the changes in taxes." I am sure you have observed that the rights granted by statutes to taxpayers to appear before the County Board of Review, the Commissioner of Taxation, or the State Board of Equalization as well as before the local Board of Review contemplate such appearance before the actual amount of taxes in dollars and cents can be computed under tax levies fixed in the latter part of the taxable year.

JOSEPH S. ABDNOR,
Assistant Attorney General.

Clarkfield Village Attorney.
July 20, 1953. 474-c

# 153

**Reduction—County board of equalization has authority to reduce values in certain cases but cannot reduce aggregate value of property returned by assessors with additions made by the auditor**—M. S. 1949, Section 274.13.

**Question**

"Has the County Equalization Board the power to make adjustments in real estate valuations when they meet for their regular meeting in July of this year? Real property in this County was assessed in 1952 and I know that the County Board would have had authority to make adjustments in real estate valuations at their 1952 meeting. However, what I want to know is if the County Board has power to make adjustments in this odd numbered year when real estate is not being assessed."

**Opinion**

The authority of the County Board of Equalization is now found in Minnesota Statutes for 1949, Section 274.13. Under date of December 18, 1915 (Attorney General's Report 1916 No. 529) this office ruled as follows:

"Answering your letter of November 3 as to the authority of an assessor or County Board of Equalization to change the assessed valuation of real estate in the odd numbered years, where such valuation does not result from the erection, damage or destruction of structures, I state that the case of State v. Atwood Lumber Company, 96 Minn. 392, to which you refer, appears to be undoubted authority to the effect that under Section 2041, G. S. 1913, the County Board of Equalization may in the odd numbered year equalize the assessed value of real property. The question seems to have been fully and frankly presented to the court in the briefs of both parties in this case as to the authority of the County Board of Equalization.

"The rule in the odd numbered year must necessarily be that only where an affirmative showing of a material change in value is made before that Board should the assessed valuation of any tract of real property be changed. I do not think the opinion of the court can be construed to mean that the taxpayer should apply for a reduction in the assessed valuation to the County Board as such, for in every instance the court calls it the 'County Board of Equalization.'

"The reasoning used by the court in reaching this conclusion as to the Board of Equalization is not applicable to that of an assessor, and in my opinion the assessor cannot in the first instance in odd numbered years change the assessed valuation of any tract of real estate, the value of which has materially changed without reference to erection or destruction of buildings or other structures."

We affirm the above quoted opinion which appears to have constituted the applicable rule since the date of its writing. It should be observed,

however, that the Board does not have authority to reduce the aggregate value of the real property or the aggregate value of the personal property as provided in Minnesota Statutes 1949, Section 274.13 (5):

> "The board shall not reduce the aggregate value of the real property, or the aggregate value of the personal property, of its county below the aggregate value thereof, as returned by the assessors, with the additions made thereto by the auditor as in this chapter required; but the board may raise the aggregate valuation of such real property, and of each class of personal property, of the county, or of any town or district thereof, when it believes the same is below the full and true value of the property, or class of property, to such aggregate amount as it believes to be the full and true value thereof."

JOSEPH S. ABDNOR,
Assistant Attorney General.

Swift County Attorney.
July 7, 1953. 406-B

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ASSESSMENTS

## 154

**Local improvements—County auditor—Certification and collection—Effect of L. 1953, C. 398, Section 13 determined.**

**Facts**

"Chapter 398, Laws of 1953, entitled MUNICIPALITIES Improvements and Special Assessments sets up a new Local Assessment law for Villages and repeals old laws regulating local assessments.

"Section 6, Subd. 3, provides for payment thru the County Offices—In other words the WHOLE assessment is transmitted to the County Auditor and his office certifies amounts due each year as per the ASSESSMENT submitted to him.

"Under former laws—the Village Council adopted the ASSESSMENTS for a given improvement—EACH year the Village Clerk would certify to the County Auditor the amount due on each parcel and the Auditor would then certify that sum for collection with GENERAL TAXES.

"The County Auditor of Ramsey county is willing to accept for collection on the SAME BASIS former Local Assessments. In other words the Village Clerk would set up the amount due each year for the life of the assessment and submit it to the Auditor and his office would thereafter certify the amount due each year as per Chapter 398, Laws of 1953."

**Question**

"Can the County Auditor under Chapter 398 assume this work?"

**Opinion**

L. 1953, C. 398, is an act relating to improvements and special assessments in cities of the second, third or fourth class, villages and boroughs. It provides a new integrated procedure for the authorization of local improvements, assessment of benefits therefor and the collection of such assessments. Section 13, Subd. 1 of C. 398, expressly repeals most, if not all, of the then existing provisions of law relating to the subject matter of C. 398. However, Section 13, Subd. 2, contains the following provisions:

> "Any proceedings or actions heretofore commenced under any of the laws repealed in subdivision 1 may be completed under the laws under which they were begun, notwithstanding such repeal."

Obviously, if the authorities under which uncollected assessments had been made were repealed without the qualification thereof found in Subd. 2, there may have arisen some question about the collectability of such assessments. The purpose of enacting Subd. 2, it appears to us, is nothing more than to qualify such repeal and to permit the completion of proceedings which have been theretofore commenced under the statutory provisions referred to in Subdivision 1. We find nothing in the language of Subd. 2 which indicates to us any intention on the part of the legislature to authorize the collection under the procedures of C. 398 of assessments which had been theretofore levied under one of the provisions of law which is referred to in Subdivision 1. Assuming, arguendo, that the legislature intended by Section 13 to put all collections of assessments in the hands of the respective county auditors, the legislature would have implemented its intention by substantive provisions prescribing the procedure necessary to certify existing assessments and vesting authority in the county auditor to accomplish the collection thereof. We have scrutinized closely the provisions of C. 398 and we have failed to find any such substantive procedures.

For these reasons, it is our opinion that local assessments may be levied and collected under authority of the laws applicable thereto at the commencement of the proceedings even though such laws are referred to in L. 1953, C. 398, Section 13, Subdivision 1, and that such assessments may not be certified to a county auditor under authority of C. 398 and collected by him thereunder.

In closing, we deem it proper to state that under some of the laws referred to in Section 13, Subdivision 1, the procedure for certification to and collection of assessments by the county auditor was the same as that in C. 398, but in other laws so referred to the certification of assessments was made annually to the county auditor.

GEO. B. SJOSELIUS,
Deputy Attorney General.

North Saint Paul Village Attorney.
November 10, 1953. 408-C

# 155

**Local improvements—Installment payments—May be paid in same manner as other taxes—M. S. A. 432.11-432.24, 434.14-434.27, 412.409-412.481.**

**Facts**

"Over the period of recent years from 1948 through 1953, the Village of Caledonia has undertaken and completed numerous sewer, water and street improvement projects and levied special assessments therefor. In all cases each particular project was completed and assessed under and pursuant to the law under which it was initiated.

"Water projects were initiated and assessed under Sections 432.11 to 432.24, Minnesota Statutes (Chapter 425, Laws 1921); sewer projects were initiated and assessed under and pursuant to Sections 431.04 to 431.13, Minnesota Statutes (Chapter 35, Laws 1915); curb and gutter and street surfacing were initiated and assessed under and pursuant to Sections 434.14 to 434.27, Minnesota Statutes (Chapter 65, Laws 1919) and more recently sewer, water, curb and gutter, and street surfacing were initiated and assessed under and pursuant to Sections 412.409 to 412.481, Minnesota Statutes (Chapter 119, Laws 1949). The County Treasurer of Houston County, in which the Village of Caledonia is situated, at the request of the Village, has been collecting the entire annual installment of such special assessments on or before June 1 of each calendar year and not permitting payment of each such annual installment, one-half in June and one-half in November. This request of the County Treasurer was based upon the language in such statutes stating that such special assessments 'shall be payable in annual installments * * * on or before the first day of June * * * ' and in view of the fact that the interest included in each installment set forth in the assessment roll was computed from the date of the adoption of the assessment to June 1 following and annually thereafter from June 1 to June 1. The request was also based on the fact that the Village would lose five months interest on the one-half of the installment in each year if payment of one-half of the installment were permitted by the County Treasurer to be deferred until November."

**Questions**

"1. Is it permissible for the County Treasurer to accept payment of each annual installment of such special assessments one-half on or before June 1 and the other half on or before November 1 or must the County Treasurer collect each annual installment of special assessment in full on or before June 1?

"2. Is the method of collection of special assessments by the County Treasurer the same under each of said laws or is the method different under one or more of the laws?"

**Opinion**

These questions may be conveniently considered together and likewise answered.

M. S. 1949, Sections 412.409 to 412.481; 431.04 to 431.13; 432.11 to 432.24, and 434.14 to 434.27, above referred to, were repealed by L. 1953, Ch. 398, Section 13, Subd. 1. However, Subd. 2 thereof provides that any proceedings or actions commenced under any of the laws repealed may be completed pursuant to the laws under which they were begun, notwithstanding such appeal. In consequence of this proviso we believe that the provisions of the above statutes relating to the manner of levying special assessments, the collection and payment thereof, remain unaffected by such repeal. Provision is contained in each of the above statutes to the effect that whenever a special assessment has been levied and the same is not paid to the municipality, and thereafter certified and transmitted to the county auditor the same shall be extended upon the proper lists of the county, which assessments **shall thereafter be collected and paid over in the same manner as other village taxes.** See L. 1949, Ch. 119, Section 55, Subd. 3 (coded as M. S. A., Section 412.441), Section 431.13, Subd. 6, Section 432.17, and Section 434.20.

The repealing act, Ch. 398, supra, Section 6 (429.061), Subd. 3, which relates to transmitting the special assessments, as adopted by the council, to the county auditor, in part provides:

> "Such assessments shall be collected and paid over in the same manner as other municipal taxes."

which is substantially the same as the terminology contained in the statute just above mentioned. Municipal taxes constitute a part of the general taxes which may be paid in semiannual installments, the first half thereof on or before May 31 and the second half before November 1 during the current year. See Section 276.05. Under Section 276.03, the county treasurer is empowered to collect local assessments made or levied by a village and certified to him "at the same time that he collects any taxes which have been or may be levied against the same tract or parcel of land under the general laws of this state." The above quoted language, together with the specific provisions contained in the statutes above referred to to the effect that the special assessments, when properly certified to the county auditor, shall be extended upon the proper lists of the county and "shall **be collected** and paid over in the same manner as other municipal taxes," justifies the conclusion that special assessments which have been certified to the county auditor under any of the statutes here considered, may be paid in two equal semiannual payments during the year when due in the same manner as general taxes. A similar conclusion was reached in the opinion of the attorney general dated October 10, 1921, No. 30, 1922 Report.

The conclusions thus reached, and in view of the provisions of the statutes here considered, require an affirmative answer to the second question.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Caledonia Village Attorney.
June 10, 1954. 408-C

# 156

**Local improvements—Street—Property owned by the United States exempt.**

**Question**

Is the Post Office building and property owned by the federal government subject to a special assessment for the street improvement?

**Opinion**

We answer the question in the negative.

Property owned by the United States government is exempt from assessments for local improvements. See McQuillin Municipal Corporations, 3rd Edition, Vol. 14, Section 3875; **Whittaker v. City of Deadwood**, 23 S. D. 538, 122 N. W. 590; 139 Am. St. Rep. 1076; **United States v. Anderson Cottonwood Irrigation District**, 19 F. Supp. 740.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Northfield City Attorney.
September 21, 1953. 408-C

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ASSESSORS

# 157

**Mileage Compensation**—M. S. 1953, Sections 350.11 and 412.131.

**Facts**

M. S. A., Section 412.131, governs the compensation of village assessor.

The council neglected to fix the compensation of the assessor and, as a result, he was entitled to the statutory per diem of $6.00 per day, not to exceed 90 days.

The statute cited, provides:

" 'In addition to other compensation, the council may allow the assessor five cents per mile for each mile necessarily traveled in his assessment work'."

**Questions**

**1.**

"In the event an assessor uses his own car, does the so-called allowance of five cents a mile, if granted, preclude him from claiming, in addition, expense reimbursement under M. S. A., Section 350.11?"

2.

"On the other hand, in the event that he was not granted an extra five cents a mile for traveling in his assessment work, to what extent, if any, can he be reimbursed for use of his car?"

**Opinion**

1.

Minnesota Statutes 1953, Section 350.11, provides, in part:

"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 section shall be construed as amending all existing laws authorizing such allowances or reimbursements by imposing the maximum limit above set forth."

That portion of the statute quoted above is clearly a maximum limitation and not a grant of authority to pay traveling expenses. We have so held in previous opinions. Opinion No. 194, 1942, Published Opinions of Attorney General; Opinion of Attorney General, March 6, 1947, 104-A-8. If a statute provides that a particular officer or employee shall be entitled to mileage at a specific rate, the allowance is not in any way affected by the above statute so long as it does not exceed the maximum limitation set forth therein. See Opinion of Attorney General, May 29, 1935, 104-A-8.

Since your questions involve a village assessor, those portions of Minnesota Statutes 1953, Section 350.11, which provide alternative provisions for counties with a population of over 550,000 inhabitants and certain cities of the second class would not be applicable. This being the case, it is our opinion that the village assessor would be precluded from claiming expense reimbursement under Minnesota Statutes 1953, Section 350.11, since the applicable portions of the statute constitute a limitation on amount and not a grant of authority to pay.

2.

Under the authority of Minnesota Statutes 1953, Section 412.111, a village council is authorized to fix the compensation of officers and employees, **when not otherwise prescribed by law.** Since the compensation of village assessor, including reimbursement for mileage, is prescribed by Section 412.131, the village council would be without authority to fix mileage compensation for the assessor except within the provisions of that section.

Minnesota Statutes 1953, Section 412.131, provides in part:

". . . 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 days 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."

The above statute provides that where the assessor's compensation is not fixed by the council, he shall receive $6 per day for each day's service necessarily rendered, not exceeding 90 days, **plus** mileage at the rate of five cents per mile for certain specific trips which the assessor is required to make in the performance of his duties. (See also Minnesota Statutes 1953, Section 273.03, which repeats the mileage allowance for one specific trip.) In addition to such mileage allowance, the village council "**may** allow the assessor five cents per mile for each mile necessarily traveled in his assessment work." See Opinion of Attorney General, August 5, 1953, 12-b-1.

On the basis of the foregoing statute, it is our opinion that the village assessor, in the case presented by your inquiry, is entitled to mileage at the rate of five cents per mile for the specific trips enumerated in the statute. In addition thereto, he is entitled to such additional mileage as the village council, in its discretion, may allow at the rate of five cents per mile for each mile necessarily traveled in his assessment work. If the council does not allow the additional mileage compensation for the traveling done by the assessor in his work, it is our opinion that he cannot be reimbursed therefor.

GEORGE H. GOULD,
Special Assistant Attorney General.

Public Examiner.
April 28, 1954. 12-B-1

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BOARD OF REVIEW

## 158

**Meeting—Mayor of South Saint Paul entitled to cast vote in case of tie—Statutory time for meeting of Local Board of Review directory and not mandatory—Aggregate value of assessment which cannot be reduced by County Board of Equalization refers to assessors' value before changes by Local Board of Review**—M. S. 1949, Sections 274.01, as amended, and 274.13, as amended.

**Facts**

"Prior to the first day of May, 1953, the County Assessor of Dakota County gave notice that the date for the meeting of the Board of Review would be the 15th day of July, 1953. Pursuant to that notice the Local Board of Review did meet and at that meeting or subsequent adjourned meetings notice was given of the intention to increase substantially the personal property returns of certain taxpayers. At the hearings on the increase a motion was made to make the increase. The vote of the Board of Review resulted in a tie and the Mayor of the City of South Saint Paul then cast the deciding vote in favor of increase of the particular personal property returns under consideration. As I understand the law, the County Assessor is required to make the changes ordered by a local board of review, before making his return to the County Board of Equalization."

**Question No. 1**

"Is the 15th day of July, a proper date for the holding of the first meeting of the Board of Review in view of the provision in Section 274.01, M. S. A., that such meeting shall be held between the first day of June and the fifteenth day of July and if the meeting was not properly held on that day, what effect does it have on the subsequent actions of the Board of Review?"

**Opinion**

The provisions of Minnesota Statutes 1949, Section 274.01, as amended, are directory and not mandatory. See Published Opinions of the Attorney General, 1940, No. 298, Page 381; **Bielke v. American Crystal Sugar Co.**, 206 Minn. 308, 288 N. W. 584; **Faribault Water Works Co. v. County of Rice**, 44 Minn. 12, 46 N. W. 143. Inasmuch as the provisions of the statute relating to time for meeting of the Board of Review are directory only, the proceedings of the Board are not invalidated by its meeting on the 15th day of July. It is not necessary to determine whether or not such day is within the specific designation of the statute.

**Question No. 2**

"The City of South Saint Paul is a home rule charter City. Section 6, Chapter III of the charter provides 'The mayor shall be ex-officio a member of the City Council and president of the same, but shall have no vote except in the case of a tie.' Section i, Chapter IV, of the charter says, 'The alderman from the different wards and from the city at large shall constitute the City Council of the city of South Saint Paul.' The charter has subsequently been amended so that all aldermen run at large. Section 17, Chapter IV, of the Charter says, 'The City Council shall meet on the fourth Monday in June, at the Council room in said city for the purpose of reviewing the assessment of property in said city . . . .

"In view of the above provisions of the Charter is the Mayor a member of the Board of Review with the power to vote at a Board of Review meeting in the event of a tie vote on the questions presented at a Board of Review meeting?"

**Opinion**

Your second question is answered in the affirmative. Under the facts stated the mayor is an ex-officio member of the City Council with the right to vote in the case of a tie. It is the opinion of this office that the status of the mayor in the Board of Review is the same and is entitled to vote in the case of a tie.

**Question No. 3**

"In the event it is your determination that the increase above referred to has been properly made and that the County Assessor is required to return to the County Board for equalization the figures as changed by the local Board of Review, does the aggregate value referred to in Subd. 5, Section 274.13, M. S. A., beyond which the County Board of Equalization may not reduce, mean the figures returned by the local assessors before being equalized by the local board of review or does it mean the final figures that the County Assessor submits to the County Board of Equalization."

**Opinion**

Minnesota Statutes 1949, Section 274.13 (5), as amended provides in part:

"The (county) board shall not reduce the aggregate value of the real property, or the aggregate value of the personal property, of its county below the aggregate value thereof, **as returned by the assessors,** with the additions made thereto by the auditor as in this chapter required; . . . " (Parenthesis and emphasis supplied.)

Minnesota Statutes 1949, Section 274.01, as amended by Laws 1949, Chapter 543, Section 1, provide in part with regard to the meeting of the local Board of Review that:

". . . . The assessor shall attend, with his assessment books and papers, and take part in the proceedings, but shall not vote. If the county employs a county assessor, he or an assistant, delegated by him shall attend such meetings. The board shall list separately, on a form appended to the assessment book, all omitted property added to the list by the board and all items of property increased or decreased, with the full and true value of each item of property, added or changed by the board, placed opposite such item. . . . "

The foregoing portion of the statute quoted from the provisions relating to the local Board of Review indicates clearly that the assessment books of the County Assessor constitute a return by him to the local Board of Review with the changes thereafter made by the local Board distinctly and sepa-

rately set out thereon. Directly answering your question, it is the opinion of this office that the words "as returned by the assessors" refer to the figures returned by the County Assessor in Dakota County before being reviewed or equalized by the local Board of Review.

JOSEPH S. ABDNOR,
Assistant Attorney General.

Dakota County Attorney.
August 3, 1953. 59-A-52

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**EXEMPTIONS**

## 159

**Parsonage — Partly rented out pro rata exempt — Opinion No. 364, 1936 Report, dated April 29, 1936, OVERRULED.**

### Facts

A church within the City of Fairmont owns a parsonage which contains two housing units. One unit is occupied by persons not connected with the church. Rent is paid for the use of this unit and the rentals are applied toward payment of the pastor's salary.

### Question

Does opinion No. 364 of 1936 still prevail so that the parsonage property which is owned by the church is not taxable?

### Opinion

Opinion No. 364 of 1936 adopts the principal use test to determine whether or not property otherwise exempt from taxation becomes taxable when part of the use made of it is revenue producing. The principal use test had been adopted by the Supreme Court in several decisions prior to the date of opinion No. 364 of 1936. In **Christian Business Men's Committee of Minneapolis v. State,** 1949, 228 Minn. 549, 38 N. W. 2d 803, the court adopted the substantial use test as the primary test in determining the taxability of property used only partially for exempt purposes. The court in that case also introduced in Minnesota pro rata taxation. In the court's language the primary rule is now as follows:

> "The better rule, which we now adopt and which is followed by many other jurisdictions wherein property is entitled to tax exemption only if it is used exclusively for a tax-exempt purpose, is 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 such institution for the purposes for which it was organized and another substantial portion thereof is primarily used for revenue

by rental to the general public, such 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."

Whether or not a substantial part of the parsonage in this case is used for the production of revenue is a question of fact and the fact should be resolved by those charged with the collection of the tax. If the revenue producing use of the property is found to be substantial, then the rule laid down in **Christian Business Men's Committee of Minneapolis v. State,** supra, is applicable.

If the part of the property rented is a substantial portion thereof, the fact that the rental income is applied toward payment of the pastor's salary will not convert a non-exempt use of the property to an exempt use. **State v. Minnesota Congregational Church,** 1927, 173 Minn. 40, 216 N. W. 326. See opinion of August 13, 1952, and opinion No. 215, 1952 report.

GEORGE L. POWELL,
Special Assistant Attorney General.

Martin County Attorney.
February 25, 1954. 414-D-12

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# 160

**Real property—Conveyed by relief recipient to municipality, reserving life estate, discussed—If not exempt, should be placed on tax rolls as omitted property**—Minn. Const. Art. IX, Section 1; M. S. 1949, Section 273.02—Opinion No. 205, 1932, Report and opinion June 16, 1936, superseded.

**Facts**

"Sometime in the spring of the year 1951, a resident of one of the cities in our county made application to the city council for direct relief. At the time of this application the applicant was the owner of his homestead, which he owned in fee simple. As a condition to his being granted relief the city required that he transfer the title to his homestead to the city retaining a life estate for himself. In accordance with the city requirement in the month of April, 1951, this resident and his wife executed a deed conveying their homestead to the municipal corporation which deed reserved unto the grantors a life estate in the property for the term of their natural lives.

"In assessing the real estate taxes for the year 1951, payable in the year 1952, which were assessed as of May 1, 1951, this real estate was not included, apparently for the reason that the fee title subject

to the life estate was in the city and it was thus devoted to a public use. However, in making the assessment for the year 1952, payable in the year 1953, which was made as of May 1, 1952, the property was included for taxes, but, however, the taxes have not been paid and are now delinquent."

**Question**

1. "Should this property be included in the tax lists or would it be exempt from real estate taxes?"

**Opinion**

Under Section 1 of Article IX of the State Constitution, "Public Property used exclusively for any public purpose, shall be exempt from taxation." According to your letter, the title to the real property here involved is, now, in the city, subject, however, to the life estate of the relief recipient. It appears, then, that the constitutional requirement that the real property must be public property is met. There remains the question whether the real property here involved is used for a public purpose. Assuming that the former owner was and is eligible for relief, it was and is the obligation of the municipality to provide for him a place within which to live, either by making an allowance for rent or otherwise. Therefore, it appears proper to us that the city, if it deemed it advisable, could provide such place by accepting a deed to the real property subject to the life estate of the grantor. We have not considered and do not pass upon the requirement of the city making conveyance of the homestead a condition precedent to granting relief. It is our opinion that the use of the real property by the life tenant is a public use as long as he is eligible for relief from the city. However, if the tenant should become ineligible for relief, or if the tenant should lease the real property to some other person, it is our opinion that the real property would not be used for a public purpose and would be subject to taxation.

From the foregoing discussion, it is apparent that we cannot answer your first question categorically. However, the county auditor, by applying the rules set forth above to the facts as he finds them to be, should have no difficulty in determining whether the real property here involved is exempt from taxation.

**Question**

2. "In the event that it is required to list this property for real estate taxes should an assessment be made for the year 1951 payable in the year 1952 at this time or should that year be passed and the property included in the tax lists for future years?"

**Opinion**

Assuming that the real property here involved was not exempt from taxation on May 1, 1951, or on May 1, 1952, it is the duty of the county auditor to assess the property and extend the taxes as provided by M. S.

1949, Section 273.02, for omitted property. Whether the real property here involved is exempt from taxation in 1953 and subsequent years must be determined by the county auditor as of May 1 of each year by applying the tests hereinabove set forth to the facts as they are at that time.

Opinion No. 205, 1932 report, dated February 11, 1932, and the opinion of the attorney general to the county attorney of Jackson County dated June 16, 1936 (file 414a-11), are superseded to the extent that they are inconsistent with this opinion.

J. A. A. BURNQUIST,
Attorney General.

Sibley County Attorney.
December 3, 1953. 414-A-11

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# 161

**YMCA camp—Exempt as institute of purely public charity under Article II, Section 1, Minn. Const., M. S. A., Section 272.02—YMCA organized under Sections 315.44 to 315.49.**

**Facts**

"The Young Men's Christian Association of Duluth, Minnesota, is a non-profit corporation reincorporated under General Laws of 1889, Chapter 232, which laws are presently coded as Sections 315.44 to 315.49 of the Minnesota Statutes."

On December 1, 1931, it duly renewed its charter as provided by law and by amendment to Article 3 thereof it provided for the following purposes and objects:

"The objects of the organization of this corporation are, First, to unite young men and boys of like Christian character and purpose in a practical program of service among their fellows, to the end that the manhood of the City of Duluth may become dominantly Christian, loyal to and active in the Church, and trained and ready to do unselfish, intelligent and courageous work in making the ideals and teachings of Jesus effective in the City of Duluth, the Nation and the World; and Second, through educationally planned and directed activities, to demonstrate to youth the value of strong bodies, trained minds, wholesome social life and of religion as the most essential factor in a well-rounded personality."

Since 1916, the Duluth Young Men's Christian Association, hereinafter referred to as YMCA, has owned and operated Camp Miller in Pine County, Minnesota, the real estate being described as follows:

"The Northwest ¼ of the Southwest ¼ (NW ¼ of SW ¼), Section 17, Township 45, Range 19 West; Government Lot Two (2), less one (1)

acre, Section 17, Township 45 North, Range 19 West; Government Lot Three (3), less the South six (6) acres, Section 17, Township 45 North, Range 19 West."

The YMCA at Duluth has been exempt from taxation on all of its property since its organization with the exception of its camps.

The YMCA of Duluth itself as well as Camp Miller is operated on a non-profit basis. Each camper pays a camping fee which does not in itself cover the expenses of the individual camper. The functions of Camp Miller are supported principally with money donated to the YMCA through private donations and the Community Chest of Duluth.

One of the major objectives of the association is

(a) To provide young men and boys with

(1) Opportunities for normal group life in which they are fully accepted and in which they develop rewarding friendship;

(2) Encouragement and opportunity to engage in socially useful service or to accept some public civic responsibility;

(3) The means of maintaining health and physical fitness;

(4) Vocational encouragement, guidance and education;

(5) Opportunities to develop new and worthy free time interests;

(6) The means and encouragement to continue their education beyond formal schooling and to adapt it to their changing life's situations and problems;

(7) Aid and encouragement in developing religious faith and ideals;

(8) Aid in understanding themselves, in planning sensibly for their lives and in solving personal problems.

**Question**

Whether or not Camp Miller located in Pine County is exempt from taxation as an institution of purely public charity.

**Opinion**

Article IX, Section 1 of the Minnesota Constitution, provides in part as follows:

"All * * * institutions of purely public charity * * * shall be exempt from taxation. * * *"

Our Supreme Court has held that in order for any institution to qualify for tax exemption under the Minnesota Constitution, Article IX, Section 1 — and M. S. A. 272.02 enacted pursuant thereto — there must be a concurrence of ownership of the property by an institution of the type prescribed by the Constitution and a use of the property for the purpose for which such institution was organized. **State v. Ritschel**, 220 Minn. 578, 20 N. W. 2d 673; **State v. Willmar Hospital, Inc.**, 212 Minn. 38, 2 N. W. 2d 564; 11 Minn. L. Rev. 541; 51 A. J., Taxation, Section 539.

In the case of **State of Minnesota v. Young Men's Christian Association of the City of Minneapolis**, Hennepin County District Court File No. 495666, our District Court, on October 28, 1953, determined that the defendant

therein was an institution of purely public charity. It further determined that certain real property known as Camp Ihduhapi used in its camping program was being put to a charitable use and was therefore exempt from taxation.

There appear to be no substantial differences between the facts you give in the instant case and those before the Court in the Minneapolis case. Both organizations have been reincorporated under the same statutory provisions and their purposes and the uses to which the properties are put appear to be substantially the same.

Accordingly, on the basis of the facts before us, we are of the opinion that the Young Men's Christian Association of the City of Duluth is an institution of purely public charity and that Camp Miller is being used for charitable purposes. Accordingly, we are of the opinion that Camp Miller is exempt from taxation.

REGINALD F. HOLSCHUH,
Special Assistant Attorney General.

Pine County Attorney.
July 6, 1954. 414-D-14

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LEVIES

## 162

**Towns — Villages — Unless otherwise provided by statute, town levy lies against property in village if village not separated for election or assessment purposes**—M. S. A., Section 412.081, Laws 1953, Chapter 473.

**Facts**

"Under authority of Chapter 473, Laws of 1953, Iron Range Township in Itasca County has levied $250.00 for recreational purposes. Taconite Village in Itasca County has levied $1,000 for recreational purposes. Taconite Village is located in Iron Range Township but is not separated from the township for tax purposes. 1953 assessed values of the above districts are as follows:

| District | Total Assessed Value | Iron Ore Assessed Value | Iron Ore % of Total Assessed Value |
|---|---|---|---|
| Iron Range..... | $ 156,690 | $ 22,299 | 14.23 |
| Taconite..... | 1,980,302 | 1,699,010 | 84.67 |
| TOTAL..... | $2,136,992 | $1,721,309 | 79.50 |

"Considered alone, Iron Range Township would not have the 55% iron ore valuation required by the above law. If Taconite Village were included, of course the 55% iron ore valuation requirement would be set."

**Questions**

"In view of the foregoing information, may the recreation levy be spread in Iron Range Township? If so, may the township recreation levy be spread also in Taconite Village?"

**Opinion**

Your questions will be answered together.

Chapter 473, Laws 1953, provides that the levy for recreation purposes may be made by any town "* * * in which the assessed valuation consists of more than 55 per cent iron ore. * * *" It appears clear the Legislature intended that the town may make such levy if 55 per cent of the assessed valuation of the property against which the levy is to be imposed consists of iron ore. If the town levy for recreation under Chapter 473 lies against the taxable property within the village, then upon the stated facts more than 55 per cent of the property against which the levy is made consists of iron ore and the requirements of the statute are met.

The following cases:

**Bradish v. Lucken,** 38 Minn. 186
**State v. Peltier,** 103 Minn. 32, 114 N. W. 90
**Love v. Town of Preston,** 112 Minn. 459, 128 N. W. 673
**Ingersoll v. Town of Deer River,** 125 Minn. 452, 147 N. W. 439

all relate to the question of the imposition of town levies against property of an incorporated village when the village has not been separated from the town for assessment and election purposes.

The foregoing cases unanimously hold that the village is liable for the debts incurred by the town for general purposes, but because of a specific statute the village is not liable to be taxed for any indebtedness on account of the roads and bridges of the town. In other words, the village property is subject to assessment for general town purposes unless there is a specific statute to the contrary, or the applicable statute indicates otherwise.

Minnesota Statutes 1949, Section 412.081, provides for distribution of money in the town treasury in certain cases upon separation of an existing village from the township. This provision of the statute would certainly lead to the conclusion that the taxes imposed by the township and ultimately paid into the town treasury are imposed not only against the property of the town but also against the property in the village, again excepting those cases in which the applicable statute indicates otherwise.

On the authority of **Love v. Preston,** supra, this office has heretofore said (published opinion of the Attorney General, 1924, No. 215, page 210):

"Taxes levied by a town for town purposes should be spread upon property within the village in that town if it has not separated therefrom. The village authorities can, of course, levy a tax on the village property to which the town does not contribute."

Under the rule of the statute, opinion and cases cited above, it is our conclusion that the levy voted by a town for recreation purposes under Chapter 473, Laws 1953, would lie against the property of a village within the geographical limits of the town if the village has not been separated for assessment or election purposes. Actually, we think most apropos today the words in the decision of the Supreme Court in the **Lucken** case, supra, decided in 1888 relating to this question wherein it said:

> "It is obvious that further legislation is desirable to define and adjust the relations between townships and villages organized under the general law."

JOSEPH S. ABDNOR,
Assistant Attorney General.

Itasca County Attorney.
February 17, 1954. 519-O

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# 163

**Towns—Villages—When not separated for election and assessment purposes, levy should be made by each political subdivision as authorized by governing body or electors within statutory limitations.**

**Facts**

"The Village of Aurora is located within the Town of White and is not separated from such Town for election or assessment purposes. In spreading the levy of the Town, the County Auditor of St. Louis County has never spread the Town Levy against any of the property located within the Village.

"We are now having an audit of the Town books by State Public Examiners and a question has been raised as to whether or not the County Auditor should not spread the general corporate levy of the Town against the property in the Village."

**Questions**

"1. Should the County Auditor of St. Louis County spread the levy of the Town of White against property located in the Village of Aurora which is not separated for assessment or election purposes from the Town of White?

"2. If the above question is answered in the affirmative, how much of such levy should he spread against Village property?

"3. If the Town Levy or part of it is to be spread against Village property, must the Village reduce the amount which it levies for itself so that it will not be levying taxes in excess of the limitations provided for by law?"

**Opinion**

These questions will be considered in the order above stated.

1. The records in the office of the secretary of state do not disclose the law under which the village of Aurora was incorporated. For the purpose of this opinion we shall assume that the village of Aurora was incorporated under a general law and not by a special act of the legislature.

The question here considered presents a difficult problem. We have not found any decision of our court which is decisive of all aspects of this question.

The court has definitely stated that where a village, organized under a general law, has not separated from a town for assessment and election purposes, a tax levy made by the town for road and bridge purposes should not be spread against the property within the village. **Bradish v. Lucken,** 38 Minn. 186.

Our court has held that a village organized pursuant to L. 1885, C. 145, which is a general law, is not, either before or after its separation from the town, liable to be taxed for indebtedness incurred on account of township roads or bridges. **State ex rel. Warren v. Peltier,** 103 Minn. 32, 114 N. W. 90; **Ingersoll v. Town of Deer River,** 125 Minn. 452, 147 N. W. 439.

By authority of these decisions we are of the opinion that taxes levied and assessed by a town for road and bridge purposes, or, to discharge an indebtedness created by a town for such purposes, may not be spread against property within a village either before or after separation from such town for assessment and election purposes.

Under the town system of caring for indigent persons the various subdivisions, whether it be city, village, or town, are by statute required to provide for the care of the poor. M. S. A., Section 261.06. To provide funds for poor relief purposes each political subdivision is by statute authorized to levy taxes to provide the necessary funds for the administration of poor relief. In view of the duty imposed by statute upon each political subdivision when operating under the town system to care for its poor and administer poor relief, and the power to levy taxes for such purposes, we believe that it is logical to conclude that taxes levied by a town for poor relief purposes should not be spread against village property when such village has not been separated from the town for election and assessment purposes. See **Village of Robbinsdale v. County of Hennepin,** 199 Minn. 203, 271 N. W. 491.

With respect to taxes levied by a town not separated from a village for election and assessment purposes, except for road and bridge purposes, or indebtedness created or incurred in connection therewith, and taxes levied for poor relief purposes, we reach the conclusion that all such other taxes so levied by a town, unless otherwise provided by law, should be spread against the property of the village not separated.

2. Our answer to the first question disposes of and renders unnecessary an answer to the second question.

3. The amount of taxes which may be levied by the governing body of a village for village purposes is to be determined by the tax limitation statutes applicable to villages unaffected by any tax levy made by a town which may be spread either in whole or in part against a non-separated village. See opinion of attorney general, No. 215, 1924 Report.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Attorney for Town of White.
February 25, 1954. 519-q

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MORTGAGE REGISTRY TAX

## 164

**Assignments—Rents from real estate—Taxability of instrument—M. S. 1949, Sections 287.01 and 287.05.**

**Facts**

An attorney has brought to the county treasurer an assignment of rents, a copy of which you enclosed, together with an affidavit reciting that the amount of indebtedness figure was $50,000.00 and tendered a mortgage registry tax of $75.00 to the treasurer.

The instrument constituting the assignment of rents states in effect that for a good and valuable consideration the property owner does assign, transfer and set over to the creditor "all rents now due or hereafter becoming due to assignor for the use and occupancy of the first floor and basement of the building" (street address and legal description of the property then given) and the "assignor authorizes and directs all tenants to pay said rent to the assignee and authorizes and empowers the assignee to collect and receive said rents." The assignee while given the right to collect and receive the rents is nevertheless "under no duty or obligation to collect or receive said rents but may do so at its option." The instrument further states that it is understood and agreed between the parties that the assignment is given to secure payment of any indebtedness then owing by the assignor to the assignee and any future indebtedness thereafter owing by assignor to assignee, or any renewals or extensions of any present or future indebtedness," and that if, as and when all indebtedness owing by assignor to assignee shall have been paid in full, assignor shall have the right to ask for and receive from assignee a release of this assignment." The instrument is signed, acknowledged and witnessed.

**Question**

Is the instrument referred to above subject to a mortgage registration tax?

**Opinion**

Minnesota Statutes 1949, Section 287.05, provides:

> "A tax of fifteen cents is hereby imposed upon each one hundred dollars 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;
>
> * * *"

Minnesota Statutes 1949, Section 287.01, provides:

> "Subd. 2. 'Real property,' 'real estate,' and 'land,' in addition to the meaning thereof contained in chapter 500, include all property a conveyance whereof may be recorded or registered by a register of deeds under existing law.
>
> "Subd. 3. The word 'mortgage' means any instrument creating or evidencing a lien of any kind on such property, given or taken as security for a debt, notwithstanding such debt may also be secured in part by a lien upon personalty."

In **Farmers Trust Co. v. Prudden**, 84 Minn. 126, 86 N. W. 887, an owner of property had given a mortgage on the real estate to a mortgagee. Sometime subsequent to the execution of the mortgage, the property became worth less than the amount of indebtedness whereupon the mortgagor executed an assignment of rents to the mortgagee as further security for the debt. An examination of the record filed with the Supreme Court discloses that the assignment of rents in this Farmers Trust Co. case was in form and substance very similar to the instrument submitted with your letter. The court found the assignment of rents to be a separate and distinct transaction from the mortgage on the property and stated:

> "There is only one question in this case requiring consideration; that is, what was the nature of the instrument executed by appellants by which they assigned to the mortgagee the rents from the building? If this instrument conveyed an interest in the real estate, respondent could acquire no rights under it, except as provided by law with reference to real-estate mortgages, but, if it was a mere assignment of personalty in the nature of choses in action, then the assignee had the authority, under the instrument, to collect the rents; and, if he was prevented from doing so by the act of the assignor, it was competent for the court to furnish the relief accorded in this case. In our judgment, the instrument in question was nothing more nor less than a transfer of the interest which the mortgagor had as against the various tenants. They were claims either existing or to exist, to pay the mortgagor specified sums."

In **State v. Royal Mineral Association**, 132 Minn. 232, 156 N. W. 128, decided after the Farmers Trust Co. case, supra, the Minnesota Supreme Court held:

"Unaccrued rents are not personal property. They are incorporated hereditaments. They are an incident to the reversion and follow the land. Burden v. Thayer, 3 Metc. 76, 37 Am. Dec. 117; Mahoney v. Alviso, 51 Cal. 440; Broadwell v. Banks, 134 Fed. 470. They pass with a sale or devise of the land. Martin v. Royer, 19 N. D. 504, 125 N. W. 1027; Stone v. Snell, 86 Neb. 581, 125 N. W. 1108; Hammond v. Thompson, 168 Mass. 531, 47 N. E. 137. If transferred apart from the land, the provision of the statute of frauds relating to sales of land applied. Brown v. Brown, 33 N. J. Eq. 650, 659; King v. Kaiser, 3 Misc. (N. Y.) 523, 23 N. Y. Supp. 21; Browne, Statute of Frauds (5th ed.), Section 230. In fact, although separable from the reversion, they are, until such separation, part of the land (Scully v. People, 104 Ill. 349; Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 580, 15 Sup. Ct. 673, 39 L. ed. 759); 'for what is the land but the profits thereof?' 1 Co. Lit. 4b."

In **O'Brien v. Liberty Mining Co.**, 164 Minn. 186, 204 N. W. 625, the Supreme Court referred to both the Farmers Trust Co. case, supra, and State v. Royal Mineral Association, supra, and said:

"Farmers Trust Co. v. Prudden, 84 Minn. 126, 86 N. W. 887, furnishes little aid. The assignment of rents there involved was not absolute, but created a lien which was sought to be and was foreclosed. The case was discussed with respect to peculiarities of mortgage law not involved here. No discussion is called for of the language proper for characterization of the royalties in question for, whatever terminology may be used, it is clear that they are subject to assignment. 'In such case the assignee is the owner of the rents.' Cargill v. Thompson, 57 Minn. 534, 59 N. W. 638. 'Unaccrued rents are not personal property. They are incorporeal hereditaments. They are incident to the reversion and follow the land,' but of course may be transferred apart from it. State v. Royal Mineral Assn., 132 Minn. 232, 156 N. W. 128; Ann. Cas. 1918A, 145. * * *"

From an analysis of the cases cited above it would seem that Farmers Trust Co., supra, stands as authority for the proposition that an assignment of rents does not constitute an assignment of an interest in "real estate," and on the authority of that case standing alone, an assignment of rents as securities for indebtedness would not constitute a lien against the real estate. However, the later case of State v. Royal Mineral Association, supra, stated unequivocally that unaccrued rents are not personal property — they are incorporeal hereditaments, and it seems to follow that a lien against such unaccrued rents under the rule of the last mentioned case might be held by the Court to be a lien against an interest in real estate. So far, the question has not been specifically answered by our Court.

This office has often held that because of the seriousness to the mortgagee of the failure to pay the proper amount of the Minnesota mortgage registration tax, we always hesitate to give an opinion that the tax is not payable on an instrument unless there can be no doubt of the correctness of the answer. (See Opinion dated July 17, 1931, File No. 418-B-12.) We have also held when the answer to the question is in doubt that the mortgagee

could ill afford the risk of an adverse decision from the Court on the question and thereby jeopardize his security should a holding be made. (Opinion dated April 16, 1940, File No. 418-A-11.)

Consistent with the established policy of this office where a doubt exists, we rule that the treasurer should accept the mortgage registry tax tendered with the instrument.

JOSEPH S. ABDNOR,
Assistant Attorney General.

Hennepin County Attorney.
May 5, 1953. 418-a-1

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PERSONAL PROPERTY

# 165

**Auction sale proceeds—Interest of vendor under conditional sales contract paramount to judgment for taxes against vendee—Nature of interest of vendor after sale of property presents fact question**—Minnesota Statutes 1949, Sections 272.49, 272.50; Laws 1951, Chapter 127.

**Facts**

Personal property taxes for the years 1949, 1950 and 1951 had been levied against X for farm machinery owned by him. All provisions of the law for assessing such taxes and all subsequent provisions were duly followed. Judgments for delinquent taxes have been entered for said years.

All property involved was farm machinery and had been purchased prior to 1949 under a conditional sales agreement from Y. In April of 1952, being then delinquent in his payments to Y, X held an auction sale of the farm machinery with the consent of Y and with the understanding the proceeds would go to Y and cancel out the conditional sales agreement. An auction sale was then had by X selling the property at auction.

The auction sale did not bring enough money to pay up the contract. However, the bank which clerked the auction, upon a demand from the sheriff, held money and still holds money sufficient to pay the personal property tax judgments. The attorney for Y claims that the taxes are not due and payable out of the proceeds of the sale of the property.

You call our attention to Minnesota Statutes, Section 272.49, and its repeal by Chapter 127 of the Laws of 1951. You also call our attention to Section 272.50 making taxes a first and perpetual lien on personal property except the vendor's interest in a conditional sales contract but you state that "In our case the conditional sales contract was not foreclosed but rather an auction sale was had in the name of X with the understanding that the proceeds would go to Y." You ask this

**Question**

"Are the proceeds of the auction sale subject to the payment of the personal property tax?"

**Opinion**

Y as the seller of the farm machinery under a conditional sales contract retained the title to such machinery. The buyer having defaulted on the contract, Y had an election of three remedies: He could retake the property; sue for the unpaid contract price; or he could while retaining possession bring suit in equity to have a lien decreed and enforced. See Dunnell's Minnesota Digest, Supplement to Volume V, Section 8651.

While Y retained title to the machinery and had the aforementioned election of remedies, if he had without proper condition or qualification consented to the sale of the machinery by X, then Y forfeited his lien and had no claim upon the proceeds from such sale. As stated in **Holmes v. Schnedler,** 176 Minn. 483, 223 N. W. 908:

> "* * * Such absolute title remains in him (the seller) or passes from him to the purchaser absolutely accordingly as the conditions of the sale are broken, or as they are performed, or as may result by operation of law from some act of election on the part of the seller."

On the basis of the foregoing rules, a fact question is presented by your inquiry. While the Attorney General does not rule upon questions of fact, the following may be of value to your county officials.

If it is determined as a matter of fact that by virtue of agreement between the parties Y duly appointed X to act for him as his agent in taking possession of the farm machinery and making a sale thereof, then the proceeds from the sale are those of Y and such proceeds are not subject to personal property tax judgments against X. See **Tremont v. General Motors Acceptance Corporation,** 176 Minn. 294, 223 N. W. 137.

It might also be determined as a matter of fact that an agreement between X and Y provided for a non-statutory contractual form of foreclosure of Y's lien on the property, in which event the proceeds of the sale would be those of Y and not subject to personal property tax judgments against X. Such a situation existed in **Great Northern States Bank v. Ryan,** 292 Fed. 10, wherein the Eighth Circuit Court of Appeals in applying the Minnesota law held with regard to a mortgagor-mortgagee relationship as follows:

> "While the Minnesota statutes provide as to the method of foreclosure of a chattel mortgage, the parties may provide as to how the foreclosure shall be carried out, and such method is cumulative to the statutory one. As long as their agreement is not violative of the statutes, or against public policy, or fraudulent as to the rights of third parties, they may enter into any agreement they see fit for the foreclosure or turning over of the property by the mortgagor to the mortgagee. They can stipulate for foreclosure without the statutory public notice. The statutory requirements are for the benefit of the mortgagor,

and may be waived if the rights of third parties are not involved. Callen v. Rose, 47 Neb. 638, 66 N. W. 639; Jones on Chattel Mortgages (2d ed.) 773."

In summary, it can be stated that if Y consented to the sale of the property by X without a proper reservation or qualification, then he has relinquished his lien on the property and the proceeds from the sale are those of X and are subject to the personal property tax judgments against X. If, on the other hand, it is found as a matter of fact that Y did by agreement appoint X as his agent for purposes of sale of the property, the title to which remained in Y, or effect a non-statutory foreclosure of the lien of Y on the property, then the proceeds from the sale are those of Y.

JOSEPH S. ABDNOR,
Assistant Attorney General.

Steele County Attorney.
March 2, 1954. 421-C

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# 166

**Boat—Not licensed, registered, or enrolled taxed at place where it belongs or is kept—M. S. A., Sections 273.34 and 273.48.**

**Facts**

"A boat owner on the St. Croix River resides at Lake City in Wabasha County, which he considers his home port, but from October 1st to May 15th he stores this boat in Washington County. The boat is not enrolled, registered, or licensed in Washington County."

**Question**

"Should this boat be assessed for tax purposes in Wabasha County or Washington County, where it is located on May 1st?"

**Opinion**

M. S. A., Section 273.34, provides:

"All persons, companies, and corporations in this state owning steamboats, sailing vessels, wharf boats, barges, and other water-craft not employed in the navigation of international waters shall list the same for assessment in the county, town, or district in which the same may belong, or be enrolled, registered, or licensed, or kept when not enrolled, registered, or licensed."

You state that the boat involved is not enrolled, registered or licensed in Washington County. I assume for the purpose of this opinion that it is enrolled, registered or licensed at no other place in the State of Minnesota.

Having in mind this assumption and the statute cited above, it follows that the boat in question is listed for personal property taxation at the place where it belongs or is kept. This presents a fact question which must be answered by the tax administrator

Since a boat is a mobile unit it is readily apparent that it can be kept in more than one place in Minnesota during the course of the year. If there is doubt in the mind of the local assessor, then we suggest that reference be made to M. S. A., Section 273.48, which provides:

> "In case of doubt as to the proper place of listing personal property, or where it cannot be listed as in this chapter provided, if between places in the same county, the place for listing and assessing shall be determined by the county board of equalization; and, if between different counties, or places in different counties, by the commissioner of taxation; and when determined in either case shall be as binding as if fixed hereby."

and the question presented pursuant thereto to the Commissioner of Taxation as an administrative officer.

JOSEPH S. ABDNOR,
Assistant Attorney General.

Washington County Attorney.
March 22, 1954. 421-C-4

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# 167

**Imported packages—Twine**—Article 1, Section 10, Clause 2, Constitution of the United States.

**Facts**

A corporation chartered in another state but which has its principal office in Minnesota in Ramsey County has imported bindery twine manufactured in the Province of Ontario, Dominion of Canada, into the United States. It paid the import duty at the point of entry. This twine was shipped by boat and rail, leaving Canada by boat and arriving in Saint Paul by rail. It is in the original package and bale in which imported. Each bale is stamped "Made in Canada." The bales bear no markings showing duty to have been paid, nor is this twine held in bond. The owner has stated to the Assessor that all of its twine in its warehouse here has been imported from Canada. It has not been mingled with twine manufactured in this country. There has been no transfer of title or hypothecation of this merchandise since arrival in this country. It will be in the owner's warehouse in Saint Paul on May 1, 1954. The Assessor has not examined bills of lading for the Great Lakes shipping nor for the rail transport to Saint Paul for this particular twine as he has for twine in a similar situation in a year or in years previous to this, but he is informed such bills of lading are

available or will later be made available for his examination. This merchandise is not sold from this warehouse but as the corporation's needs require is shipped to its branches in Minnesota and nearby states for sale to consumers.

**Question**

"Will this twine be subject to ad valorem taxation as of May 1, 1954, in the County of Ramsey?"

**Opinion**

You are answered in the negative. This opinion is based upon the premise that the following factual elements were present in the situation outlined above as of May 1, 1954, to-wit:

a. The twine under consideration was imported **for purposes of sale** by its importer and title to the twine remained in the original importer;

b. The twine was in the original bales (packages) in which it was imported and it was stored in the importer's warehouse;

c. It had not been co-mingled with other similar property so as to have lost its distinctive character as imported material.

Assuming the above facts, we are of the opinion that any attempt to subject said property to ad valorem taxation would be in violation of Article 1, Section 10, Clause 2, of the Constitution of the United States which in part provides as follows:

> "No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; . . . "

The Supreme Court of the United States in the early days of this nation had occasion to interpret said clause in the cases of **Brown v. Maryland,** 12 Wheat 419, 6 Lawyers Edition 678, and **Waring v. City of Mobile,** 8 Wall 110, 19 Lawyers Edition 342. The court there laid down a rule to the effect that where factual elements as set forth above were present a tax thereon was plainly a duty on imports and prohibited by said constitutional clause

The foregoing determinations survive as the law of the land to this day and were as recently as 1945 acknowledged as such in both the majority opinion of Mr. Chief Justice Stone and the minority opinion of Justice Black in the case of **Hooven and Allison Co. v. Evatt,** 324 U. S. 652, 657, 666, 688, 65 Supreme Court 870, 873, 877, 887. The **Hooven** case—although it involved a question of **when** Philippine goods imported **for use in manufacturing** by their importer lost their immunity—reviews the rationale of the constitutional provision in question and its several judicial interpretations. Even though the court was not passing upon the particular question raised in your request, nevertheless the unanimous agreement by the majority and dissenting members of the court on the instant question—even though by way of obiter — requires that the taxing officials of this state continue to be bound by the historic interpretation of this clause.

This opinion should be construed as being limited to the facts as set forth herein. In any given case, a product might lose its immunity as an import depending upon the particular facts of the case. e.g., whether the material has been sold or resold—though still in the importer's possession—prior to the assessment date; whether title remains in the importer but the material is in the hands of a third person for purposes of resale or use; whether it is still in its "original package," as that term has been defined by the courts in the cases of fungible goods or bulky goods such as heavy machinery; when, in the cases of raw material, it has entered the manufacturing process, etc.

REGINALD F. HOLSCHUH,
Special Assistant Attorney General.

Ramsey County Court House.
May 24, 1954. 421-C-14

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TAX-FORFEITED LANDS

## 168

**Forfeiture invalid — Lien for subsequent taxes does not include penalties, interest or costs thereon**—M. S. 1953, Section 284.25.

### Facts

"A private party has succeeded in setting aside a tax forfeiture in Hubbard County and we are now ready to proceed under Section 284.25 to determine the amount to be paid by this private party."

### Question

May sub-paragraph 2 of Subdivision 1 of Section 284.25 be interpreted to include penalties which would at this date be due and payable for the lands in question had taxes been assessed and levied?

### Opinion

M. S. 1953, Section 284.25, so far as here relevant, provides:

"Subdivision 1. When, in any action or proceeding in court, the forfeiture to the state for taxes of any parcel of land which shall have been sold as provided by law is invalidated, except in the cases where such forfeiture is invalidated because the land was exempt from taxation or because all taxes were paid prior to forfeiture, the court shall determine, upon such hearing and evidence as it may require, the following facts:

"(1) The amount of all taxes, special assessments, penalties, interest, and costs, if any, which were due against the land at the time of the supposed forfeiture;

"(2) The amount of all subsequent taxes and special assessments that would have been assessed and levied against the land but for the supposed forfeiture;

"* * * ."

It is to be noted that, with reference to taxes and special assessments due at the time of forfeiture, paragraph (1) expressly provides for the inclusion of "penalties, interest, and costs." It is significant that, with reference to subsequent taxes and assessments which were not levied, paragraph (2) does not contain any language providing for the inclusion of penalties, interest, and costs. It appears to us that the omission of this provision must have been made advisedly. After making the express provision in paragraph (1) for inclusion of penalties, interest, and costs, the legislature, we believe, would have made the same provision in paragraph (2) if it intended to require inclusion thereof in the amount of the lien. It, also, appears that the inclusion of penalties, interest, and costs in connection with taxes not yet spread upon the books might be questionable validity in view of the fact that the statutes provide that penalties, interest, and costs attach at prescribed times and stages in the process of collecting taxes and assessments.

For the foregoing reasons, your question is answered in the negative.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Hubbard County Attorney. 425-C
March 11, 1954. 505-D

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## 169

**Forfeiture invalid—Purchase price may be recovered only as provided by M. S. 1953, Section 284.25.**

**Facts**

"In approximately 1915 a platted portion of the Village of Park Rapids in Hubbard County was vacated by action in District Court. The land in question continued, however, to be assessed and carried on the tax rolls as platted property. Several years later the same forfeited as platted property and still later a state tax deed issued to the present owner of the land which tax deed described the property as certain lots and blocks according to the plat.

"The purchaser of the tax deed who now holds the property has never been dispossessed by anyone nor has anyone ever questioned the validity of his title by any court proceedings. He did, however, consult an attorney who told him that his title was invalid and who then proceeded to quiet title to the property in question.

"The land owner has now submitted a claim to the Hubbard County Board demanding that the Board pay the full costs of his action to quiet title and contending that he did not receive a good tax title."

**Questions**

"1. May the County Board allow and pay such a claim?
"2. Must the County Board allow and pay such a claim?"

**Opinion**

Your questions are both answered in the negative.

The State of Minnesota does not warrant its title to tax-forfeited land. The deed of the state is in effect a quitclaim deed. If the title of the state is determined in action in court to be defective, the court will provide in its judgment pursuant to M. S. 1953, Section 284.25, that the amount paid by the purchaser is a lien upon the land in favor of the purchaser. If this amount and other amounts are determined by the court to be a lien upon the land, the land will be sold to satisfy the lien as provided in Section 284.25, Subd. 4. This is the purchaser's only remedy.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Hubbard County Attorney.
August 10, 1954. 425-C

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# 170

**Purchase—Default in payment cancels contract**—Laws 1941, Chapter 43, Section 7; Laws of 1943, Chapter 164; Laws of 1945, Chapter 296; Laws of 1949, Chapter 461; Laws of 1943, Chapter 164, Section 7; Laws of 1945, Chapter 296, Section 7.

**Facts**

"On January 18th, 1954, we mailed a list of defaulted contracts under Chap. 386, Laws of 1935; Chap. 422, Laws of 1947 and Chap. 456, Laws of 1949 to G. Howard Spaeth, Tax Commissioner and received authority from him to cancel these certificates under Minn. Statutes 1949, Section 282.01, Subds. 5 and 6, as amending Chap. 627, Laws of 1943, Secs. 2 and 3

"At the same time we enclosed a list of defaulted repurchase contracts under Chap. 43, Laws of 1941; Chap. 164, Laws of 1943; Chap. 296, Laws of 1945, and Chap. 461, Laws of 1949, which were all similar in the fact that no payment had been made since the original payment except for four instances and those had had only two payments with no payments since 1950.

"We have your opinion dated June 2, 1953, stating that the ..... repurchase contract under Chap. 43, Laws of 1941, was cancelled by operation of the law because of default in payment under the terms of the law."

**Question**

"Since all forfeitures are **to the State of Minnesota, not to the County,** should not the County Auditor have some authorization from the Commissioner of Taxation in order to list these contracts as being cancelled?"

**Opinion**

Your question is answered in the negative.

Our opinion dated June 2, 1953 (File No. 425-C-13) to which reference is made, relates to the cancellation of a contract pursuant to the provisions of Laws 1941, Chapter 43. We referred to Section 7 of that chapter and stated specifically:

"When the default in the payment under the contract occurred, the contract was cancelled by operation of law. The cancellation was completed so there is nothing more for the county auditor to do except to show upon his records the date of default and cancellation of the contract which are, of course, the same."

In writing the above opinion this office did not omit reference to authorization by the Commissioner of Taxation through oversight. In other words, it is our opinion that the rule quoted above is applicable and no authorization is required from the Commissioner of Taxation in order to list the contracts as being cancelled.

The same answer applies with respect to contracts made pursuant to Chapter 164, Laws of 1943, Chapter 296, Laws of 1945, and Chapter 461, Laws of 1949. Section 7 of Chapter 164, Laws of 1943 and Section 7 of Chapter 296, Laws of 1945, carry identical provisions with that found in Section 7, Chapter 43, Laws of 1941, relating to the question you present. Chapter 461, Laws of 1949, amends Minnesota Statutes for 1945, Section 282.241. As a result of this 1949 amendment, Section 7 of Chapter 296, Laws of 1945, which had been codified into the 1945 and 1949 statutes as Section 282.301, were identical and applicable with equal force.

JOSEPH S. ABDNOR,
Assistant Attorney General.

Crow Wing County Attorney.
March 25, 1954. 425-C-13

# 171

**Repurchase—Right of purchaser to repurchase after forfeiture discussed—** M. S. 1949, Section 282.241, as amended by L. 1953, C. 471.

**Facts**

"It seems that a certain parcel of land in our County forfeited for non-payment of taxes. Thereafter it was appraised for sale and sold to a party other than the original owner. Thereafter the land again forfeited. Since the second forfeiture a new repurchase act has been passed by the Legislature allowing the owner, at the time of forfeiture, etc., to repurchase the land.

"The original owner and the re-sale owner both ask the right to re-purchase the land under the new re-purchase law."

**Question**

"* * * can either or both of these owners exercise the re-purchase right under the new re-purchase law in question?"

**Opinion**

Under M. S. 1949, Section 282.241, as amended by L. 1953, C. 471, and as it was prior thereto, the right of repurchase existed only if the parcel of land involved had not been sold prior to the time that it was desired by a former owner to repurchase the land. Under this language, the right of the original owner was cut off when the land was sold to a new purchaser by the state as tax-forfeited land.

The new owner has a right to repurchase under M. S. 1949, Section 282.241, as amended by L. 1953, C. 471, so far as the time element is concerned, if the repurchase is made by him within one year from the date of forfeiture or on or before November 1, 1953, whichever is the later. The repurchase, of course, is subject to the other provisions which are to be found in Section 282.241, as amended.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Aitkin County Attorney.
August 4, 1953. 425-C-13

# 172

**Sale—To ineligible purchaser void—Eligible purchasers discussed—Duty of county auditor discussed**—M. S. 1949, Sections 282.222, 280.05.

**Officers—Interest in contract.**

**Questions**

"Can any County Official or his employees, other than those specifically stated in M. S. 280.05, qualify to bid for and purchase tax forfeited lands at a public sale held pursuant to M. S. 282.222?

"Is there any distinction between this May Tax Sale and a sale of tax forfeited lands under M. S. 282.222 as far as your opinion is concerned?"

**Opinion**

These questions are answered by an opinion of the attorney general under date of October 16, 1946 (file 90b).

We are cognizant of the amendment to M. S. 1945, Section 382.18, by L. 1947, C. 360. However, this amendment does not affect our opinion of October 16, 1946.

**Question**

"Whose responsibility is it to determine the eligibility of the buyer?"

**Opinion**

In the first instance, it is the responsibility of the buyer to determine for himself whether he is eligible to purchase tax forfeited lands.However, the determination of the buyer is not binding upon the county auditor. When the county auditor conducts the sale of tax forfeited lands it is his responsibility to ascertain and determine the eligibility of the buyer.

**Question**

"If such a prohibited sale is made, is such sale considered void, or do only the penal provisions apply?"

**Opinion**

If a sale is made to a person who is ineligible by law to purchase tax forfeited lands, such sale is void. **Stone v. Bevans, et al.**, 88 Minn. 127, 92 N. W. 520.

**Question**

"If such a sale can be considered void, what is the status of the parcel of tax forfeited land?"

### Opinion

If a purported sale of tax forfeited lands is made which is void, there has never been a sale of such lands, and their status is unchanged from that which existed at the time of the purported sale. It is the duty of the county auditor to correct his own error in making such sale and in removing the lands from the tax forfeited sale list, by restoring such parcel to such list so that it is exactly the same as if there had never been a purported sale.

We know of no authority to reoffer such parcel of land at the next sale other than the general authority under M. S. 1949, Section 282.01, to withdraw a parcel of tax forfeited land from a sale and then reappraise it and reoffer it at the next subsequent sale.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Itasca County Attorney. 425-C
December 1, 1953. 90-B

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## 173

**State deed—Ownership of heirs of purchaser thereof can only be evidenced by certified copy of final decree in estates of decedents—L. 1935, C. 386, M. S. A. 282.01, Subd. 6.**

### Facts

"A., B. and C. purchased certain tax forfeited lands here in Swift County pursuant to Laws 1935, Chapter 386, and Acts Amendatory thereof. These lands were purchased on a contract and the final installment of the purchase price has been paid. Subsequent to the date on which this property was purchased by A., B. and C., A. and B. died and C.. the daughter of A. and B., is the sole surviving heir of A. and B. Our County Auditor made his Certificate of payment in full of these lands sold to the Commissioner of Taxation and requested that the State Deed be issued to C. as the sole survivor of A. and B. The Auditor filed with the Commissioner of Taxation certified copies of the death record of A. and B. and the Affidavit of C. stating that she was the sole survivor."

### Questions

1. "Will it be necessary to probate the estates of A. and B. to determine their heirship before the State can issue a deed to C.?"

2. "If your answer to this question is that probate proceedings would be necessary would the interest of A. and B. in these lands be described in the probate proceedings in the same manner as a vendee's interest in an ordinary contract for deed?"

**Opinion**

The tax-forfeited lands in question were sold pursuant to L. 1935, C. 386, which is now, so far as here pertinent, coded as M. S. 1949, Section 282.01, Subd. 6. Pursuant thereto the commissioner of taxation issues the conveyance upon certification to him by the county auditor that the purchase price has been paid. It is our opinion that, when a purchaser of tax-forfeited land has died, an affidavit as to who the purchaser's heirs are is not evidence of heirship upon which the county auditor is authorized to certify to the commissioner of taxation who the heirs of the purchaser are. The only evidence upon which the county auditor is authorized to make such certification is the final decree of the probate court, which has jurisdiction of the estate of the deceased purchaser. There are a number of reasons, some of which follow, for our conclusion. The decedent may have died testate. There may be claims against the estate of the decedent which must be satisfied by the sale of the lands. There may be a dispute as to who the heirs are, even though the deceased died intestate. For the same reasons, the commissioner of taxation only can issue a conveyance to the heirs of the deceased purchaser who are designated by name therein when they have been determined by the probate court in its final decree to be the heirs of the deceased purchaser.

We see no difference between a contract to purchase lands from the State of Minnesota and a contract to purchase lands from an individual. It would appear to us that the interest in the lands should be described in the probate proceedings in the same manner as a vendee's interest in an ordinary contract for deed. This answers your second question.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Swift County Attorney.
September 14, 1953. 410-B

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TAX ROLLS

## 174

**County auditor—Certificate as to taxes upon deed—Transfer of land upon books of auditor—M. S. A., Section 272.12.**

**Register of deeds—Recording—Deed—Second deed describes portions which were included in the first conveyance.**

**Facts**

The owner of Government Lot 1, Section 25, Township 55, Range 26, executed and delivered a warranty deed conveying a part of this lot to a second party. The deed is dated August 4, 1950, and has been recorded in the office of the register of deeds. There has been presented to the county

auditor a second warranty deed dated August 28, 1953, executed by the grantor in the first deed conveying to a third party a parcel of said Lot 1. The description of the premises as set forth in the second deed overlapped the description contained in the first deed by approximately 6 feet on one end and 10 feet on the other end. There appears to be no deed or instrument of record to show that the grantee in the first deed has conveyed any part of the premises therein described. All taxes have been paid on the premises described in the second deed. The grantee in the second deed is aware of the overlapping of the descriptions in the two deeds. He has presented the second deed to the county auditor for certification as to taxes and to enter a transfer of ownership upon his records as prescribed by statute.

**Question**

Should the county auditor certify upon second deed that there are no taxes due and enter a transfer of the premises upon the books of his office as prescribed in M. S. A., Section 272.12?

**Opinion**

From the facts above recited it appears that the grantor in the first and second deeds is the same and identical person, and at the time when the first deed was executed and delivered he was the owner of Lot 1, Section 25, Township 55, Range 26. Upon execution and delivery of the first deed it necessarily follows that the title to the premises therein described was conveyed to the grantee therein named. As to such parcel, the conveyance would operate as a divestiture of the grantor's title and interest in and to the premises conveyed. At the time when the second deed was executed and delivered it appears that the description of the premises in the first deed is a part of the description of the premises in the second deed. This situation results in a segment of land about 6 feet wide at one end and 10 feet wide at the other end which is included in the description in both of the deeds. There are no taxes due on the premises described in the second deed, and the specific question is whether, in the circumstances stated, the county auditor should certify that there are no taxes due on said premises and transfer the land on the record in his office as prescribed by M. S. A., Section 272.12. So far as here material this statute reads as follows:

> "When a deed or other instrument conveying land, or a plat of any townsite or addition thereto, is presented to the county auditor for transfer, he shall ascertain from his records if there be taxes due upon the land described therein, or if it has been sold for taxes. If there are taxes due, he shall certify to the same; and upon payment of such taxes, and of any other taxes that may be in the hands of the county treasurer for collection or in case no taxes are due, he shall transfer the land upon the books of his office, and note upon the instrument, over his official signature, the word, 'taxes paid and transfer entered,' or, if the land described has been sold or assigned to an actual purchaser for taxes, the words 'paid by sale of land described within'; and, unless

such statement is made upon such instrument, the register of deeds or the registrar of titles shall refuse to receive or record the same; * * * ."

This statute does not require the county auditor to determine the ownership of the premises described in the second deed which has been presented for certification with respect to taxes and for transfer as therein provided. The ownership of land is often a matter of grave doubt and uncertainty. In the instant case we accept as true the statement that the grantor in both deeds was the owner of said Lot 1 at the time when the first deed was executed and delivered. Consequently, when the second deed was executed the grantor was the owner of the premises therein described except such portions thereof which were included in the first conveyance. In these circumstances we believe that the county auditor should certify on the second deed that all of the taxes have been paid. In making a record of the transfer of the premises conveyed by said second deed we believe that the description for such purposes should be all of Lot 1, Section 25, Township 55, Range 26, except that portion thereof as described in the warranty deed dated August 4, 1950, and recorded in Book 190 of Deeds, page 459, which description should be stated in full as the same appears in the first deed as recorded.

The description of the premises as conveyed by the second deed for taxation and assessment purposes should conform to the description as the same appears in the transfer record of the county auditor. If this course is followed there should be no conflict of ownership in listing these premises for assessment and taxation purposes.

As bearing upon the question here considered see Sections 273.03 and 275.28, 6 Dunnell's Minn. Digest, Section 9212; **Berg v. Van Nest,** 97 Minn. 187, 106 N. W. 255; **McQuade v. Jaffray,** 47 Minn. 326; **St. Peter's Church, Shakopee, v. County of Scott,** 12 Minn. 280.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Itasca County Attorney. 21-A
September 25, 1953. 373-B-17-d

# INDEX
# TO
# OPINIONS

# A

ACTIONS—See "Courts and Criminal Law"

ADOPTION—See "Children"

ADVERSE POSSESSION—See "Highways"

AGRICULTURE

**Extension Service**

County Committee

Qualifications for membership ..... 1

**Societies**

State Aid

Annual fair should be held in home county of society as prerequisite to state aid—Merger of two or more societies, which comply with conditions prescribed in statute, are not deprived of receiving aid ..... 2

**Soil Conservation**

Districts—Aid—Appropriation ..... 8

**Weeds**

Destruction ..... 93

AIRPORT

Town may not appropriate funds to private committee opposing expansion of airport ..... 76

ASSESSMENTS—See "Taxation"

ASSESSOR—See "Taxation"

# B

BIDS AND CONTRACTS

**Bids**

Competitive

Identical—No authority to accept several bids for lowest responsible bidder and thereafter divide contract between such bidders ..... 62

**BIDS AND CONTRACTS**—cont.

**Bids**—cont.

Must conform to advertisement—Conditional bid which ties two or more jobs contrary to advertisement is a departure therefrom ..... 63

Radio—Telephone Service—Not required ..... 119

Transportation charges

Added to purchase price of contract ..... 64

Trial—Rental Clause

Water treating equipment—Certain lease containing optional purchase conditions considered ..... 65

**Contracts**

Employment

Bids not required for personal services ..... 66

Public Health Nurse ..... 137, 138

Public Officials

Interest in prohibited ..... 35, 172

Teacher

Change in form of government does not affect existing contract ..... 44

Towns

Fire protection—Contract made should be on annual basis ..... 141

Highway project ..... 90

Villages

Fire protection—Beyond corporate limits—Contract should be in writing ..... 140

**BOARDS AND COMMISSIONS**—See "Municipalities" and "State"

**BOAT**

**Taxation**

At place where it belongs or is kept ..... 166

**BOND ISSUE**—Also see "Municipalities"

**Counties**

Cancelled bonds—may not be destroyed except on compliance with statute ..... 139

Election—County Board may call special election to be held simultaneously with primary election ..... 49

Road Improvement—Debt Limit ..... 78, 81

**BOND ISSUE**—cont.

**School Districts**

Schoolhouse equipment ..... 38
Schoolhouse site ..... 43

**Villages**

Sewer Improvement—General obligation—Voting upon question ..... 98

**BONDED INDEBTEDNESS**—See "Finances"

**BRIDGE**—See "Highways"

# C

**CEMETERIES**

**Ordinance**

Perpetual care and maintainance—Owners of lots to contribute to maintenance fund ..... 129

**Owner of Plot**

Freeholder—If deed of conveyance conveys an estate of inheritance ..... 34

**CHARTER**

**Amendments**

Description of boundaries—corporate limits ..... 67
Rejected by voters may be subsequently submitted ..... 68

**CHILDREN**

**Minors**

Control of parent—Both sexes under 21 years of age are minors 51

**Paternity Proceedings**

Complaints—Civil and not criminal in nature ..... 10
Evidence — Preliminary hearing; accused may be called for cross-examination as adverse witness ..... 11
Expenses—Incurred for confinement and maintenance of child may be enforced after adoption ..... 12
Guardian ad litem—Appointment of for minor mother ..... 13

**CITIES**—See "Municipalities"

**CIVIL DEFENSE**—See "Military"

**CIVIL SERVICE**

Leave of absence — Payment for leave granted to employee after time of compensable injury cannot be used to supplement compensation payments ..... 69

Physical disability—presents fact question as to inability to perform duties in reasonable manner ..... 70

Police Chief—receiving temporary appointment under police civil service commission rule obtains no permanent rights 71

Veterans Preference

Police Captain—Veteran who attains a passing mark in promotional civil service examination for captain entitled to promotion over other applicants who are non-veterans ..... 72

Term "Veteran"—No distinction between World War I and World War II ..... 73

**CONDEMNATION**—See "Eminent Domain"

**CONSERVATION**

**Drainage**

Assessments—Land assessed for benefits becomes tax-forfeited and no part of assessment has been paid, rights of parties considered for cancellation of assessment under statutory direction ..... 3

Cost—Proceedings dismissed—Liability of village for costs incurred ..... 4

County Ditch Construction—Bids—Must conform to advertisement therefor; conditional bid which ties two or more jobs contrary to advertisement is a departure therefrom ..... 63

Petitions — Procedure where engineer's recommendations on preliminary hearing appear to be a departure from plan of petition. Suggested procedure. If proceedings dismissed, cost of surveys paid in subsequent new proceedings ..... 5

Repairs

Cost—Funds—Financing cost when funds inadequate ..... 6

County board to maintain drainage ditch. Status of rights of lands assessed for benefits. Trespassers against ditch are without rights ..... 7

CONSERVATION—cont.

**Lands**

Tax-Forfeited

Forfeiture Invalid

Lien for subsequent taxes does not include penalties, interest or costs thereon ..... 168

Purchase price may be recovered only as provided by statute ..... 169

Purchase

Default in payment cancels contract ..... 170

Repurchase

Right of purchaser to repurchase after forfeiture discussed ..... 171

Sale

To ineligible purchaser void—Eligible purchasers discussed—Duty of county auditor discussed—Officers—Interest in contract ..... 172

State Deed

Ownership of heirs of purchaser thereof can only be evidenced by certified copy of final decree in estates of decedents ..... 173

Transfer

Taxes

County Auditor—Certificate as to taxes upon deed—transfer of land upon books of auditor—Register of Deeds — Recording — Deed — Second deed describes portions which were included in the first conveyance ..... 174

**Mineral**

Rights of abutting owner ..... 102

**Soil Conservation Districts**

Funds appropriated by county board for aid should be for soil conservation purposes — purposes for expenditure of moneys should be within scope of powers of district and supervisors ..... 8

CONTRACTS—See "Bids and Contracts"

CORRUPT PRACTICES—See "Elections"

COUNTIES—See "Municipalities"

## COURTS

**Actions**

Costs

Judgments properly docketed constitute a lien ..... 9
Justice of Peace must file itemized statement ..... 17

Paternity Proceedings

Complaints—Civil and not criminal in nature—Need not be certified to Juvenile Court when defendant is a minor 10

Evidence—Preliminary hearing—accused may be called for cross-examination as adverse witness ..... 11

Expenses — Incurred for confinement and maintenance of child may be enforced after adoption ..... 12

Guardian ad litem—Appointment of for minor mother ..... 13

Sheriff

Serving summons — warrants — writs issued by court of record ..... 118

**District**

Clerk

Fees

Condemnation proceedings — unauthorized to charge public utility corporation for moneys in payment of condemnation ..... 14

Old age assistance lien—Foreclosure ..... 15

**Justice**

Attorney

Justice not authorized to employ attorneys to defend persons in his court ..... 16

Criminal Cases—Costs

Justice must prepare and file itemized statement of costs .... 17

Incompatible Offices

Justice and Deputy City Clerk are not ..... 126

Jurisdiction

Change of Venue—Violation of village ordinance—Where no municipal court in village, town justice has jurisdiction within county ..... 18

Traffic Violations—Juvenile Offenders ..... 20

Vacancy

Appointment—Term ..... 19

**Juvenile**

Traffic Violation

Jurisdiction—Juvenile Offenders ..... 20

**COURTS**—cont.

**Municipal**

Judge may not hold office of Special Deputy Sheriff ..... 127

Minor—Arraignment upon criminal charge—Transfer to juvenile court determined by age of minor ..... 21

**Probate**

Estates

Representative to sell real estate of decedent at public sale 22

Mentally Ill

Discharge—Recommitment ..... 23

**CRIMINAL LAW**

Juveniles—Separate detention facilities ..... 75

Prisoners—Sheriff compensation for boarding ..... 117

Reciprocal Support Act—Extradition—Defendant may be proceeded against under extradition statute without regard to Reciprocal Support Act ..... 24

Registration—of persons convicted of crimes other than misdemeanors—Constitutionality of city ordinance ..... 130

Traffic Violations

Arrests—Officials and private persons in matter of arrests ..... 25

Juvenile Offenders ..... 20

Prosecution—Costs—How Paid ..... 26

## D

**DAMAGES**—See "Liability"

**DANCE HALLS**

License—may not be granted where liquor is sold ..... 52

Spiked drinks—may not be consumed—waitresses from adjacent tavern may not solicit orders for beer ..... 53

**DEEDS**—See "Recording"

**DELINQUENT CHILDREN**—See "Children"

**DISTRICT COURTS**—See "Courts"

**DRAINAGE**—Also see "Conservation"

Assessments—Land assessed for benefits becomes tax-forfeited and no part of assessment has been paid, rights of parties considered for cancellation of assessment under statutory direction ..... 3

Cost—Proceedings dismissed—Liability of village for costs incurred ..... 4

County Ditch Construction—Bids—Must conform to advertisement therefor; conditional bid which ties two or more jobs contrary to advertisement is a departure therefrom..... 63

Petitions — Procedure where engineer's recommendations on preliminary hearing appear to be a departure from plan of petition. Suggested procedure. If proceedings dismissed, cost of surveys paid in subsequent new proceedings..... 5

Repairs

Cost—Funds—Financing cost when funds inadequate..... 6

County board to maintain drainage ditch. Status of rights of lands assessed for benefits. Trespassers against ditch are without rights..... 7

# E

**EASEMENTS**

**County**

Authorized to sell and convey an easement over and across a county-owned poor farm ..... 136

**Streets**

Vacation

Village as owner of highway easement is not an owner..... 104

**Water Mains**

Right of village to lay and maintain mains across private premises—To terminate same without incurring liability for resulting damages ..... 144

**EDUCATION**

**School Districts**

Annexation — Consolidation — Detachment — Dissolution — Reorganization

Annexation

Adjoining Territory

Corner to corner—District which is to be dissolved 32

**EDUCATION**—cont.

**School Districts**—cont.

Bonded Indebtedness
Payment—Neither one mill tax nor State Aids may be used ..... 37

Property taken from one district and attached to another — Order cannot provide that the owner will pay taxes on outstanding bonds of district to which land attached even if owner consents ..... 28

Spreading taxes ..... 27

Petition
Administrative Proceedings ..... 29

Consolidation
Bonded Indebtedness—payment ..... 37

Boundaries—Change shall not be made so as to leave old district without at least one schoolhouse and four sections of land — District containing less than four sections may be merged ..... 30

Commissioner of Education—Approval of plat ..... 33

Procedure—No requirement for consolidation to include district which maintains graded elementary or secondary school ..... 31

Detachment
County Boards' order to detach lands cannot be rescinded at subsequent meeting ..... 29

Dissolution
Annexation — of dissolved district — Adjoining territory—meaning of corner to corner ..... 32

County Board—Cannot resurrect dissolved district ..... 33

Petition—May be signed by freeholder before county board acts thereon subsequent to previous signing and withdrawal of name ..... 34

Reorganization
Manner of voting ..... 27

Finances
Bond issue
School House—Acquisition—Betterments ..... 38

School Site ..... 43

Bonded Indebtedness
Land detached—outstanding bonds ..... 28

Payment—Neither one mill tax nor State Aid may be used ..... 37

**EDUCATION**—cont.

**School Districts**—cont.

Spreading Taxes ..... 27

Transportation Aid

High School Pupils ..... 39

High School Areas

How formed and changed—Transportation aid ..... 39

Transportation—Bus route in certain circumstances may pass through another high school area ..... 40

Officers and Employees

Veterans' Preference—Positions—Applicants ..... 41

Property

Athletic Field

May be leased to various organizations providing lease does not interfere with recreation program—Beer may not be sold on premises ..... 42

School House

Acquisition, furnishing and equipping—Funds—Loan —Bond Issue—Special Election—Vote ..... 38

School Site

Acquisition—Sale or trade—Bond Issue—Special Election—Vote ..... 43

Public Health Nurse

Services—May jointly contract with village or town..... 138

School Board

Authority—School Property ..... 38, 43

Financial interest in contracts prohibited—Member owner of newspaper ..... 35

Qualification—Upon change of district ..... 44

Resignation—Oath of Office—Vacancies—how filled..... 36

Teachers

Contracts

Change in form of government from common to independent school district does not affect existing contracts ..... 44

Transportation

Aid—High School Area..... 39

Bus Route ..... 40

Tuition

Nonresident Pupil ..... 45

**ELECTIONS**

**Corrupt Practices Act**

Removal of county seat—Effect on election of offer of site and money ..... 46

**Permanent Registration**

Person may not vote unless registered—Registered voter must sign "Certificate of Registered Voter" ..... 47

**Primary**

Filing on two party ticket forbidden—Affidavit must disclose party of affiliation ..... 48

**School**

Acquisition of a new schoolhouse ..... 38

**Special**

County Bond Issue

Election to be held simultaneously with primary election but may not adopt resolution calling for such election more than 60 days prior to primary election ..... 49

**EMINENT DOMAIN**

**Awards**

Fees—Clerk of District Court ..... 14

Interest on ..... 74

Mutual error of inadequate award may be corrected by proper stipulation ..... 82

**Certificate**

Certified and entered ..... 111

**Proceedings**

Initiative and referendum—Emergency Ordinance—Off-street parking ..... 74

# F

**FINANCES**—Also see "Municipalities"

**Appropriations**

County—Board may appropriate funds for separate detention facilities for juveniles ..... 75

Soil Conservation Districts—Aid ..... 8

**FINANCES**—cont.

**Appropriations**—cont.

Town—May not contribute funds or employ counsel to assist private committee in opposing expansion of airport ..... 76

**Assets**

Distribution—upon separation of town and village ..... 77

**Bond Issue**

Road Improvement—Debt Limit ..... 78, 81
Sewer Improvement—General obligations voting on question ..... 98

**Budget**

Council need not adopt an appropriation ordinance ..... 79

**Funds**

City—Without power to pay cost of election to vote on sale of electrical distribution plant ..... 142
Municipally owned water works system may be financed by improvement warrants ..... 106
Public Works—Reserve ..... 145
Town—Road Improvement Project ..... 90

**School Districts**

Bond Issue—Schoolhouse equipment ..... 43
Bonded Indebtedness
Neither one mill tax or school aids may be used ..... 37
Spreading taxes ..... 27
Outstanding bonds—Taxes on when property is taken from one district and included in another ..... 28
School House—Acquisition—Special election ..... 38

**FIRE PROTECTION**—See "Public Safety"

**FREEHOLDER**

Owner of cemetery lot—Petition to dissolve school district ..... 34

## G

**GAME AND FISH**—See "Conservation"

# H

**HEALTH**—See "Public Health"

**HIGHWAYS**

**Bridge**

Cost of building or improving
Duty of county board ..... 80

**Culvert**

Bids—On basis of estimated steel to meet the needs..... 62

**Eminent Domain**

Mutual error of inadequate award may be corrected by proper stipulation ..... 82

**Power Lines**

County to pay cost of moving lines in order to widen road..... 83

**State Aid Road**

Construction—Cost—Issuance of warrants or bonds..... 81

**Survey**

County engineer has authority to make survey at county expense in cooperation with highway commission..... 84

**Town Line Roads**

Establishment—Prerequisite therefor ..... 85

Maintenance—By town and village and apportionment of responsibility of each ..... 86

**Town Roads**

Closing—Statutory requirements must be followed ..... 87

Establishment by user—Established and never opened may be lost by adverse possession..... 88

Impassable—Authority of county board to order repair—Limitation of expenditure ..... 89

Improvement—To be financed in part from town funds and in part from special assessments—May not be carried out under contract between town and county if project in excess of $2,500 ..... 90

**HIGHWAYS**—cont.

**Traffic Regulations**

Police Vehicle—Red lights and siren equipment on "authorized emergency vehicles" ..... 91

State Aid and County Aid Roads—Load restrictions on state aid and county aid roads within boundaries of village may be imposed by county and not village ..... 92

**Weeds**

Destruction of ..... 93

## I

**IMPROVEMENTS**—See "Local Improvements"

**INCOMPATIBLE OFFICES**—See "Offices"

**INSURANCE**

**Television**

Picture tube

Not covered by M. S. 1949, Section 60.29, Clause (3) ..... 50

## J

**JAILS**—Also see "Courts and Criminal Law"

Separate detention facilities for juveniles ..... 75

Sheriff—Boarding prisoners ..... 117

## L

**LABOR**

**Children**

Minors

Control of parent—Both sexes under 21 years of age are minors ..... 51

**City**

Employees—Strike ..... 124

**LANDS**

**Tax-Forfeited**

Forfeiture Invalid

Lien for subsequent taxes does not include penalties, interest or costs thereon ..... 168

Purchase price may be recovered only as provided by statute ..... 169

Purchase

Default in payment cancels contract ..... 170

Repurchase

Right of purchaser to repurchase after forfeiture discussed 171

Sale

To ineligible purchaser void—Eligible purchasers discussed —Duty of county auditor discussed—Officers—Interest in contract ..... 172

State Deed

Ownership of heirs of purchaser thereof can only be evidenced by certified copy of final decree in estates of decedents ..... 173

**Transfer**

**Taxes**

County Auditor—Certificate as to taxes upon deed—transfer of land upon books of auditor—Register of Deeds —Recording—Deed—Second deed describes portions which were included in the first conveyance ..... 174

**LEGISLATURE**

**Powers**

Create office as that of Legislative Post-Auditor and Department of Post-Audit—Transferring functions of the Department of Public Examiner ..... 151

**LIABILITY**

Civil defense organization—Equipment—If person or property should be injured or damaged ..... 60

Power Lines—Removal—County liable to owner for damages.... 83

Water Mains—Across private premises and to terminate same without incurring liability ..... 144

**LIBRARIES**

**Librarian**

Appointment—Member of library board may not be appointed 94

Salary — Village may pay in counties where county library board exists and village maintains a reading room ..... 95

**LICENSES**

**Dance Halls**

May not be issued where liquor containing ½ of one per cent is sold ..... 52

**Liquor**

Intoxicating

On-Sale—May not be issued to joint owner with right of survivorship ..... 54

Non-Intoxicating

Applicant need not be owner of premises ..... 57

Wholesale—Liquor control commissioner to issue license ..... 58

**LIQUOR**

**Commission**

Appointment—Member need not be a resident ..... 123

**Intoxicating**

Dance Halls

Prohibition of dance hall license where liquor containing one half of 1 per cent is sold ..... 52

Spiked drinks—May not be consumed in a public dance hall —Waitresses from adjacent beer tavern may not solicit orders for beer in public dance hall for consumption therein ..... 53

License

On-Sale—May not be issued to joint owners with right of survivorship ..... 54

Sale

Sale to club guests not authorized ..... 55

**Non-Intoxicating**

Beer

Gift—Person not licensed to sell beer cannot give same to purchasers of pop corn ..... 56

May not be sold on school athletic grounds ..... 42

License

Applicant for license to sell need not be owner of premises and fixtures ..... 57

Wholesale—Issued by liquor control commissioner—Municipalities not authorized to issue ..... 58

Sale

Drive-in restaurant—Parking area of premises licensed for on-sale ..... 59

**LOCAL IMPROVEMENTS**

**Alley**

The word "street" as used in M. S. A. 440.135 does not include "alley" ..... 96

**Sewer**

Assessment must be based upon actual benefits..... 97
Bond Issue—General Obligations—Election therefor..... 98

**Sidewalks**

Improvement—May be made upon petition or upon action of village council ..... 99

**Streets**

Establishment
City unauthorized to establish street outside of corporate limits in absence of charter or statutory authority..... 100
Gutters—Curbs
Preliminary expenses—Cost bond..... 101
Parking
Off-Street ..... 74
Rights
Abutting owner's rights to mineral and soil..... 102
Fee title vests in abutting owners—Term "street" includes curbs, gutters and sidewalk..... 105
Vacation
Petition — Must be signed by owners of land abutting thereon—Village as owner of highway easement is not an owner ..... 104
Rights of abutting property owners..... 103

**Tax**

Assessments
Certification and collection ..... 154
Exemption—Property owned by United States..... 156
Installment payments ..... 155

**Water System**—Also see "Public Utilities"

Extension of municipally owned water works system may be financed by improvement warrants..... 106

# M

**MILITARY**

**Civil Defense**

Equipment—Organizational equipment may be used for civil defense purpose only — Liability if persons or property should be injured or damaged..... 60

MILITARY—cont.

**National Guard**

Leave of absence—Temporary city employee entitled to retain his military pay ..... 61

**Veterans' Preference**

School officers and employees ..... 41
Veteran cannot be compelled to retire at age of 65 ..... 122
Veteran who attains a passing mark in civil service examination is entitled to promotion over nonveteran applicant ..... 72

MINERAL

Rights of abutting owner ..... 102

MORTGAGE REGISTRY TAX—See "Taxation"

MOTOR VEHICLES—See "Traffic Regulations"

MUNICIPALITIES

**Agriculture**

Extension Service
County Committee
Qualifications for membership ..... 1

Societies
State Aid
Annual fair should be held in home county of society as prerequisite to state aid—Merger of two or more societies which comply with conditions prescribed in statute, are not deprived of receiving aid ..... 2

**Bids and Contracts**

Bids
Competitive
Identical—No authority to accept several bids for lowest responsible bidder and thereafter divide contract between such bidders ..... 62
Must conform to advertisement — Conditional bid which ties two or more jobs contrary to advertisement is a departure therefrom ..... 63
Radio—Telephone Service—Not required ..... 119

Transportation charges
Added to purchase price of contract ..... 64

Trial—Rental Clause
Water treating equipment—Certain lease containing optional purchase conditions considered ..... 65

**MUNICIPALITIES**—cont.
**Bids and Contracts**—cont.
Contracts
Employment
Bids not required for personal services ..... 66
Public Health Nurse ..... 137, 138
Public Officials
Interest in prohibited ..... 35
Teacher
Change in form of government does not affect existing contract ..... 44
Towns
Fire protection—Contract made should be on annual basis ..... 141
Village
Fire protection — Beyond corporate limits — Contract should be in writing ..... 140
**Charter**
Amendments
Description of boundaries—Corporate Limits ..... 67
Rejected by voters may be subsequently submitted ..... 68
**Civil Defense**—See "Military"
**Civil Service**
Leave of Absence — Payment for leave granted to employee after time of compensable injury cannot be used to supplement compensation payments ..... 69
Physical disability—presents fact question as to inability to perform duties in reasonable manner ..... 70
Police Chief — receiving temporary appointment under police civil service commission rule obtains no permanent rights .. 71
Veterans' Preference
Police Captain—Veteran who attains a passing mark in promotional civil service examination for captain entitled to promotion over other applicants who are non-veterans ..... 72
Term "Veteran"—No distinction between World War I and World War II ..... 73
**Eminent Domain**
Awards
Fees—Clerk of District Court ..... 14
Interest on ..... 74
Mutual error of inadequate award may be corrected by proper stipulation ..... 82
Certificate
Certified and entered ..... 111
Proceedings
Initiative and referendum — Emergency Ordinance—Off-street parking ..... 74

MUNICIPALITIES—cont.

**Finances**

Appropriations
County—Board may appropriate funds for separate detention facilities for juveniles ... 75
Soil Conservation Districts—Aid ... 8
Town—May not contribute funds or employ counsel to assist private committee in opposing expansion of airport ... 76

Assets
Distribution—upon separation of town and village ... 77

Bond Issue
Road Improvement—Debt Limit ... 78, 81
Sewer Improvement—General obligations voting on question ... 98

Budget
Council need not adopt an appropriation ordinance ... 79

Funds
City—Without power to pay cost of election to vote on sale of electrical distribution plant ... 142
Municipally owned water works system may be financed by improvement warrants ... 106
Public Works—Reserve ... 145
Town—Road Improvement Project ... 90

School Districts
Bond Issue—Schoolhouse equipment ... 43
Bonded Indebtedness
Neither one mill tax or school aids may be used ... 37
Spreading taxes ... 27
Outstanding bonds—Taxes on when property is taken from one district and included in another ... 28
School House—Acquisition—Special election ... 38

**Highways**

Bridge
Cost of building or improving
Duty of county board ... 80

Culvert
Bids—On basis of estimated steel to meet the needs ... 62

Eminent Domain
Mutual error of inadequate award may be corrected by proper stipulation ... 82

Power Lines
County to pay cost of moving lines in order to widen road 83

State Aid Road
Construction—Cost—Issuance of warrants or bonds ... 81

**MUNICIPALITIES**—cont.

**Highways**—cont.

Survey

County engineer has authority to make survey at county expense in cooperation with highway commission..... 84

Town Line Roads

Establishment—Prerequisite therefor ..... 85

Maintenance—By town and village and apportionment of responsibility of each ..... 86

Town Roads

Closing—Statutory requirements must be followed..... 87

Establishment by user—Established and never opened may be lost by adverse possession..... 88

Impassable—Authority of county board to order repair—Limitation of expenditure ..... 89

Improvement—To be financed in part from town funds and in part from special assessments—May not be carried out under contract between town and county if project in excess of $2,500..... 90

Traffic Regulations

Police Vehicle — Red lights and siren equipment on "authorized emergency vehicles" ..... 91

State Aid and County Aid Roads—Load restrictions on state aid and county aid roads within boundaries of village may be imposed by county and not village..... 92

Weeds

Destruction of ..... 93

**Liability**

Civil defense organization—Equipment—If person or property should be injured or damaged..... 60

Power Lines—Removal—County liable to owner for damages.... 83

Water Mains—Across private premises and to terminate same without incurring liability ..... 144

**Libraries**

Librarian

Appointment—Member of library board may not be appointed ..... 94

Salary—Village may pay in counties where county library board exists and village maintains a reading room..... 95

**Licenses**

Dance Halls

May not be issued where liquor containing ½ of one per cent is sold ..... 52

**MUNICIPALITIES**—cont.

**Licenses**—cont.
Liquor
Intoxicating
On-Sale—May not be issued to joint owner with right of survivorship ..... 54
Non-Intoxicating
Applicant need not be owner of premises ..... 57
Wholesale — Liquor control commissioner to issue license ..... 58

**Liquor**
Commission
Appointment—Member need not be a resident ..... 123
Intoxicating
Dance Halls
Prohibition of dance hall license where liquor containing one half of 1 per cent is sold ..... 52
Spiked Drinks — May not be consumed in a public dance hall—Waitresses from adjacent beer tavern may not solicit orders for beer in public dance hall for consumption therein ..... 53
License
On-Sale—May not be issued to joint owners with right of survivorship ..... 54
Sale
Sale to club guests not authorized ..... 55
Non-Intoxicating
Beer
Gift—Person not licensed to sell beer cannot give same to purchasers of pop corn ..... 56
May not be sold on school athletic grounds ..... 42
License
Applicant for license to sell need not be owner of premises and fixtures ..... 57
Wholesale—Issued by liquor control commissioner—Municipalities not authorized to issue ..... 58
Sale
Drive-in restaurant — Parking area of premises licensed for on-sale ..... 59

**Local Improvements**
Streets
Establishment
City unauthorized to establish street outside of corporate limits in absence of charter or statutory authority ..... 100

**MUNICIPALITIES**—cont.

**Local Improvements**—cont.

Gutters—Curbs
Preliminary expenses ..... 101

Parking
Off-Street ..... 74

Rights
Abutting owner's rights to mineral and soil ..... 102
Fee title vests in abutting owners—Term "street" includes curbs, gutters and sidewalk ..... 105

Vacation
Petition—Must be signed by owners of land abutting thereon—Village as owner of highway easement is not an owner ..... 104
Rights of abutting property owners ..... 103

Tax
Assessments
Certification and collection ..... 154
Exemption—Property owned by United States ..... 156
Installment payments ..... 155

Water System—Also see "Public Utilities"
Extension of municipally owned water works system may be financed by improvement warrants ..... 106

**Officers**

Assessor
Compensation—Town assessor ..... 107
Deputy—Appointment and compensation ..... 107, 108
Expenses and mileage ..... 109, 157
Vacancy—To be filled by county board ..... 107

County Attorney
Clerk Hire—Payment to be made directly to employee ..... 110

County Auditor
Certificate as to taxes paid upon deed transferring land ..... 174
Special Assessments—Certification and collection ..... 154

County Board
Powers
Appropriating funds for separate detention facilities for juveniles ..... 75

School Districts
Cannot resurrect dissolved school district ..... 33
Order to detach lands cannot be rescinded at subsequent meeting ..... 29
Petition for dissolution — Signer withdrawing name ..... 34

**MUNICIPALITIES**—cont.

**Officers**—cont.

County Engineer
Highway Survey ..... 84
Justice of Peace—Also see "Courts"
Appointment—Vacancy—Term ..... 19
Register of Deeds
Recording
Certificate—Eminent Domain ..... 111
Conditional Sales Contract ..... 112
Deed-Description of premises ..... 174
Federal Tax Liens ..... 113
Mortgage Registry Tax—Payment of tax required ..... 114
Plats—Certified copy of coded parcel or tract of land must be recorded—Fee to be paid by county ..... 115
Resolution—Village council declaring certain tracts of land are not served by public highway ..... 116
Sheriff
Compensation—Boarding of prisoners ..... 117
Mileage—Serving summons, warrants, writs issued by court of record ..... 118
Radio telephone service—County board authorized to provide ..... 119
Special Deputy Sheriff and Municipal Judge—Offices incompatible ..... 127
Street Commissioner—Contract—Employment
Call for bids not required in contract for personal services 66
Village Council
May not delegate powers of appointment and tenure of nonelective officers and employees ..... 128
Member may not agree to serve for less than amount fixed by council in order to qualify for retirement benefits ..... 120
Member may not hold position of street commissioner at additional compensation ..... 128

**Officers and Employees**

Pension
Policeman's Relief Association—Funds—Payment of pension ..... 121
Residence
Member of liquor commission appointed by council need not be resident of city ..... 123
Resignation
Entire board resigning at one time ..... 36
Retirement
Veterans cannot be compelled to retire at age 65 under Veterans' Preference Law ..... 122

**MUNICIPALITIES**—cont.

**Officers and Employees**—cont.

Salaries

Increase—City without authority to grant increases retroactively ..... 124
Leave of absence with national guard ..... 61
Village trustee may not agree to serve for less compensation in order to qualify for retirement benefits..... 120

**Offices**

Incompatible

Deputy city clerk and justice of the peace are not..... 126
Deputy city clerk who is not member of city council or board of equalization, and city assessor are not..... 125
Librarian and member county library board ..... 94
Municipal judge and special deputy sheriff are ..... 127
Village trustee may not hold appointive position of village street commissioner at additional compensation..... 128

**Ordinances**

Cemeteries

Perpetual Care—Owners of lots to contribute to permanent care and maintenance fund ..... 129

Constitutionality

City of Minneapolis requiring registration of persons convicted of crimes other than misdemeanors..... 130

Eminent Domain

Emergency ordinance ..... 74

Milk

Neither board of county commissioners nor county board of health has authority to enact ordinance regulating sale, distribution and handling of milk throughout the county ..... 131

Sabbath Day

Prohibiting coin operating music machine on Sunday in 3.2 beer establishment ..... 132

Safeguards

Necessity of adequate safeguards around open pits, excavations on private property for protection of inhabitants and penalties for violation thereof ..... 133

Trailer Coach or Trailer House

Requiring permission of village council to keep trailer coach or trailer house within village ..... 134

Village Budget

Appropriation ordinance required ..... 79

Violation

Jurisdiction of court ..... 18

MUNICIPALITIES—cont.

**Organization**

Villages

Annexation — Petition must be signed by majority of owners ..... 135

**Property**

County Seat

Removal—Effect on election—Offer of site and money..... 46

Easements

County is authorized to sell and convey an easement over and across a county-owned poor farm..... 136

**Public Health**

Milk

Ordinance—Regulating sale and distribution throughout county ..... 131

Nurse

County boards may jointly employ ..... 137

Village and school district or town may jointly contract for services ..... 138

Water

Water treating equipment—Chlorinator ..... 65

**Public Records**

Destruction

Cancelled county bonds—Tax settlement records or county auditor's work sheets ..... 139

**Public Safety**

Fire protection

Beyond corporate limits—Written contract required—Income derived paid to village ..... 140

Towns and villages may mutually contract when authorized by town electors—May jointly own equipment..... 141

Safeguards

Necessity of adequate safeguards around open pits, excavations on private property for protection of inhabitants and penalties for violation thereof..... 133

Traffic Regulations

Police Vehicle—Red lights and siren equipment on "authorized emergency vehicles" ..... 91

**Public Utilities**

Commission

Has no supervision over baseball park ..... 146

**MUNICIPALITIES**—cont.

**Public Utilities**—cont.

Municipally Owned
Sale—City may not use electric fund to pay cost of election to vote on question ..... 142
Services—City subject to same obligations as corporations in same class of business ..... 143

Water Mains
Easement—Right of village to lay and maintain mains across private premises—To terminate same without incurring liability for resulting damages ..... 144

Water and Sewer Systems
Construction—Vote required—Taxes levied may not exceed per capita limitation ..... 145

**Public Welfare**

Children
Minors
Criminal charge—Arraignment ..... 21
Parent Control—Both sexes under 21 years of age are minors ..... 51
Relief—Settlement—Emancipation of minor presents factual question ..... 149

Paternity Proceedings
Complaint ..... 10
Evidence—Hearing ..... 11
Expenses—Confinement and maintenance of child—May be enforced after adoption ..... 12
Guardian ad litem—Appointment for minor mother ..... 13

Reciprocal Support Act
Defendant may be proceeded against under extradition statutes ..... 24

Mentally Ill
Discharge—Recommitment ..... 23
Maintenance—Apportionment of cost between county and city ..... 147

Old Age Assistance
Claims—Assistance granted spouse prior to marriage ..... 148
Lien—Foreclosure ..... 15

**Public Works**—Also see "Local Improvements"

Baseball Park
Control and supervision not vested in water, light, and building commission ..... 146

Reserve Funds
Tax levy—limitation ..... 145

MUNICIPALITIES—cont.

Taxation—Also see subject "Taxation"

Assessments

Cancellation—Lands assessed become tax-forfeited ..... 3

Local Improvements

Certification and collection ..... 154

Exemptions—U. S. property ..... 156

Installment payments ..... 155

Sewer—Must be based upon benefits ..... 97

Real Estate

Board of Review—No authority to change in odd numbered years ..... 152

Value cannot be reduced by board ..... 153, 158

Levies

Levy should be made by each political subdivision when not separated for assessment and election purposes ..... 163

Town levy lies against property in village if village not separated for assessment or election purposes ..... 162

Water and Sewer System—Per capita limitation ..... 145

# N

NURSES—See "Public Health"

# O

OFFICERS

Assessor

Compensation—Town assessor ..... 107

Deputy—Appointment and compensation ..... 107, 108

Expenses and mileage ..... 109, 157

Vacancy—To be filled by county board ..... 107

County Attorney

Clerk Hire—Payment to be made directly to employee ..... 110

County Auditor

Certificate as to taxes paid upon deed transferring land ..... 174

Special Assessments—Certification and collection ..... 154

**OFFICERS**—cont.

**County Board**

Powers

Appropriating funds for separate detention facilities for juveniles ..... 75

School Districts

Cannot resurrect dissolved school district ..... 33

Order to detach lands cannot be rescinded at subsequent meeting ..... 29

Petition for dissolution—Signer withdrawing name..... 34

**County Engineer**

Highway survey—Cost ..... 84

**Justice of Peace**—Also see "Courts"

Appointment—Vacancy—Term ..... 19

**Register of Deeds**

Recording

Certificate—Eminent Domain ..... 111

Conditional Sales Contract ..... 112

Deed—Auditor's statement as to taxes paid ..... 174

Federal Tax Liens ..... 113

Mortgage Registry Tax—Payment of tax required..... 114

Plats—Certified copy of coded parcel or tract of land must be recorded—Fee to be paid by county ..... 115

Resolution—Village council declaring certain tracts of land are not served by public highway ..... 116

**Sheriff**

Compensation—Boarding of prisoners ..... 117

Mileage—Serving summons, warrants, writs issued by court of record ..... 118

Radio telephone service—County board authorized to provide.... 119

Special Deputy Sheriff and Municipal Judge—Offices incompatible ..... 127

**Street Commissioner—Contract—Employment**

Call for bids not required in contract for personal services..... 66

**Village Council**

May not delegate powers of appointment and tenure of nonelective officers and employees ..... 128

Member may not agree to serve for less than amount fixed by council in order to qualify for retirement benefits..... 120

Member may not hold position of street commissioner at additional compensation ..... 128

## OFFICERS AND EMPLOYEES

### Civil Service

Leave of Absence—Payment for leave granted to employee after time of compensable injury cannot be used to supplement compensation payments ..... 69
Physical disability—presents fact question as to inability to perform duties in reasonable manner ..... 71
Police Chief—receiving temporary appointment under police civil service commission rule obtains no permanent rights.. 70
Veterans' Preference
Police Captain—Veteran who attains a passing mark in promotional civil service examination for captain entitled to promotion over other applicants who are non-veterans ..... 72
Term—"Veteran"—No distinction between World War I and World War II ..... 73
Veteran cannot be compelled to retire at age of 65 under Veterans' Preference Act ..... 122

### Pension

Policeman's Relief Association—Funds—Payment of pension.... 121

### Residence

Member of liquor commission appointed by council need not be resident of city ..... 123

### Resignation

Entire board resigning at one time ..... 36

### Retirement

Veterans cannot be compelled to retire at age of 65 under Veterans' Preference Law ..... 122

### Salaries

Increase — City without authority to grant increases retroactively ..... 124
Leave of absence with national guard ..... 61
Village trustee may not agree to serve for less compensation in order to qualify for retirement benefits ..... 120

## OFFICES

### Incompatible

Deputy city clerk and justice of the peace are not ..... 126
Deputy city clerk, who is not member of city council or board of equalization, and city assessor are not ..... 125
Librarian and member county library board ..... 94
Municipal judge and special deputy sheriff are ..... 127
Village trustee may not hold appointive position of village street commissioner at additional compensation ..... 128

**OLD AGE ASSISTANCE**—See "Public Welfare"

**ORDINANCES**

**Cemeteries**

Perpetual Care—Owners of lots to contribute to permanent care and maintenance fund ..... 129

**Constitutionality**

City of Minneapolis requiring registration of persons convicted of crimes other than misdemeanors ..... 130

**Eminent Domain**

Emergency ordinance ..... 74

**Milk**

Neither board of county commissioners nor county board of health has authority to enact ordinance regulating sale, distribution, and handling of milk throughout the county.... 131

**Sabbath Day**

Prohibiting coin operating music machine on Sunday in 3.2 beer establishment ..... 132

**Safeguards**

Necessity of adequate safeguards around open pits, excavations on private property for protection of inhabitants and penalties for violation thereof ..... 133

**Trailer Coach or Trailer House**

Requiring permission of village council to keep trailer coach or trailer house within village ..... 134

**Village Budget**

Appropriation ordinance required ..... 79

**Violation**

Jurisdiction of court ..... 18

**ORGANIZATION**

**Villages**

Annexation—Petition must be signed by majority of owners.... 135

## P

**PENSIONS**—See "Officers and Employees"

**PERSONAL PROPERTY**—See "Taxation"

**POLICE**—See "Officers and Employees," "Public Safety"

**POOR**—See "Public Welfare"

**PROBATE COURT**—See "Courts"

**PUBLIC HEALTH**

**Milk**

Ordinance — Regulating sale and distribution throughout county ..... 131

**Nurse**

County boards may jointly employ ..... 137

Village and school district or town may jointly contract for services ..... 138

**Water**

Water treating equipment—Chlorinator ..... 65

**PUBLIC IMPROVEMENTS**—See "Local Improvements"—"Public Works"

**PUBLIC LANDS**—See "Lands"

**PUBLIC OFFICIALS**—See "Municipalities"—"Officers"—"State"

**PUBLIC RECORDS**

**Destruction**

Cancelled county bonds — Tax settlement records or county auditors' work sheets ..... 139

**PUBLIC SAFETY**

**Fire Protection**

Beyond corporate limits—Written contract required—Income derived paid to village ..... 140

Towns and villages may mutually contract when authorized by town electors—May jointly own equipment ..... 141

**Safeguards**

Necessity of adequate safeguards around open pits, excavations on private property for protection of inhabitants and penalties for violation thereof ..... 133

**Traffic Regulations**

Police Vehicle—Red lights and siren equipment on "authorized emergency vehicles" ..... 91

PUBLIC UTILITIES

**Commission**
Has no supervision over baseball park ..... 146

**Municipally Owned**
Sale—City may not use electric fund to pay cost of election to vote on question ..... 142
Services—City subject to same obligations as corporations in same class of business ..... 143

**Water Mains**
Easement—Right of village to lay and maintain mains across private premises—To terminate same without incurring liability for resulting damages ..... 144

**Water and Sewer Systems**
Construction—Vote required—Taxes levied may not exceed per capita limitation ..... 145

PUBLIC WELFARE

**Children**
Minors
Criminal charge—Arraignment ..... 21
Parent Control—Both sexes under 21 years of age are minors ..... 51
Relief—Settlement—Emancipation of minor presents factual question ..... 149
Paternity Proceedings
Complaint ..... 10
Evidence—Hearing ..... 11
Expenses—Confinement and maintenance of child—May be enforced after adoption ..... 12
Guardian ad litem—Appointment for minor mother ..... 13
Reciprocal Support Act
Defendant may be proceeded against under extradition statutes ..... 24

**Mentally Ill**
Discharge—Recommitment ..... 23
Maintenance—Apportionment of cost between county and city 147

**Old Age Assistance**
Claims—Assistance granted spouse prior to marriage ..... 148
Lien—Foreclosure ..... 15

**Relief**
Property conveyed by relief recipient to municipality reserving life estate ..... 160

**Youth Conservation**
County may provide separate detention facilities for juveniles.... 75

PUBLIC WORKS—Also see "Local Improvements"

**Baseball Park**
Control and supervision not vested in Public Utilities Commission ..... 146

**Reserve Funds**
Tax levy—limitation ..... 145

PUPILS—See "Education"

# R

RAILROADS

**Crossings**
Speed of Trains
Cities may install signal devices at crossings—May regulate speed of trains within municipality until Railroad Commission takes action ..... 150

REAL ESTATE—See "Municipalities," "Taxation"

REGISTER OF DEEDS

**Recording**
Certificate—Eminent Domain ..... 111
Conditional Sales Contract ..... 112
Deed-Description of premises ..... 174
Federal Tax Liens ..... 113
Mortgage Registry Tax—Payment of tax required ..... 114
Plats—Certified copy of coded parcel or tract of land must be recorded—Fee to be paid by county ..... 115
Resolution—Village council declaring certain tracts of land are not served by public highway ..... 116

RELIEF—See "Public Welfare"

ROADS—See "Highways"

RECORDS—See "Public Records"—"Register of Deeds"

# S

SABBATH DAY

**Ordinance**
Prohibiting coin operating music machine in 3.2 beer establishment ..... 132

**SALARIES**—See "Municipalities"—"Officers" and "Officers and Employees"

**SCHOOLS**—See "Education"

**SEWERS**—See "Local Improvements"

**SHERIFF**

Compensation—Boarding of prisoners ..... 117
Mileage—Serving summons, warrants, writs issued by court of record ..... 118
Radio telephone service—County board authorized to provide.... 119
Special Deputy Sheriff and Municipal Judge—Offices incompatible ..... 127

**SIDEWALKS**—See "Local Improvements"

**SOCIAL WELFARE**—See "Public Welfare"

**SOLDIERS**—See "Military"

**STATE**

**Agricultural Societies**

State Aid

Annual fair should be held in home county of society as prerequisite to state aid—Merger of two or more societies, which comply with conditions prescribed in statute, are not deprived of receiving state aid..... 2

**Highway Commissioner**

Payment to county for board of prisoners prosecuted by the highway patrol ..... 117

**Highway Study Commission**

Highway survey cost ..... 84

**Legislature**

Powers

Create office as that of Legislative Post Auditor and Department of Post-Audit — Transferring functions of the Department of Public Examiner ..... 151

**Railroad and Warehouse Commission**

Railroads

Speed of trains—Crossings—Cities may regulate speed of trains within municipality until commission has taken action ..... 150

STREETS—Also see "Highways"—"Local Improvements"

**Establishment**

City unauthorized to establish street outside of corporate limits in absence of charter or statutory authority ..... 100

**Gutters—Curbs**

Preliminary expenses ..... 101

**Parking**

Off-street ..... 74

**Railroad Crossings**

Installation of signals at crossings—Speed of trains..... 150

**Rights**

Abutting owner's rights to mineral and soil ..... 102
Fee title vests in abutting owners — Term "street" includes curbs, gutters and sidewalk ..... 105

**Survey**

County engineer has authority to make ..... 84

**Vacation**

Petition—Must be signed by owners of land abutting thereon—Village as owner of highway easement is not an owner..... 104
Rights of abutting property owners ..... 103

# T

TAXATION

**Ad Valorem**

Real Estate

Assessments—Local board of review has no authority to change assessment in odd numbered years ..... 152
Reduction—County board of equalization has authority to reduce values in certain cases—Cannot reduce aggregate value of property returned by assessor with additions made by the auditors .....153, 158

**Assessments**

*Cancellation*

Lands assessed for benefits become tax-forfeited ..... 3

Local Improvements

Certification and collection ..... 154
Installment payments ..... 155
Property owned by the United States exempt..... 156
Sewer — Assessments must be based upon actual benefits 97

TAXATION—cont.

Assessments—cont.

Real Estate
Board of Review
Has no authority to change assessments in odd numbered years ..... 152
Value of assessment which cannot be reduced by board ..... 153, 158

Assessor
City Assessor ..... 125
Compensation—Town Assessor ..... 107
Deputy—Appointment and compensation ..... 107, 108
Expenses and mileage ..... 109, 157
Vacancy—to be filled by county board ..... 107

Board of Equalization
Reduction
County board has authority to reduce values in certain cases — Cannot reduce aggregate value of property returned by assessors with additions made by auditors 153

Board of Review
Meeting
Time for meeting directory and not mandatory—Tie vote.... 158
Powers
No authority to change assessments in odd numbered years 152

Exemptions
Parsonage
Partly rented out—pro rata exempt ..... 159
Real Property
Conveyed by relief recipient to municipality reserving life estate—If not exempt should be placed on tax rolls as omitted property ..... 160
Y.M.C.A. Camp
Exempt as institution of purely public charity ..... 161

Levies
Towns—Villages
Unless otherwise provided by statute, town levy lies against property in village if village not separated for election or assessment purposes ..... 162
Water and Sewer System
May not exceed per capita limitation..... 145
When not separated for election and assessment purposes, levy should be made by each political subdivision as authorized by governing body or electors within statutory limitations ..... 163

TAXATION—cont.

**Mortgage Registry Tax**

Assignment—Rental from real estate ..... 164
Quitclaim deed and assignment of sheriffs' certificates of foreclosure given as security for a debt ..... 114

**Personal Property**

Auction Sale Proceeds
Interest of vendor under conditional sales contract paramount to judgment for taxes against vendee—Nature of interest of vendor after sale of property ..... 165

Boat
Not licensed, registered, or enrolled—taxed at place where it belongs or is kept ..... 166

Imported Packages
Twine ..... 167

**School Districts**

Bonded Indebtedness ..... 27, 28

**Tax-forfeited Lands**

Forfeiture invalid
Lien for subsequent taxes does not include penalties, interest or costs thereon ..... 168
Purchase price may be recovered only as provided by statute ..... 169

Purchase
Default in payment cancels contract ..... 170

Repurchase
Right of purchaser to repurchase after forfeiture ..... 171

Sale
To ineligible purchaser void—Eligible purchasers discussed—Duty of county auditor discussed—Officers—Interest in contract ..... 172

State Deed
Ownership of heirs of purchasers thereof can only be evidenced by certified copy of final decree in estates of decedents ..... 173

**Tax Rolls**

County Auditor
Certificate as to taxes upon deed—Transfer of land upon books of auditor — Register of Deeds — Recording—Deed—Second deed describes portions which were included in the first conveyance ..... 174

Real Property
Conveyed by relief recipient to municipality reserving life estate—If not exempt should be placed on tax rolls ..... 160

**TEACHERS**—See "Education"

**TELEVISION**

**Picture tube**

Not covered by M. S. 1949, Section 60.29, Clause (3) ..... 50

**TOWNS**—See "Municipalities"

**TRAFFIC**

**Regulations**

Load restrictions—State aid and county aid roads within boundaries of village ..... 92

Police Vehicle—Red lights and siren equipment on "authorized emergency vehicles" ..... 91

Railroad Crossings—Speed of trains and installation of signal devices at crossings ..... 150

Trailer coach or trailer houses—Validity of ordinance requiring permission of village council to keep same within village.... 134

**Violations**

Arrests—By officials and private persons ..... 25

Juvenile Offenders ..... 20

Prosecutions—Costs—How paid ..... 26

# V

**VETERANS' PREFERENCE**

**Civil Service**

Veteran who attains a passing mark is entitled to promotion over nonveteran applicants ..... 72

**Retirement**

Veteran cannot be compelled to retire at age of 65..... 122

**School Districts**

Positions—Qualified veterans ..... 41

**Term—"Veteran"**—No distinction between World War I and World War II ..... 73

**VILLAGES**—See "Municipalities"

**VOTERS and VOTING**—See "Elections"

# W

**WATERS**—See "Conservation," "Public Health," "Public Utilities"

**WELFARE**—See "Public Welfare"

**WORDS and PHRASES**

Acquisition ..... 38
Alley ..... 96
Corner to corner ..... 32
Emergency vehicle ..... 91
Improve ..... 80
Street ..... 96, 105
Strike ..... 124
Veterans ..... 73

# Y

**YOUTH CONSERVATION**—See "Courts" and "Public Welfare"

# INDEX
# TO
# STATUTES

## STATUTES

### CONSTITUTION OF THE UNITED STATES

| Article | Section | Clause | Opinion |
|---|---|---|---|
| I | 10 | 2 | 167 |
| 5th and 14th Amendments | | | 130 |

### CONSTITUTION OF MINNESOTA

| Article | Section | Opinion |
|---|---|---|
| I | 7 | 130 |
| I | 11 | 130 |
| I | 13 | 82 |
| III | | 151 |
| IV | 22 | 150 |
| IV | 36 | 19 |
| IV | 36 | 67 |
| IV | 36 | 68 |
| V | 4 | 19 |
| V | 8 | 36 |
| VI | 8 | 19 |
| VI | 10 | 19 |
| VII | 8 | 1 |
| IX | 1 | 160 |
| IX | 1 | 161 |
| XIII | 1 | 20 |

### RULES OF CIVIL PROCEDURE

| Section | Opinion |
|---|---|
| 17.02 | 13 |
| 43.02 | 11 |
| 67.02 | 14 |
| 86.01 | 14 |
| 86.02 App. B (1) and B (2) | 14 |

### REVISED LAWS 1866

| Chapter | Section | Opinion |
|---|---|---|
| 70 | 10 | 118 |

### REVISED LAWS 1905

| Chapter | Section | Opinion |
|---|---|---|
| | 806 | 107 |
| | 2697(1) (25) | 118 |

### SPECIAL LAWS 1887

| Chapter | Section | Opinion |
|---|---|---|
| 5 | | 150 |
| CV 5 | 3 Par. 27 | 150 |

### SPECIAL LAWS 1889

| Chapter | Section | Opinion |
|---|---|---|
| 10 | | 19 |

### SPECIAL LAWS 1933-1934

| Chapter | Section | Opinion |
|---|---|---|
| 46 | 7 | 52 |

### LAWS OF 1860

| Chapter | Section | Opinion |
|---|---|---|
| 33 | | 112 |

### LAWS OF 1867

| Chapter | Section | Opinion |
|---|---|---|
| 21 | 1 | 2 |

### LAWS OF 1868

| Chapter | Section | Opinion |
|---|---|---|
| 19 | | 2 |

### LAWS OF 1873

| Chapter | Section | Opinion |
|---|---|---|
| 5 | 73 | 85 |
| 5 | | 86 |

### LAWS OF 1885

| Chapter | Section | Opinion |
|---|---|---|
| 145 | | 163 |

### LAWS OF 1889

| Chapter | Section | Opinion |
|---|---|---|
| 232 | | 161 |

### LAWS OF 1895

| Chapter | Section | Opinion |
|---|---|---|
| 8 | 87 | 121 |
| | 119 | |

### LAWS OF 1899

| Chapter | Section | Opinion |
|---|---|---|
| 65 | | 88 |
| 152 | | 87 |

### LAWS OF 1911

| Chapter | Section | Opinion |
|---|---|---|
| 243 | 6 | 150 |

### LAWS OF 1913

| Chapter | Section | Opinion |
|---|---|---|
| 143 | | 112 |

### LAWS OF 1915

| Chapter | Section | Opinion |
|---|---|---|
| 35 | | 155 |
| 364 | | 112 |

### LAWS OF 1917

| Chapter | Section | Opinion |
|---|---|---|
| 158 | | 112 |

### LAWS OF 1919

| Chapter | Section | Opinion |
|---|---|---|
| 65 | | 155 |
| 455 | 1 | 52 |

### LAWS OF 1921

| Chapter | Section | Opinion |
|---|---|---|
| 323 | 46 | 85 |
| 425 | | 155 |

## STATUTES—Continued

### LAWS OF 1923

| Chapter | Section | Opinion |
|---|---|---|
| 139 | 1 | |
| | 5 | |
| | 6 | 52 |

### LAWS OF 1925

| Chapter | Section | Opinion |
|---|---|---|
| 336 | | 150 |
| 386 | | 170 |

### LAWS OF 1929

| Chapter | Section | Opinion |
|---|---|---|
| 371 | | 147 |

### LAWS OF 1933

| Chapter | Section | Opinion |
|---|---|---|
| 328 | | 122 |

### LAWS OF 1935

| Chapter | Section | Opinion |
|---|---|---|
| 169 | | 112 |
| 278 | | 3 |
| 386 | 7 | 3 |

### LAWS OF 1941

| Chapter | Section | Opinion |
|---|---|---|
| 43 | 7 | 170 |
| 252 | | 111 |

### LAWS OF 1943

| Chapter | Section | Opinion |
|---|---|---|
| 62 | | 122 |
| 164 | 7 | 170 |
| 627 | 2 | |
| | 3 | 170 |

### LAWS OF 1945

| Chapter | Section | Opinion |
|---|---|---|
| 67 | 4 | 52 |
| 224 | | 96 |
| **296** | 7 | 170 |

### LAWS OF 1947

| Chapter | Section | Opinion |
|---|---|---|
| 312 | | 111 |
| 422 | | 170 |
| 624 | | 121 |

### LAWS OF 1949

| Chapter | Section | Opinion |
|---|---|---|
| 119 | | 155 |
| 119 | 110 | 77 |
| 405 | | 131 |
| 456 | | 170 |
| 461 | | 170 |
| 489 | | 50 |
| 543 | 1 | 158 |

### LAWS OF 1951

| Chapter | Section | Opinion |
|---|---|---|
| 82 | 1 | 75 |
| 104 | 1 (10) | 95 |
| 127 | | 165 |
| 146 | 4, 5, 6 | 124 |
| 173 | 1 | 147 |
| 331 | | 91 |
| 332 | | 44 |
| 345 | | 107 |
| 375 | | 73 |
| 378 | | 120 |
| 390 | | 1 |
| 550 | 38 | 2 |
| | 40 | |
| 550 | 78 | 121 |
| 563 | | 138 |
| 589 | | 84 |
| 638 | 6 | 115 |
| 641 | | 109 |
| 694 | 3 (5) | |
| | 302 | 60 |

### LAWS OF 1952

| Chapter | Section | Opinion |
|---|---|---|
| 591 | | 28 |
| 591 | | 30 |

### LAWS OF 1953

| Chapter | Section | Opinion |
|---|---|---|
| 7 | | 77 |
| 47 | 3 | 140 |
| 49 | | 120 |
| 164 | | 74 |
| 195 | | 98 |
| 202 | 4 | 1 |
| 244 | | 90 |
| 279 | | 90 |
| 296 | | 117 |
| 346 | | 58 |
| 398 | | 90 |
| 398 | | 145 |
| 398 | 1 (7) | 96 |
| 398 | | 98 |
| 398 | | 106 |
| 398 | 6 (2) | 155 |
| 398 | 6 (3) | 154 |
| 398 | 13 (1) | 154 |
| 398 | 13 (1) | 155 |
| 398 | 13 (2) | 154 |
| 462 | | 90 |
| 471 | | 171 |
| 473 | | 162 |
| 488 | 1 | 113 |
| 577 | 13 | 145 |
| 594 | | 71 |
| 692 | 1 | |
| | 2 | |
| | 5 | 84 |
| 707 | | 84 |
| 718 | | 48 |
| 723 | | 23 |
| 732 | | 147 |
| 735 | 5 | 64 |
| 735 | 5 | 65 |
| 735 | 8 | 79 |
| 735 | 12 | 104 |
| 744 | | 27 |
| 756 | 5 | 44 |
| 756 | 2 (6) | 37 |

### GENERAL STATUTES 1878

| Chapter | Section | Opinion |
|---|---|---|
| XIII | 73 | 85 |

## STATUTES—Continued

### GENERAL STATUTES 1894

| Section | Subd. | Opinion |
|---|---|---|
| | 1824-1827 | 86 |
| | 1875 | 85 |

### GENERAL STATUTES 1913

| Chapter | Section | Opinion |
|---|---|---|
| | 612 | 46 |
| | 1350 | 68 |
| | 2041 | 153 |
| | 5543 | 3 |
| | 5544 | 3 |
| | 5548 | 3 |
| | 5762 (1) (25) | 118 |

### GENERAL STATUTES 1923

| Chapter | Section | Subd. | Opinion |
|---|---|---|---|
| | 2586 | | 85 |
| | 6545 | | 111 |
| | 6553 | | 111 |
| | 6555 | | 111 |
| | 6993 | 1, 25 | 118 |

### MASON'S STATUTES 1927

| Chapter | Section | Subd. | Opinion |
|---|---|---|---|
| | 2586 | | |
| | 6993 | 1, 25 | 118 |
| | 8346 | | 112 |
| | 8364 | | 112 |

### MINNESOTA STATUTES

| Section | Subd. | Opinion |
|---|---|---|
| 22.46 | | 1 |
| 32.30 | | 131 |
| 38.01 | | 2 |
| 38.02 | 2 | 2 |
| 38.02 | 1, 3 | 2 |
| 40.07 | | 8 |
| 40.08 | | 8 |
| 43.24 | | 151 |
| 60.29 | 1, 3 | 50 |
| 106.031 | | 4 |
| 106.031 | | 5 |
| 106.061 | | 5 |
| 106.081 | 1, 4 | 5 |
| 106.101 | 3, 4, 5, 6 | 5 |
| 106.111 | | 5 |
| 106.15 | | 85 |
| 106.451 | | 6 |
| 106.471 | 2(a) | 7 |
| 106.471 | 5(a), 7(e) | 6 |
| 106.621 | | 5 |
| 117 | | 74 |
| 117.01 | | 74 |
| 117.05 | | 82 |
| 117.09 | | 111 |
| 117.10 | | 14 |
| 117.16 | | 74 |
| 117.19 | | 111 |
| 117.20 | 4 | 74 |
| 117.20 | 4 | 111 |
| 120.11 | 3 | 39 |
| 120.11 | 3 | 40 |
| 121.01 | 2(a), (b) | 27 |
| 122.01 | | 30 |
| 122.01 | 2, 4 | 44 |
| 122.03 | | 29 |
| 122.03 | | 32 |
| 122.05 | | 34 |
| 122.09 | | 28 |
| 122.09 | | 30 |
| 122.10 | | 30 |
| 122.15 | | 29 |
| 122.15 | 2 | 27 |
| 122.15 | | 34 |
| 122.18-122.27 | | 31 |
| 122.18 | | 43 |
| 122.19 | | 33 |
| 122.28 | | 32 |
| 122.28 | | 34 |
| 122.30 | 4 | 44 |
| 122.40-122.54 | | 27 |
| 122.40-122.57 | | 34 |
| 122.52 | | 27 |
| 122.57 | | 27 |
| 124.13 | | 36 |
| 125.01 | | 44 |
| 125.06 | 1 | 44 |
| 125.03 | | 36 |
| 125.06 | 2 | 43 |
| 125.09 | 1 | 43 |
| 127.02 | | 37 |
| 128.06 | | 37 |
| 128.082 | 6 | 45 |
| 128.088 | 2, 3 | 45 |
| 130.18 | | 44 |
| 131.01 | | 31 |
| 134.07 | | 95 |
| 134.09 | | 94 |
| 134.11-134.15 | | 94 |
| 144.371 | 10 | 97 |
| 144.372 | 1 | 97 |
| 144.373 | | 97 |
| 144.377 | 3 | 97 |
| 145.01 | | 131 |
| 145.08 | 1 | 137 |
| 145.08 | 3 | 138 |
| 145.125 | | 137 |
| 145.47-145.54 | | 131 |
| 160.01 | 4 | 84 |
| 160.01 | 6 | 86 |
| 160.07 | | 92 |
| 160.09 | | 84 |
| 160.19 | | 88 |
| 160.43 | | 92 |
| 160.431 | | 92 |
| 160.433 | | 92 |
| 160.46 | | 92 |
| 160.50 | | 92 |
| 160.51 | | 92 |
| 161.03 | 21 | 25 |
| 161.03 | 22 | 26 |
| 161.03 | 22 | 117 |
| 162.01 | 2 | 84 |
| 162.02 | | 80 |
| 162.09 | | 81 |
| 162.24 | 2 | 89 |
| 162.39 | | 81 |
| 163.01 | | 90 |
| 163.13 | 1 | 87 |
| 163.13 | 5 | 85 |
| 163.17 | 1, 2, 3, 4 | 85 |
| 169.01 | 5 | 91 |
| 169.03 | | 91 |
| 169.09 | | 130 |
| 169.14-169.17 | | 91 |
| 169.14 | 2 | 25 |
| 169.20 | 5 | 91 |
| 169.64 | 2 | 91 |
| 169.68 | | 91 |
| 169.87 | 1 | 92 |
| 176.01 | | 69 |
| 192.26 | | 61 |
| 197.45 | 2 | 72 |
| 197.45 | | 73 |
| 197.45 | 1, 2 | 41 |
| 197.45-197.48 | | 122 |

## STATUTES—Continued

| Section | Subd. | Opinion |
|---|---|---|
| 197.46 | | 41 |
| 197.46 | | 73 |
| Chapter | | |
| 201 | | 47 |
| Section | | |
| 201.01 | | 47 |
| 202.03 | | 48 |
| 205.72 | | 48 |
| 206.04 | | 47 |
| 206.12 | | 47 |
| 206.14 | | 47 |
| 210.03 | | 46 |
| Chapter | | |
| 211 | | 46 |
| Section | | |
| 211.11 | | 46 |
| 215.11 | | 139 |
| 215.11 | | 151 |
| 219.26 | | 150 |
| 219.383 | | 150 |
| 219.44 | | 150 |
| 246.31 | 4 | 147 |
| 246.47 | | 147 |
| 256.25 | | 148 |
| 256.26 | 3, 4, 8, 9 | 15 |
| 256.27 | | 15 |
| 257.18-257.33 | | 10 |
| 257.18-257.33 | | 13 |
| 257.20-257.21 | | 11 |
| 257.23 | | 12 |
| 260.02 | | 20 |
| 260.125 | 12 | 21 |
| 260.125 | 15 | 75 |
| 260.22 | | 10 |
| 260.22 | 1 | 21 |
| 261.06 | | 163 |
| 261.07 | 3 | 149 |
| 270.07 | | 152 |
| 272.02 | | 161 |
| 272.12 | | 114 |
| 272.12 | | 174 |
| 272.196 | | 115 |
| 272.40 | | 165 |
| 272.48 | | 113 |
| 272.50 | | 165 |
| 273.01 | | 152 |
| 273.02 | | 160 |
| 273.03 | | 157 |
| 273.03 | | 174 |
| 273.06 | | 107 |
| 273.06 | | 108 |
| 273.071 | 7 | 109 |
| 273.08 | | 107 |
| 273.17 | | 152 |
| 273.34 | | 166 |
| 273.48 | | 166 |
| 274.01 | | 152 |
| 274.01 | | 158 |
| 274.13 | | 153 |
| 274.13 | 5 | 158 |
| 275.09 | | 141 |
| 275.11 | | 145 |
| 275.28 | | 174 |
| 276.10 | | 139 |
| Chapter | | |
| 278 | | 152 |
| Section | | |
| 280.05 | | 172 |
| 281.16-281.27 | | 3 |
| 282.01 | 5, 6 | 170 |
| 282.01 | | 171 |
| 282.01 | 6 | 173 |
| 282.07 | | 3 |
| 282.222 | | 172 |
| 282.241 | | 170 |
| 282.241 | | 171 |
| 282.301 | | 170 |
| 284.25 | | 168 |
| 284.25 | | 169 |
| 287.01 | 2, 3 | 164 |
| 287.01 | 3 | 114 |
| 287.03 | | 114 |
| 287.05 | | 114 |
| 287.05 | | 164 |
| 296.36 | | 84 |
| 296.37 | | 92 |
| 296.40 | | 84 |
| 306.05 | | 34 |
| 306.09 | | 34 |
| 306.15 | 2 | 34 |
| 309.01-309.09 | | 121 |
| 315.44-315.49 | | 161 |
| 317.69 | | 121 |
| 330.01-330.06 | | 22 |
| 340.01-340.06 | | 56 |
| 340.01 | | 58 |
| 340.01 | | 132 |
| 340.02 | 2 | 59 |
| 340.02 | 3, 4 | 58 |
| 340.11 | 6 | 55 |
| 350.11 | | 109 |
| 350.11 | | 157 |
| 351.03 | | 19 |
| 351.03 | | 20 |
| 357.02 | 1, 25 | 14 |
| 357.09 | 1, 11 | 118 |
| 357.14 | | 17 |
| 358.05 | | 36 |
| 365.02 | | 76 |
| 365.10 | | 76 |
| 365.15-365.18 | | 141 |
| 366.015 | 1 | 93 |
| 367.03 | | 107 |
| 367.04 | | 107 |
| 367.05 | 1 | 107 |
| 368.01 | | 90 |
| 373.01 | 3 | 136 |
| 373.05 | | 75 |
| 375.18 | | 75 |
| 375.19 | | 8 |
| 375.20 | | 49 |
| 375.21 | | 62 |
| 375.21 | | 119 |
| 375.33 | 1, 4 | 94 |
| 382.18 | | 172 |
| 384.06 | | 109 |
| 384.14 | 5 | 139 |
| 387.13 | | 127 |
| 388.105 | | 110 |
| 393.01 | 4 | 147 |
| 393.07 | | 147 |
| 393.08 | | 147 |
| 410.07 | | 67 |
| 410.18 | | 67 |
| 412 | | 71 |
| 412 | | 73 |
| 412.011 | | 77 |
| 412.041 | 4 | 135 |
| 412.081 | 1, 3 | 77 |
| 412.081 | | 162 |
| 412.111 | | 16 |
| 412.111 | | 73 |
| 412.111 | | 108 |
| 412.111 | | 128 |
| 412.111 | | 157 |
| 412.131 | | 108 |
| 412.131 | | 157 |
| 412.161 | | 73 |
| 412.171 | | 16 |
| 412.181 | | 120 |
| 412.19 | | 145 |
| 412.221 | 6 | 86 |
| 412.221 | 32 | 95 |
| 412.221 | 32 | 133 |
| 412.221 | 32 | 134 |
| 412.231 | | 133 |
| 412.251 | 10 | 95 |
| 412.311 | | 64 |
| 412.311 | | 65 |
| 412.311 | | 128 |

**STATUTES—Continued**

| Section | Subd. | Opinion |
|---|---|---|
| 412.321 | 2 | 145 |
| 412.401-412.481 | | 90 |
| 412.401 | | 96 |
| 412.409-412.481 | | 155 |
| 412.421 | 4 | 90 |
| 412.471 | | 106 |
| 412.711 | | 79 |
| 412.851 | | 104 |
| 412.901 | | 86 |
| 413.071 | | 77 |
| 413.072 | | 77 |
| 419 | | 70 |
| 419 | | 71 |
| 419 | | 72 |
| 419 | | 73 |
| 419.06 | | 70 |
| 419.06 | 8 | 71 |
| 419.07 | | 70 |
| 419.11 | | 70 |
| 419.12 | | 70 |
| 422.04 | | 122 |
| 423.41 | | 121 |
| 423.41-423.62 | | 121 |
| 423.50 | | 121 |
| 423.51 | | 121 |
| 423.55 | | 121 |
| 429.031 | 1 | 101 |
| 429.21 | | 99 |
| 431.04-431.13 | | 155 |
| 432.11-432.24 | | 155 |
| 434.14-434.27 | | 155 |
| 438.08 | | 140 |
| 438.09 | | 140 |
| 440.135 | 2 | 96 |
| 444.075 | | 98 |
| 453.01 | | 146 |
| 453.04 | | 146 |
| 462 | | 90 |
| 462.24-462.35 | | 96 |
| 465.01 | | 100 |
| 465.03 | | 46 |
| 471.57 | 1 | 145 |
| 471.59 | 1 | 137 |
| 471.69 | | 81 |
| 471.69 | | 141 |
| 471.87 | | 35 |
| 471.87 | | 128 |
| 471.88 | | 35 |
| 471.88 | | 128 |
| 475 | | 43 |
| 475 | | 106 |
| 475.51-475.75 | | 38 |
| 475.51-475.75 | | 78 |
| 475.51 | 2, 5 | 78 |
| 475.51 | 2, 7, 8 | 38 |
| 475.52 | 3 | 81 |
| 475.52 | 3 | 78 |
| 475.52 | 5 | 38 |
| 475.53 | 1 | 78 |
| 475.57 | | 38 |
| 475.58 | | 81 |
| 475.58 | | 98 |
| 475.60 | 4 | 81 |
| 475.61 | | 37 |
| 485.02 | | 14 |
| 500.05 | | 34 |
| 507.29 | | 116 |
| 511.04 | | 112 |
| 511.18 | | 112 |
| 511.20 | | 112 |
| 511.26 | | 112 |
| 512.01 | | 56 |
| 518.41 | | 24 |
| 525.54 | | 51 |
| 525.641 | | 22 |
| 525.65 | | 22 |
| 525.80 | | 51 |
| 526.01 | | 147 |
| 526.05 | | 147 |
| 526.06 | | 147 |
| 531.11 | | 18 |
| 549.15 | | 9 |
| 595.03 | | 11 |
| 605.09 | | 13 |
| 606.04 | | 9 |
| 610.49 | | 130 |
| 617.42 | | 52 |
| 617.46 | | 52 |
| 617.46 | | 53 |
| Chapter | | |
| 629 | | 24 |
| Section | | |
| 629.33 | | 25 |
| 629.37 | | 25 |
| 630.15 | | 127 |
| 633.01 | | 18 |
| 633.27 | | 17 |
| 641.11 | | 117 |
| 641.14 | | 75 |
| 641.35 | | 75 |
| 645.08 | | 96 |
| 645.16 | | 31 |
| 645.16 | | 93 |
| 645.16 | | 96 |
| 645.17 | | 31 |
| 645.26 | | 52 |
| 645.39 | | 122 |
| 645.44 | 9 | 115 |